

**SUPREME COURT OF NIGERIA**  
29TH JANUARY, 1999. SC. 22/1998  
**CORAM:- M. L. UWAIS CJN, I. L. KUTIGI, M. E. OGUNDARE,**  
**E. O. OGWUEGBU, A. I. IGUH, JJSC.**

GANIYU NASIRU	.....	APPELLANT
V.		
THE STATE	.....	RESPONDENT

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**CONSTITUTIONAL LAW** - Evidence - Right to opt not to testify under s. 33 (11) of the 1979 Constitution - It may not be desirable to exercise this right where in a trial - The prosecution had established a strong case against the accused.

**COURTS** - Comment - About failure of accused to testify under the provisions of s. 33 (11) of the 1979 Constitution - Trial judge is at liberty to draw any unfavourable inference - Having regard to the evidence.

**EVIDENCE** - Burden of proof - In a criminal case - Lies on the prosecution - And the standard required is proof beyond reasonable doubt - But not beyond any shadow of doubt.

**EVIDENCE** - Circumstantial evidence - Proof of death by it - Is accepted - Because in criminal cases the possibility of always proving the offence charged by direct evidence is rare

**EVIDENCE** - Criminal trial - Burden of proof - Is upon the prosecution - But the burden may shift to the accused.

**JUDGMENTS** - Misdirection - By the trial judge - In referring to the doctrine of *res ipsa loquitur* - Has not occasioned any miscarriage of justice.

**MURDER** - Conviction - Based on circumstantial evidence - The state-

*ment made by the accused to the Police - Does not constitute a co-existing circumstance which weakens the inference that the accused killed the deceased.*

### **FACTS**

The accused was charged with the murder of Saliu Kolade contrary to s. 316 (3) of the Criminal Code, Cap. 29 of the Laws of Ogun State of Nigeria, 1978, punishable under s. 319 thereof. On the 12th day of April, 1985, the accused in company of one Taju hired taxi driven by Saliu Kolade, the deceased, at Sango-Otta motor park to convey them to Ado-Odo at a consideration of N10.00. The deceased started the journey from the Motor Park with the accused and Taju in the taxi. When the driver failed to report to the owner of the taxi at the end of the day as expected, he later reported the disappearance of his driver with the taxi to the Police. Subsequent search led to the discovery of the dead body of the driver in a gutter at Ajegunle along the road to Ado-Odo. This was in the early hours of the 13th day of April, 1985. Postmortem examination revealed multiple laceration of the scalp with underlying fracture of the skull. In the opinion of P.W. 8, Dr. Akintunde Oluwadare, who performed the Postmortem examination, the deceased died on the 12th April, 1985. The accused and Taju arrived at Ado-Odo at about 10.00pm night of the said date. It was the accused who personally drove the deceased's taxi that evening into Ado-Odo and headed for the residence of P.W.3 where they passed the night although he too lived in the same town. Both the accused and Taju again drove off in the early hours of the 13th April 1985 in the deceased's taxi. On the following day P.W. 5 Sgt Anderson Amadi based on information received arrested the accused at Ado-Odo. Taju was able to escape Police arrest. The taxi was later recovered by P.W.5. At the conclusion of investigations, the accused was charged to court for the murder of the deceased. The accused opted not to testify as he was entitled to.

In his judgment, the learned trial judge found the charge against the accused proved, convicted him as charged and passed a sentence of death on him. Not satisfied with the conviction the accused unsuccessful-

fully appealed to the Court of Appeal, Ibadan Division. He has now appealed further to the Supreme Court raising four issues but issue No. 3 was adjudged in competent.

**ISSUES FOR DETERMINATION**

*"(1) Whether or not the Court of Appeal erred on the facts and law when it affirmed the trial court's decision and held that the circumstantial evidence upon which the appellant was convicted was overwhelming, strong, cogent and irresistible enough to establish the guilt of the appellant.*

*(2) Whether or not the court below erred in Law by its failure to hold specifically that the onus of proof lies on the Respondent which onus must be proved beyond reasonable doubt.*

*(4) Whether or not the courts misdirected themselves on the issue of Burden of proof and if so was the appellant's case prejudiced thereby?"*

**HELD** (Unanimously dismissing the appeal per lead judgment of **UWAIS CJN**)

***Evidence - Burden of proof***

1. It is trite that in a criminal case the burden of proof lies on the prosecution and the standard of such proof is proof beyond reasonable doubt - see section 138 of the Evidence Act, Cap. 112 of the laws of the Federation of Nigeria, 1990. However, the expression "beyond reasonable doubt" does not mean beyond any shadow of doubt. - see Akalezi v. The State, (1993) 2 N.W.L.R. (part 273) 1 at p. 13. (p. 209 E)

***Evidence - circumstantial evidence***

2. The provisions of section 149 of the Evidence Act, Cap. 112 enables a court to accept the proof of death by circumstantial evidence. This has been made so because in criminal cases the possibility of always proving the offence charged by direct and positive testimony of eye-witnesses is rare. It is, therefore, permitted to infer, from the facts proved, other facts necessary to complete the elements of guilt or establish innocence. (p. 209 G)

***Murder - Conviction***

3. I cannot see how it can be said that the foregoing facts had been fabricated to implicate the Accused. The facts are real. Nor can I find any co-existing circumstances that weaken or destroy the inference made, B except the alibi raised by the Accused in his statement to the police, Exhibit A-A1. But the facts stated in the statement are not admission or confessional in terms of Sections 19 and 28 of Evidence Act, Cap. 112 and so they are not to be taken as proved or true. When the statement C was tendered and admitted in evidence by the prosecution, it was to simply prove that the statement was taken from the Accused - See Sanusi v. State, (1984) 10 S.C. 166 at P. 198. The Accused could have raised the contents of the Statement to a higher pedestal had it been he chose to testify at the trial admitting that he made the statement and standing by it, D but this the Accused did not do. In m view the statement does not, therefore, constitute a co-existing circumstance which weakens or destroys the inference that Accused and Taju killed the deceased to deprive him of the taxi. E (p. 211 A)

