

SUPREME COURT OF NIGERIA
11TH FEBRUARY, 2000. SC. 160/1998
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, S. O. UWAIFO,
A. O. EJIWUNMI, E. O. AYoola, JJSC

JONATHAN IGBI	1ST APPELLANT
OKIEMUTE ODIBO	2ND APPELLANT
V.		
THE STATE	RESPONDENT

APPEALS - Interference - Judgment - Finding of fact - Which is supported by evidence - Will be interfered with - When miscarriage of justice will be perpetrated.

COURTS - Evidence - Witness - Contradictions in the evidence of a witness - It is the duty of the trial Court to determine - Whether such contradictions affect the quality of the evidence.

CRIMINAL PROCEDURE - Identification parade - Is not necessary in every case.

EVIDENCE - Witness - Contradictions - In the evidence of a witness or witnesses - When it is material.

FACTS

In the Orerokpe Judicial Division of the former Bendel State (but now in Delta State), the appellants and six others were charged with the offences of conspiracy to commit felony contrary to section 519 of the Criminal Code cap 48 Vol 11 Laws of Bendel State of Nigeria 1976 and murder contrary to section 319 (1) of the said Code. On the night of 24th May 1986, Abel Emunemu, (the deceased"), P.W.1, P.W.2, P.W.3, P.W.4 and others attended a burial ceremony in a neighbouring village called Otumara at which PW3 was one of the chief mourners. The deceased and the others had attended the ceremony on the invitation of

PW3. The two appellants among several others, were present at the ceremony. In the course of the ceremony, at about 3 am on 25th May, 1986, the deceased was alerted by one Umuboro, (the 7th accused) that some Otumara boys were planning to attack him and those with him on their way home because the deceased, it was alleged, was befriending one Josephine who had once been a girl friend of one of the Otumara boys and because the deceased had the effrontery of bringing her to their village. The deceased, P.W.2 and P.W.4 on their way home were chased by a group of boys who were armed, among whom were the two appellants. At a nearby bush the deceased was macheted to death. PW 2 and PW 4 gave eyewitness accounts of the killing of the deceased by the appellants and others. There were slight contradictions in the evidence of PW 2 and PW 4. At their trial the appellants pleaded not guilty to the two counts of conspiracy and murder.

At the conclusion of the trial, the 4th, 5th and 7th accused persons were acquitted and discharged. The appellants who were the 6th and 8th accused persons were found not guilty of conspiracy but guilty of murder and each sentenced to death. The 1st three accused died in prison in the Course of the trial. They appealed to the Court of appeal, which court dismissed their appeals. They have further appealed to the Supreme Court raising three issues respectively, but the appeal was decided on two main issues.

ISSUES FOR DETERMINATION

"(a) Whether the Court of Appeal was right to uphold the judgment of the trial High Court in the face of the obvious and irreconcilable conflicts and discrepancies in the prosecution witnesses' evidence?"

(b) Whether the 1st appellant was properly identified as the person who killed the deceased ?

HELD (Dismissing the appeal per lead judgment of **AYOOLA JSC**, **KUTIGI** and **UWAIFO JJSC** dissenting)

Evidence - Witness

1. Discrepancies or contradictions in the evidence of a witness or witnesses may be said to be material where they go to an issue of fact which

must be determined before a proper verdict can be arrived at in the case or where in the circumstances in which they occurred they were such as to cast a doubt on the credibility of the witness or witnesses. (p. 496 B)

Courts - Evidence

2. Whether contradictions in the evidence of a witness affects the quality of the evidence of the witness is primarily for the trial court to determine having regard, no doubt, to the rest of the evidence of the witness and the fact or facts in respect of which such contradictory evidence has been given. The duty of the trial court is to determine whether there were contradictions, and if there were, to advert to them and then take them into consideration in the evaluation of the credit of the witnesses. In this case, there was nothing material in the location of the witnesses at the material time. (p. 496 F)

Appeals - Judgment

3. Where, in a criminal case, a finding of fact is supported by evidence believed by the trial judge, an appellate court will be loath to interfere with such finding unless it is evidently perverse. Where such finding is a concurrent finding of fact of the trial judge and the court of first appeal, a court of second appeal, such as this court, will only interfere in very exceptional circumstances when not to do so will perpetrate miscarriage of justice. (p. 497 E)

Criminal Procedure - Evidence

4. The question whether appellant was properly identified or not is a question of fact to be considered by the trial court: Orimoloye v. The State (1984) NSCC 654, 657 per Karibi-Whyte, JSC). It is trite law, now, that it is not in every case that an identification parade becomes necessary: See Adeyemi & Ors v. The State (1991) 1 NWLR (part 170) 679.