***Evidence - criminal trial***

4. It is very clear from the provisions of sections 136, 138 and 139 of the F Evidence Act, Cap. 112 that the burden of proving a charge against an accused person is upon the prosecution. The burden may of course shift to the accused person by virtue of the provisions of sections 138 subsection (3), 139, 141 and 143 of the Evidence Act, Cap. 112. There is no G doubt that the standard of proof by the prosecution is beyond reasonable doubt as per section 138 of the Evidence Act. Therefore, when the prosecution in this case adduced circumstantial evidence which showed that the Appellant and Taju were guilty of murdering the deceased, the burden of proving that they were or Appellant was innocent shifted on him. H (p. 215 G)

***Constitutional law - Evidence - Right to opt not to testify***

5. Section 33 subsection (11) of the 1979 Constitution which provides:-

*"(11) No person who is tried for a criminal offence shall be compelled to give evidence at the trial."*

entitled Appellant to opt not to testify as he did. However, it may not be desirable to exercise this right where the prosecution in a trial has closed its case and had in the course of that established a strong case against the accused. (p. 216 B)

***Comment - About failure of accused to testify***

6. As to whether the trial court is at liberty to comment about the failure of the accused to testify, it was decided by this court in Sugh v. The State, (1988) 1 NSCC 852 that the provisions of section 33 subsection (11) of the 1979 Constitution does not stop a trial judge from drawing any unfavourable inference against the accused having regard to the evidence adduced in the case by the prosecution. (p. 216 D)

***Judgments - Misdirection***

7. I am in no doubt that the learned trial judge in this case misdirected himself in referring to the doctrine of res ipsa loquitur, but this has not occasioned any miscarriage of justice since the Appellant opted not to give evidence at the trial and there was sufficient evidence adduced by the prosecution to justify his conviction of the murder charged. (p. 216F)

**NOTABLE POINT OF INTEREST**

**OGWUEGBU JSC**

***1. Circumstantial - evidence***

Where direct evidence is not available, the jury or the judge sitting without a jury is permitted to infer from the facts proved other facts necessary to complete the element of guilt or establish innocence. Such evidence must however be closely examined. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be certain that there are no other co-existing circumstances which may weaken or destroy the inference. See Teper v. R. (1952) A.C. 480 at 489. On the other hand, circumstantial evidence has been held to be the best evidence particularly where it is overwhelming and

lead to no other conclusion than the guilt of the accused. See Obosi v. The State (1965) N.M.L.R. 129, R. v. Taylor, Weaver & Donovan 21 Cr. App. R. 20 at 21. (p. 217 H)

B

**REPRESENTATION**

C. Uwensuyi-Edosomwan with L.S. Olorunshola for the Appellant.

O. Mabekoje, D.P.P. Ogun State, with J.K. Omotosho, State counsel, for the Respondent.

C

**CASES REFERRED TO**

Egbe v Alhaji, (1990) 1 N.W.L.R. (part 128) 548 at p. 590,

Agu v. Ikewibe, (1991) 3 N.W.L.R. (part 180) 385 at p. 401 and

D Adigun v. Ayinde, ( 1993) 8 N.W.L.R. (part 313) 516 at pp. 528 and 538.

Ansha v. The State, (1998) 2 N.W.L.R. (part 537) 246 at p. 265

Anakwe v. The State, (1976) 9-10 S.C. 255 at p. 264

Abieke v. The State 1975) 9-11 S.C. 97 at p.114

E Onah v State. (1985) 3 N.W.L.R (part 12)

Kalu v. State, (1993) 6 N.W.L.R. (part 300) 385 at p. 396 and

Lori v. The State, (1980) 8-11 S.C. 81 at p. 86.2) 236 at pp. 243 and 244

Nweze v The State (1996) 2 N.W.L.R. (part 428) at pp 11-12 and 19

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**STATUTES REFERRED TO**

Criminal Code, Cap. 29 Laws of Ogun State of Nigeria, 1978 ss 316 (3) and 319

Constitution of the Federal Republic of Nigeria, 1979, s. 33 (5) and (11)

G Evidence Act, Cap 112 of the Laws of the Federation of Nigeria, 1990, ss 19, 28, 136, 138, 139 141, 143 and 149

H

**LEAD JUDGMENT BY UWAIS CJN**

This is an appeal from the decision of the Court of Appeal, Ibadan. The Appellant was charged with and convicted of the murder of Saliu Kolade contrary to section 316 subsection (3) of the Criminal Code, Cap.

29 of the Laws of Ogun State of Nigeria, 1978, punishable under section 319 thereof.

The facts of the case are simple. The deceased was a taxi driver. His taxi which was a Volkswagen Beetle car bore the Registration Number OG 9725 T. On the 12th day of April, 1985, the deceased was approached and requested at Sango-Ota Motor Park by the accused who was accompanied by one Taju, to take them in his taxi to Afo-Odo. The deceased agreed to do so. He charged N10.00 as the fare and the amount was instantly paid to him by the accused. The deceased started the journey from the Motor Park, with the accused and Taju in the taxi. By 10.00 p.m. in the night of the same day, the taxi was parked outside the house of P.W. 7 Akintunde Oshunsina and P.W. 3, Oladunjoye Olakitan at Isaga Compound in Ado-Odo. The accused drove the taxi to the Isaga compound in company of Taju. The deceased was not with them nor did he drive the car to the Isaga compound. The accused saw P.W. 7 and asked him about P.W. 3 who was then not at home. On learning that P.W. 3 was absent, the accused and Taju left in the taxi with the former riving. Later in the night they returned to Isaga compound and met P.W.3 who had then returned to his house. Both accused and Taju sought the permission of P.W. 3 for them to stay the night in his house. P.W. 3 agreed to their request. The taxi was parked outside the Isaga compound.

P.W. 7 enquired from the accused, about the owner of the taxi and why they chose to stay the night with him. The accused answered that the taxi belonged to Taju and that they were unable to arrive at the Isaga compound earlier than they did because the men of customs and Excise Department had set up roadblocks on the way. The accused also mentioned to P.W. 7 that they were on their way to Lagos but had to stay the night at Ado-Odo because of the presence of customs and Excise officials on the route to Lagos. At 7.00 a.m. on the 13th day of April, 1985, when P.W. 7 woke up from sleep, he discovered that the accused, Taju and P.W. 3 had left Isaga compound.

In his testimony, P.W. 3 said that the accused and one other person came to him on the 12th day of April, 1985 in a taxi at his house in Isaga compound. They both asked for his permission to stay the night

with him. They indicated to him that they were on business trip. He allowed them to stay the night. On the 13th day of April, 1985 in the morning, the accused and Taju said to P.W. 3 that they did not have money on them. P.W. 3 gave them N20 and 2 bottles of a drink. They left the house of P.W. 3 in the taxi while P.W. 3 went to his place of work. P.W. 3 left for Agege on the same day and when he was returning to Ado-Odo from there, he saw both the accused and Taju somewhere on the road near Alapoti village. They were at the road side when P.W. 3 asked them why they were still in Ado-Odo and they replied that they had smuggled (contraband) goods in the taxi and that the road was blocked by customs and Excise officials who had mounted road-blocks on the road. As the taxi was not in their company when P.W. 3 saw them, he asked about the taxi and they pointed to him at where it was parked. P.W.3 left them at the spot and returned to his house.

On the 14th day of April, 1985, P.W.3 while at his house in Isaga compound saw a number of policemen who came to him in a police vehicle. The asked him about "Akin" who was then not present in the house. He told them that Akin had gone to drink. The policemen asked him to take them to the drink place. As they got there Akin took to his heel but he was pursed and later arrested by the police. Later the policemen asked of the accused and P.W.3 took them to accused's house which was in the township of Ado-Odo. On reaching the house both P.W.3 and the policemen saw the accused coming out of the house and was about to enter a taxi. The accused entered the taxi and beckoned to them to follow. In the taxi were the driver and Taju. The taxi took off and the police vehicle followed it. After about 30 minutes chase of the taxi by the police around Ado-Odo town, the policemen caught up with the taxi. They arrested the accused but Taju escaped the arrest.

While being cross-examined by counsel for the accused at the trial court , P.W.3 said that he knew the accused as a smuggler. He also said that accused and Taju left his house on the 13th day of April, 1985 early in the morning at 5.00 a.m.

P.W.I, Moshood Olawole, testified that the taxi driven by the deceased was given to the deceased by him on the 12th day of April,

1985; on behalf of the owner, for the deceased to drive it as a taxi. He said that the taxi belonged to one Mr. David Falade. When by the 13th day of April, 1985 the deceased did not return the taxi to him, P.W. I went to Mr. Falade to make a report. They both decided to report to the police about the missing taxi and the deceased. The police advised them to make further inquiries about the whereabouts of the deceased and the taxi.

P.W. I went to Otta Motor park where on inquiry he learnt that it was the accused that hired the taxi the previous day to take him to Ado-Odo. P.W.I together with the wife of Mr. Falade and the wife of the deceased went to Ado-Odo to find out about the accused and the deceased. Although they were informed that the taxi was seen in Ado-Odo the previous day and on the 13th day of April, 1985, they did not succeed in either tracing the taxi or the accused. They, therefore, returned to Sango Otta and went to the police station to inform the police about the outcome of their inquiries in Ado-Odo. The policemen asked P.W. I to return to the station on the following day.

On the 14th day of April, 1985, P.W.I returned to the police station. He was taken by the policemen to the General Hospital at Ilaro, and at the mortuary of the hospital, he was shown a dead body. He immediately identified it as the corpse of Saliu kolade. P.W.I and the police returned to the police station at Sango Otta. P.W. 1 and 2 policemen went to Ado-Odo for further investigation. At the Isaga compound the policemen arrested a person who informed them that the taxi driven by the deceased was parked outside the compound in the night on the 12th day of April, 1985. The man arrested by the police and he took the team to a place in the vicinity of Alapoti village, where the taxi driven by the deceased was found.

P.W.6, Surejo Akinyele, of Attan-Otta testified that on the 13th day of April, 1985 he was in the company of his fellow villagers, with whom he went to fetch water, when his attention was called by the noise of children who had discovered a corpse. P.W.6 picked up the corpse which was lying in a gutter. He left the corpse and went to report of the incident to his father. Together with his father, they went to Sango Otta

police station to make a report to the police. The witness observed that the corpse suffered wounds all over. He said that it was later taken from the scene to the mortuary at the hospital.

P.W.5 said, in this testimony, that he was on duty on the 13th day of April, 1985 at Sango Otta police station when a case of "sudden and unnatural death" was referred to him for investigation. He left for Atan Otta and somewhere on the way at "the old Ajegunle Road," he was shown the corpse of a young man laying in a gutter. With the help of some people who were around, he removed the corpse to the mortuary of Ilaro State Hospital where he deposited it.

On the following day - the 14th day of April 1985, P.W.5 arrested the accused at Ado-Odo. Later on he was taken to a farm near Alapoti village by P.W.3, where he recovered the taxi driven by the deceased, which was reported missing. On his returning to the police station, he charged the accused with the murder of the deceased. He spoke to the accused in pidgin English. After cautioning the accused, he volunteered to make a statement. Accused spoke to P.W.5 in pidgin English also. The statement was recorded and signed by the accused after it was read to him by the witness. The statement was tendered without objection by the accused and it was admitted as "Exhibit A - A1" at the trial.

P.W.4, Alhaji Jimoh Kolade, testified that he was the full-brother of the deceased. He said that he received informed on the 14th day of April, 1985 that the corpse of his brother was discovered,. He went to Ilaro State Hospital where he saw the corpse of the deceased in the mortuary. He said that he identified the corpse to a doctor in the hospital.

Dr. Akintunde Oluwadare, a medical practitioner, testified as P.W.8. He said that he performed autopsy on the body of the deceased on the 16th of April, 1985. He gave the age of the deceased as 24 years old and said that the corpse was identified to him by Alhaji Jimoh Kolade, P.W.4. He said that at the time of the autopsy the body was decomposed. There were multiple lacerations on the scalp, with fractured skull. In his opinion the deceased died of cerebral haemorrhage and that he must have died on or about the 12th day of April, 1985.

At the conclusion of the case the Appellant opted not to testify as he was entitled to.

In his judgment, the learned trial judge (Solmolu, J.) found the charge against the Appellant proved. He accordingly convicted him as charged and passed a sentence of death on him.

Not satisfied with the conviction, the Appellant unsuccessfully appealed to the Court of Appeal (Mukhtar, Okunola and Adamu, JJ.C.A.). He has now appealed further to this Court.

Briefs of argument have been filed by the parties. The Appellant has raised 4 issues for determination, namely -

*"(1) Whether or not the Court of Appeal erred on the facts and law when it affirmed the trial court's decision and held that the circumstantial evidence upon which the appellant was convicted was overwhelming, strong, cogent and irresistible enough to establish the guilt of the appellant.*

*(2) Whether or not the court below erred in Law by its failure to hold specifically that the onus of proof lies on the Respondent which onus must be proved beyond reasonable doubt.*

*(3) Whether the court of appeal was right in affirming the judgment of the Trial Court inspite of the fact that the learned judge having made a finding that the two investigation police officers failed to investigate the Alibi of the Accused and therefor failed to prove the Alibi wrong, could have rightfully held that the prosecution had proved the case beyond reasonable doubt.*

*(4) Whether or not the courts misdirected themselves on the issue of Burden of proof and if so was the appellant's case prejudiced thereby?"*

The Respondent alluding to the grounds of appeal filed by the Appellant submitted that the only issues which arose from the grounds of appeal, for determination are:-

*"(a) Whether the court of Appeal erred on facts and in law when it affirmed the trial Court's decision and held that the circumstantial evidence upon which the appellant was convicted was overwhelming, strong, cogent, irresistible and enough to establish the guilt of the*

appellant.

(b) *Whether the Court of Appeal was right in failing to hold that the trial court misdirected itself on the issue of burden of proof and if so whether the appellant's case was prejudiced."*

B Of the 3 grounds of appeal, filed by counsel on behalf of the Appellant, the first complains that the Court of Appeal failed to hold that the circumstantial evidence adduced by the prosecution at the trial court was not sufficient or irresistible to convict the Appellant. The second  
C ground contends that the Court of Appeal was in error when it failed to hold that the learned trial judge acted wrongly in shifting the onus of proof beyond reasonable doubt from the prosecution to the Appellant. The third ground alleges that the Court of Appeal failed to hold that the learned trial judge misdirected himself in shifting the onus of proof to the  
D Appellant contrary to section 33 subsection 5 of the 1979 Constitution. From this, it is clear, as stated in the Respondent's brief of argument, that issue No.3, in the Appellant's brief of argument, on alibi cannot be hinged on any of the grounds of appeal. It does not therefore, arise. Conse-  
E quently, I will discountenance Appellant's issue No. 3 - See Western Steel Works V Iron & Steel Workers Union, (1987) 1 N.W.L.R. (part 49) 284 at p. 304; Egbe v Alhaji, (1990) 1 N.W.L.R. (part 128) 548 at p. 590, Agu v. Ikewibe, (1991) 3 N.W.L.R. (part 180) 385 at p. 401 and Adigun v. Ayinde, ( 1993) 8 N.W.L.R. (part 313) 516 at pp. 528 and 538.  
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Arguing issue No. 1, learned counsel for the Appellant submitted that the circumstantial evidence upon which the Appellant was convicted by the trial court and confirmed by the Court below was not cogent, complete and unequivocal. Nor did it lead irresistibly to the conclusion  
G that it was the Appellant and not anyone else that killed the deceased . The case of Ansha v. The State, (1998) 2 N.W.L.R. (part 537) 246 at p. 265 was cited in support. Furthermore, it was submitted that the evidence before the trial court merely rased suspicion against the Appellant  
H and Taju; and suspicion no matter how strong cannot, on the authority of the following cases, lead to a conviction - Anakwe v. The State, (1976) 9-10 S.C. 255 at p. 264; Igboji Abieke & Anor. v. The State, 1975) 9-11 S.C. 97 at p.114; Onah v State, (1985) 3 N.W,L R (part 12) 236 at pp.

243 and 244; Nweze v The State, (1996) 2 N.W.L.R. (part 428) at pp 11-12 and 19;

In reply, learned Director of Public Prosecutions, conceded that the prosecution relied on circumstantial evidence in the absence of direct evidence. He defined circumstantial evidence as evidence is capable of B proving a proposition with the accuracy of mathematics. He submitted that the circumstances relied upon, in a case based on circumstantial evidence, should point unequivocally, positively, unmistakably and irresistibly to the fact that the offence charge had been committed and that it was the accused that committed it. He cited the cases of Kalu v. State, C (1993) 6 N.W.L.R. (part 300) 385 at p. 396 and Lori & Anor. v. The State, (1980) 8-11 S.C. 81 at p. 86. He then submitted that the circumstantial evidence upon which the Appellant was convicted, and which conviction was affirmed by the Court of Appeal, was cogent and un- D unequivocal. Learned Director of public Prosecutions argued that the fact that the Appellant and Tajū were the last persons to see the deceased alive is by itself a strong circumstantial evidence to prove the guilt of the Appellant. He cited the following cases in support - Peter Igho v. The State, E (1978) 1 All N.L.R. 88; Safiu Amusa & Ors. v. The State, (1986) 3 N.W.L.R. (part 30) 536; Kalu v. State, (1993) 6 N.W.L.R. (part 300) 385 and Ariche v. State, (1993) 6 N.W.L.R. (part 302) 752.

Now, it is trite that in a criminal case the burden of proof F lies on the prosecution and the standard of such proof is proof beyond reasonable doubt - see section 138 of the Evidence Act, Cap. 112 of the laws of the Federation of Nigeria, 1990. However, the expression "beyond reasonable doubt" does not mean beyond any shadow of doubt. - see Akalezi v. The State, G (1993) 2 N.W.L.R. (part 273) 1 at p. 13. The provisions of section 149 of the Evidence Act, Cap. 112 enables a court to accept the proof of death by circumstantial evidence. This has been made so because in criminal cases the possibility of always proving the offence charged by direct and positive H testimony of eye-witnesses is rare. It is, therefore, permitted to infer, from the facts proved, other facts necessary to complete the elements of guilt or establish innocence. In Taper v. R, (1952)

A.C. 480 it was held by Lord Normand, on p. 489 thereof that circumstantial evidence -

"..... must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another  
B ..... it is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

See also the case of The Queen v Ororosokode, 5 FSC 208 at p.  
C 210 where this dictum was cited by the Federal Supreme Court with approval.

The facts of this case should therefore be viewed with the foregoing warning in mind. The circumstantial evidence in the case which was accepted by the learned trial judge and considered over-whelming  
D by the Court of Appeal is that the Accused together with from Sango Otta motor park. The Accused and Taju reached Ado-Odo in the taxi but without the deceased. What then had happened to the deceased? The prosecution answered this question by producing the evidence that the  
E deceased was found dead the following morning in a gutter at a place different from Sango Otta and Ado-Odo. The inference to be drawn from this is that the deceased was killed so that he could be deprived of his taxi. If this is so, who would have killed him? Evidence was adduced  
F that the Accused was seen driving the vehicle and he told P.W.7 that the taxi belonged to Taju, which was a lie

The inference to be drawn from this is that the deceased was killed by the Accused and Taju in order for the Accused and Taju to steal the taxi. This inference is strengthened by the fact that from the evidence ad-  
G duced by the prosecution, the Accused and Taju stayed together from the 12th day of April, 1985 to the 14th day of April, 1985 when the Accused was arrested by the police and Taju escaped from the arrest. Although accused lived in Ado-Odo he avoid staying in his house on the  
H night of the 12th day of April, 1985 by staying with P.W.3.

Furthermore the medical evidence produced by the prosecution showed that the deceased suffered a violent death. His head had injuries and his skull was fractured and his body was thrown into a gutter. This

goes to support the inference that force was used on him in order that the taxi might be taken away from him.

**This is the type of mathematical education envisaged by the cases cited above for a conviction based on circumstantial evidence. I cannot see how it can be said that the foregoing facts had been fabricated to implicate the Accused. The facts are real. Nor can I find any co-existing circumstances that weaken or destroy the inference made, except the alibi raised by the Accused in his statement to the police, Exhibit A-AI,. But the facts stated in the statement are not admission or confessional in terms of Sections 19 and 28 of Evidence Act, Cap. 112 and so they are not to be taken as proved or true. When the statement was tendered and admitted in evidence by the prosecution, it was to simply prove that the statement was taken from the Accused - See Sanusi v. State, (1984) 10 S.C. 166 at P. 198 where Oputa, J.S.C. stated thus:-**

*"In Subramanian v. Public Prosecutor, (1956) 1 W.L.R. 965 at p. 970 the necessary distinction was drawn between tendering an accused person's statement as proof of the truth. It is my humble view that when the prosecution tenders the Statement of an accused person they tender same only as proof (of the fact) that statement was made, and not as proof of the truth of its contents."*

**The Accused could have raised the contents of the Statement to a higher pedestal had it been he chose to testify at the trial admitting that he made the statement and standing by it, but this the Accused did not do.**

**In my view the statement does not, therefore, constitute a co-existing circumstance which weakens or destroys the inference that Accused and Taju killed the deceased to deprive him of the taxi.**

The facts of the case of The Queen V Ororosokode (supra) are similar to those of the present case though not on all fours. In that case the deceased was a taxi driver, and on the 28th December he left Onitsha for Warri with two passengers wore dark glasses but were seen by a witness, who was sufficiently near to them to be able to describe the

clothes that they were wearing as they sat in the motor car. This witness was unable to identify the accused as either of the passengers and there was no evidence to show that a third passenger, was in fact, ever picked up or that such passenger was the accused. The deceased had been expected back in Onitsha from the trip to Warri either on the following day or on the 30th December, but he did not return and he was never seen alive again. On the morning of the 29th December, the body of the deceased was found lying on the grass verge of the road to Jesse. He had been brutally murdered, and it was probable that the matchet used for the murder was the deceased's own matchet, which had been in the motor car, as the scabbard of that matchet was found at the scene of the crime bespattered with blood. The pockets of the clothes which the deceased was wearing had been turned out and any property which had been in them removed. The motor car was missing, and from subsequent events there could be no doubt that it had been stolen either by the murderers or by some person or persons who had found the abandoned car on the road. On the same morning as that on which the body of the driver was found two persons were arraigned at Akuri for the registration of a motor car, which was later identified as the stolen taxi, and the car was registered in the name of one of the persons, who gave his name as S. Oke. On the same day the car was taken to a painter, who altered the colour from black to green. The accused was identified as S. Oke by a clerk in the motor registration office. The accused was also identified by the painter. The car was later used as a taxi in Akuri by a man named Robinson until his death on 22nd February, when the fact that the car was stolen came to light. The engine number was removed. The car appeared to have been used exclusively by Robinson and there was no evidence to show that the accused had any financial or other interest in it after it had been registered and licensed; and the directions given by Robinson shortly before his death tended to show that the accused had no interest in the car at that time.

The accused denied the charge, both in his statement to the police and in his testimony when he said that he was at a camp collecting food from the 24th to 29th December, and that one Mapo had Seen him

there. Mapo was not called as a witness as the police were unable to find him for the purpose of serving subpoena, which was issued at the instance of the defence. The trial judge convicted the accused on the circumstantial evidence that the persons who took the car for registration within a few hours of the death of its driver and who took it to the painter to change the colour were the persons who stole it, and, having regard to the very short period which elapsed between the killing of the driver and the appearance of the persons before the licensing officer. The trial judge found that the accused and Robinson stole the car after killing the driver. He convicted the accused.

On appeal to the Federal Supreme Court, that Court found that there were two circumstances which weakened the inference of guilt. One was that the accused was not identified as one of the passengers in the deceased's motor car on its fatal trip to Warri, and in the second the circumstances of the case were consistent with the motor vehicle having been registered by some person other than the murderer. There was also the point that it was strange that there was nothing to show that the accused received any financial benefit from the motor car, if it fact he stole it for the purposes of gain after murdering the driver.

It is quite clear that the same cannot be said of the accused in the present case. His identity as a passenger in the deceased's taxi is not in doubt. He retained and drove the taxi even after the deceased was killed.

I, therefore, agree with the finding of the learned trial judge, confirmed by the Court of Appeal, that the circumstantial evidence adduced by the prosecution was irresistible enough to establish the guilt of the Appellant.

Appellant's issues Nos. 2 and 4 which deal with proof beyond reasonable doubt and the onus of proof can be dealt with together. Learned Counsel for the Appellant contested that the Court of Appeal was in error when it failed to specifically hold that the onus of proof beyond reasonable doubt rested with the Respondent. He referred to the judgment of the lower court to show that the learned trial judge shifted the onus of proof on the Appellant by requiring him to prove his innocence. He argued that since the trial Judge misdirected himself in this respect, there

was doubt in his mind as to whether the prosecution proved its case beyond reasonable doubt and that the doubt ought to have been resolved in favour of the Appellant. That the right to silence, which the Appellant exercised by not giving evidence, had been guaranteed by section 33 subsection (11) of the 1979 Constitution. He referred to the cases of Uyo v. A-G of Bendel State, (1986) 1 N.W.L.R. (part 17) 418; Ogunbanjo v. State, (1996) 6 N.W.L.R. (part 452) 78 at p. 89 and Alonge v. Inspector General of Police, (1959) 4 FSC 203 at p. 204. He argued further that the learned trial judge was wrong to rely on the case of Utteh v. State, (1992) 2 N.W.L.R. (part 223) 259 at p. 275 because its facts are distinguishable from those of the present case. Learned counsel submitted that based on the evidence adduced by the prosecution, there was no nexus between the injuries inflicted on the deceased and the Appellant because the prosecution failed to prove that the Appellant killed the deceased. It is only when this is done by the prosecution that the trial court could call upon the accused to enter his defence. He relied on the case of Onah v. State, (1985) 3 N.W.L.R. (part 12) 236 at p. 247. He referred to section 138 (sic 139) of the Evidence Act.

Learned counsel referred to this remark by the learned trial judge in his judgment -

*"That the decomposed lifeless body of Saliu Kolade within the textual content of the facts of this case raises quite straight forwardly the legal concept or doctrine of RES IPSA LOQUITUR, barring of course suicide or immolation of a type."*

and submitted that by this remark the learned trial judge meant that the Appellant's involvement in the murder of the deceased speaks for itself and therefore the onus of proof is now on the Appellant to show that he did not murder the deceased. Learned Counsel submitted that this is wrong and that the trial court based its finding of guilt of the Appellant on the wrong principle of law which applies to tort and not criminal law and that the Court of Appeal was in error for not so holding.

In reply learned counsel for the Respondent conceded that it is trite that there is no onus on the accused person to prove his innocence. The onus is on the prosecution to establish the guilt of the accused be-

yond reasonable doubt. However, he argued, when the evidence adduced by the prosecution conclusively points to the accused as the perpetrator of the crime alleged to have been committed, the onus is on the accused to rebut the presumption of guilt against him. He referred to the case of Khadel v. State, (1997) 8 N.W.L.R. (part 516) 237 at p. 248 B where it was stated:-

*"In other words once circumstantial evidence conclusively points to the accused as the perpetrator of the offence and the same has been adequately scrutinized, believed and accepted by the trial court, the onus shifts to the accused to rebut the presumption of guilt or to cast a reasonable doubt on the prosecution's case even though by preponderance of probabilities."* C

Learned counsel submitted that the prosecution had discharged the onus placed on it by adducing cogent and compelling evidence as held by the trial court. He argued that the trial court did not impose any duty on the Appellant to prove his innocence, and that it was only after the court had accepted the case for the prosecution that the trial judge stated that the Appellant failed to avail himself of the opportunity to rebut the presumption of guilt or cast reasonable doubt on the prosecutions case. With reference to the doctrine of res ipsa loquitur, counsel submitted that the trial judge referred to it loosely to show that the deceased was killed by the two persons to have last seen him alive. Since the burden of proof in the case was not predicated on the reference, no miscarriage of justice had been occasioned by the wrongful allusion to the doctrine having regard to the totality of the evidence before the trial court. D E F

In treating the argument advanced in respect of Appellant's issue No.1 I inter alia dealt with the question of standard of proof. **It is very clear from the provisions of sections 136, 138 and 139 of the Evidence Act, Cap. 112 that the burden of proving a charge against an accused person is upon the prosecution. The burden may of course shift to the accused person by virtue of the provisions of sections 138 subsection (3), 139, 141 and 143 of the Evidence Act, Cap. 112. There is no doubt that the standard of proof by the prosecution is beyond reasonable doubt as per section 138 of the Evidence Act.** G H

Therefore, when the prosecution in this case adduced circumstantial evidence which showed that the Appellant and Taju were guilty of murder the deceased, the burden of proving that they were or Appellant was innocent shifted on him. It was in trying to state this position of the Evidence Act that the learned trial judge wrongly used the expression res ipso loquitur which is a doctrine of the law of tort inapplicable to criminal law. The question is: did the reference by the learned trial judge to the doctrine derogate from the Appellant's right not to prove his innocence? In my opinion it does not. **Section 33 subsection (11) of the 1979 Constitution which provides:-**

*"(II) No person who is tried for a criminal offence shall be compelled to give evidence at the trial."*

entitled Appellant to opt not to testify as he did. However, it may not be desirable to exercise this right where the prosecution in a trial has closed its case and had in the course of that established a strong case against the accused. As to whether the trial court is at liberty to comment about the failure of the accused to testify, it was decided by this court in Sugh v. The State, (1988) 1 NSCC 852 that the provisions of section 33 subsection (II) of the 1979 Constitution does not stop a trial judge from drawing any unfavourable inference against the accused having regard to the evidence adduced in the case by the prosecution.

I am in no doubt that the learned trial judge in this case misdirected himself in referring to the doctrine of res ipsa loquitur, but this has not occasioned any miscarriage of justice since the Appellant opted not to give evidence at the trial and there was sufficient evidence adduced by the prosecution to justify his conviction of the murder charged.

On the whole, I come to the conclusion that this appeal has no merit and that it should be dismissed. Accordingly, it is hereby dismissed and the decision of the Court of Appeal confirming that of the trial Court is hereby affirmed.

### KUTIGI JSC

I read in advance the judgment just rendered by my learned brother Uwais, CJN. I agree with his reasoning and conclusions.

The appeal is dismissed. Conviction and sentence are accordingly confirmed.

B

### OGUNDARE JSC

I agree entirely with the judgment of the Honourable the Chief Justice of Nigeria just delivered. I have nothing more to add.

C

I too dismiss the appeal and affirm the conviction of the Appellant for murder and the sentence of death passed on him.

D

### OGWUEGBU JSC

I have read the judgment of my learned brother Uwais, C.J.N and I am in full agreement with his reasoning and conclusion.

The only issue worth considering in this appeal is that of circumstantial evidence. It was canvassed before us by the appellant's counsel that the circumstantial evidence was not cogent, compelling and unequivocal and did not point to the irresistible conclusion that the appellant and no one else killed the deceased.

F

In this case the facts accepted by the trial court called for an explanation by the appellant and none was given. The circumstantial evidence adduced by the prosecution was rightly held to be sufficient proof of guilt of the appellant. See Igho v. The State (1978) 3 S.C. 87 and R. v. Mary Ann Nash (1911) 6 Cr. App. R. 225 at 228. In that case the deceased was last seen alive with the accused being carried on the accused's bicycle. She was later found dead. At the trial, accused denied the charge and gave no further explanation. It was held that the conviction was justified. See also Lori & Or. v. The State (1980) 8-11 H S.C. 89.

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Where direct evidence is not available, the jury or the judge sitting without a jury is permitted to infer from the facts proved other facts

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necessary to complete the element of guilt or establish innocence. Such evidence must however be closely examined. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be certain that there are no other co-existing circumstances which may weaken or destroy the inference. See Teper v. R. (1952) A.C. 480 at 489. On the other hand, circumstantial evidence has been held to be the best evidence particularly where it is overwhelming and lead to no other conclusion than the guilt of the accused. See Obosi v. The State (1965) N.M.L.R. 129, R. v. Taylor, Weaver & Donovan 21 Cr. App. R. 20 at 21. See also Ukorah v. The State (1977) 4 S.C. 167 at 174 and Ona v. The State (1985) 3 N.W.L.R. (pt. 12) 236 at 241.

In the appeal before us there was sufficient circumstantial evidence to support the conviction of the appellant of the murder of the deceased. The totality of the evidence was cogent, compelling and unequivocal and they lead conclusively and indisputably to the guilt of the appellant. See McGreavy v. D.P.P. (1973) ALL E.R. 503, The State v. Edebor & Ors. (1975) 9-11 S.C. 69, Peba v. The State (1980) 8-11 S.C. 81, Omogodo v. The State (1981) S.C. 5 and R. v. Onufrejczyk 39 Cr. App. R. 1.

From the facts and the circumstances surrounding the death of Saliu Kolade given in evidence which were accepted by the trial judge and affirmed by the court below, a complete and unbroken chain of evidence was established justifying the irresistible conclusion that the appellant alone or in collaboration with Taju (who is at large) murdered the deceased.

In the result, I would dismiss this appeal and it is accordingly dismissed.

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### IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by the Hon. the Chief Justice of Nigeria and I am in complete agreement with the reasoning and conclusion therein reached.

The facts of the case are not in dispute and have been set out

most admirably in the judgment of the learned Chief Justice. It suffices to stress that in the morning of the 12th day of April, 1985, the appellant in company of One Taju, hired a Volkswagen, Beetle taxi Car No. OG 9725 T driven by Saliu Kolade, the deceased, at Sango-Otta Motor Park to convey them to Ado-Odo at a consideration of N10.00. The said B driver with his taxi duly set out the same morning with the appellant and Taju to Ado-Odo as Ostensibly contracted. When the driver failed to report to the owner of the taxi at the end of the day as expected, the latter reported the disappearance of his driver with the taxi to the Police. Sub- C sequent search led to the discovery of the dead body of the driver, Saliu Kolade in a gutter at Ajegunle along the road to Ado-Odo. This was in the early hours of the 13th day of April, 1985.

Post mortem examination revealed multiple laceration of the scalp D with underling fracture of the skull. In the opinion of P.W. 8, Dr. Akintunde Oluwadare, who performed the post mortem examination, the deceased died on the 12th April, 1985.

It is significant that the appellant drove to the house of P.W. 3 at E Ado-Odo with the said Taju in the night of the 12th April, 1985 in the deceased's missing Volkswagen Beetle taxi car. They slept in the house of P.W. 3 on the said 12th April, 1985 and drove off the following morning in the same taxi car of the deceased.

On information received, P.W. 5, Sgt. No. 67376 Anderson F Amadi on the 14th April 1985 ambushed the appellant as the latter drove to a halt in his house with the deceased's taxi car. The appellant, as P.W. 5 stepped out to arrest him, quickly jumped back into the same taxi car out of which he had just disembarked and sped away. P.W. 5 gave the G appellant a chase in another taxi. He fired a shot at the appellant's taxi as a result of which the driver of the taxi was forced to stop. There and then, the appellant with his companions jumped out and ran in different directions. The appellant was pursued, over-powered and arrested. Taju H was able to escape police arrest. The appellant, at the conclusion of investigations, was charged to court for the murder of the deceased.

The principle of law is firmly settled that where circumstantial evidence adduced by the prosecution is so cogent, positive, over-whelming

and compelling that it irresistibly and conclusively points to the accused as the perpetrator of the offence alleged to have been committed, a court of law would be entitled to infer from such evidence and surrounding circumstances that the accused committed the offence and convict him accordingly on such evidence. See Uwe Idighi Esai and others v. The State (1976) 11 S.C. 39, Ibina v. The State (1989) 5 N.W.L.R. (Part 120) 238, Kim v. The State (1991) 2 N.W.L.R. (part 175) 622, Kalu v. The State (1993) 6 N.W.L.R. (part 300) 385 at 396. In other words, where strong circumstantial evidence is led against an accused person in a criminal trial and this gives rise to the drawing of a presumption or inference irresistibly warranted by such evidence, the trial court will not hesitate to draw such a presumption or inference so long as it is so cogent and compelling as to convince a jury that on no rational hypothesis other than the inference can the facts be accounted for. See Mical Onufreiczvk (1955) 39 Cr. App. R. 1, Lori and Another v. The State (1980) 8-11 S.C. 81 at 86 etc.

In the present case, there was no direct evidence as to the murder of the deceased person. In the absence of such direct evidence, the prosecution, as it was entitled to do, relied on circumstantial evidence to establish the guilt of the appellant. Details of the circumstantial evidence relied on by the prosecution have already been set out above. I need only stress that the appellant with Taju, now at large, chartered the taxi of the deceased at the Sango Otta motor park in the morning of the 12th day of April, 1985 to convey them to Ado-Odo. The deceased drove his taxi as they set out that morning from the motor park to Ado-Odo. It is not in dispute that only the appellant and Taju arrived at Ado-Odo with the deceased's taxi at about 10 p.m. in the night of the said date. It is also established that it was the appellant who personally drove the deceased's taxi that evening into Ado-Odo and headed for the residence of P.W. 3 where they passed the night although he, too, lived in the same town. Both the appellant and Taju again drove off in the early hours of the 13th April 1985 in the deceased's taxi.

The dead body of the deceased was discovered in the morning of the 13th April, 1985 in a gutter at Ajegunle along the Sango Otta to

Ado-Odo road with multiple lacerations and a broken skull. Medical examination established that the deceased died on the 12th April, 1985.

The possibility of other persons killing the deceased's driver did not arise as there was no evidence that the deceased at any point in time left the appellant and Taju as he was driving them to Ado-Odo. Of particular significance, however are the facts that the appellant was personally seen driving the deceased's taxi in the evening of the 12th April, 1985 without the deceased and misrepresented to P.W. 7 that the taxi belonged to Taju. It is clear to me that both courts below were perfectly right in coming to the conclusion, on the evidence, that the appellant killed the deceased for the purpose of stealing his Volkswagen Beetle taxi car No. OG 9725T. In my view, the undisputed evidence before the court unequivocally points at the appellant and Taju as the persons who were last seen with the deceased until his murder. They all left Sango Otta in the deceased's taxi but only the appellant and Taju reached Ado-Odo. The appellant was also seen driving the taxi of the deceased in the evening of the date he was killed. I entertain no doubt that the circumstantial evidence adduced by the prosecution against the appellant in this case is so strong, cogent, positive compelling and overwhelming that it irresistibly points at the appellant as a principal part to the commission of the offence of the murder of the deceased. See Peter Igbo v. The State (1978) 1 All N.L.R. 88, Ariche v. The State (1993) 6 N.W.L.R. (part 302)752. I am therefore satisfied that the court below was entirely right on the facts and in law when it affirmed the decision of the trial court and held that the circumstantial evidence upon which the appellant was convicted was irresistible, strong and enough to establish his guilt. Issue 1 is accordingly resolved against the appellant.

The second issue concerns the question of burden of proof and whether or not the court below was right in failing to hold that the trial court misdirected itself thereupon in the case. It is beyond dispute that there is no onus on an accused person to prove his innocence or that no crime had been committed even though such proof rested upon facts peculiarly within his own knowledge. See Rex v. Amadu Admu (1944) 10 W.A.C.A. 161, Woodmington v. D.P.P. (1935) A.C. 462. Where,

however, the evidence adduced by the prosecution conclusively points to the accused as the perpetrator of the crime for which he stands trial, and the same has been adequately considered and believed by the trial court, the onus will shift on the accused to rebut this presumption of guilt or to cast a reasonable doubt on such case thus presented by the prosecution, al-beit, by preponderance of probabilities. See Khadel v. The State (1997) 8 N.W.L.R. (part 516) 237 at 248.

In the present case, the evidence adduced by the prosecution which was accepted by both courts below is so cogent, positive, compelling, and overwhelming that it conclusively points to the appellant as the perpetrator of the offence for which he was charged. He neither rebutted this presumption of guilt against him nor did he adduce any evidence whatever which cast any reasonable doubt, no matter how feeble, on the prosecution's case. On the contrary, the appellant rested his defence on the overwhelming case presented on behalf of the prosecution. None of the findings of fact relied on by the trial court, as affirmed by the court below, has been established to be perverse. No misdirection on the issue of burden of proof was also established against either of the two courts below. Issue 2 must in consequence be resolved against the appellant.

It is for the above and the more detailed reasons clearly set out in the judgment of the Hon. the Chief Justice of Nigeria that I, too, dismiss this appeal and affirm the conviction and sentence passed on the appellant by the trial court as affirmed by the Court of Appeal.

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