The present case, rather than be case of "mistaken identity", was one of recognition of persons already known to the witnesses prior to the incident. (p. 498 E)

NOTABLE POINTS OF INTEREST

AYOOLA JSC

1. Statement Containing both admissions and denials - How treated

It is trite law that when a statement made by an accused contains both admissions and denials, the prosecution is entitled to use the admissions as well. (p. 497 E)

2. Evidence that cast doubt on the prosecution's case

Where it is suggested that a piece of evidence cast some doubt on the prosecutions' case, it is helpful to show, unless such is evident, what aspect of the case becomes doubtful by reason of the evidence. (p. 499C)

UWAIFO JSC (Dissenting)

3. Contradictions in evidence - How treated by the Courts

The contradictions in the evidence of P.W.2 and his extra-judicial statement (exhibit 1) and between his evidence and that of P.W.4 in this case are such that it is not possible to escape the consequences of the principles laid down in Onubogu v. The State (1974) 9 NSCC 358. It was held by this court in that case that where a witness has made a statement to the police before trial which is inconsistent with the evidence he gives in court and he gives no cogent reasons for the inconsistency, the court should regard his evidence as unreliable. Similarly, where one witness called by the prosecution contradicts another prosecution witness on a material point, the prosecution cannot choose whose evidence to accept as between them if there is no foundation for accepting the evidence of one of them in preference to the evidence of the other. (p. 510 C)

4. Material inconsistencies in evidence - When it will lead to a total rejection of the evidence

Where the evidence of a witness is the basis of the case being made by the prosecution and has, by its nature, an entangling quality, then material inconsistencies in the evidence which undermine the reliability of the witness must lead to a total rejection of the evidence. There is nothing in the present case to permit the court to accept and act on any portion of

the evidence of P.W.2 and P.W.4. The evidence as to whether they witnessed the killing of the deceased and by whom formed the basis of the prosecution's case and was material, and indeed crucial. Since from their performance they were certainly unreliable witnesses, in my opinion their evidence was totally discredited. It is most unsafe to rely on it to convict the appellants or to uphold their convictions. (p. 511 A) B

5. Material discrepancies in the prosecution's case - Consequence of
I need not repeat that where there are material discrepancies in the prosecutions' case on relevant issues, a reasonable doubt as to the guilt of the accused exists. The case cannot therefore be said to be proved according to the standard required and the accused is entitled to an acquittal. That is the situation in this case. (p. 512 D) C

EJIWUNMIJSC

6. What to prove in a prosecution for murder

The cardinal principle in a criminal trial is that the burden of proving the guilt of an accused rests on the prosecution. The standard of proof required of the prosecution to discharge that burden has long been settled as proof beyond reasonable doubt. See Oteki v Attorney-General Bendel State (1986) 2 NWLR (pt. 24) 648. And in order to discharge that burden, it is essential in a prosecution for murder, for the prosecution to prove:- F

"(a) Death of the deceased by a voluntary act of the accused.

(b) With intent to cause such death or cause grievous bodily harm to the deceased."

It is my humble view that the case against the appellants was established beyond reasonable doubt. The alleged discrepancies in the evidence of the 2nd PW and 4th PW, cannot be said to have materially altered the fact that these witnesses gave evidence which was believed, and quite properly, as to the perpetrators of this offence. (p. 517 B) G H

REPRESENTATION

O. M. Sagay Esq. for the 1st appellant

Okiemute Mudiaga Odje Esq. for the 2nd appellant

Professor A.A. Utuama, Attorney-General, Delta State with him Akpo Mudiaga Odje Esq. for the respondent.

B CASES REFERRED TO

Onubogu v. The State (1974) 9 NSCC 358

Jizurumba v. The State (1976) 10 NSCC 156

Onafowokan v. The State (1987) 3 NWLR (pt.61) 538 at 544-545

Woolington v D.P.P. (1935) A.C. 426 at P.481

C Okogbue v Commissioner of Police (1965) NMLR 232

Queen v. Abdullahi (1961) 1 All NLR 668 at 671-672; (1961) 2 SCNLR 347

Anyanwu v. State (1986) 5 NWLR (pt. 43) 412

D Oremoloye v. The State (1984) 10 SC 138

Oteki v Attorney- General Bendel State (1986) 2 NWLR (pt.24) 648

LEAD JUDGMENT BY AYoola JSC

E The appellants were two of eight persons jointly charged at the High Court of (what was then) Bendel State with the offences of conspiracy to commit felony contrary to section 519 of the Criminal Code, Cap 48 vol 11 Laws of Bendel State of Nigeria, 1976 and murder contrary to section 319 (1) of the said code. The two appellants, Jonathan

F Igbi and Okiemute Odibo, who were respectively 6th and 8th accused at the trial, now, respectively, the 1st and 2nd appellants on this appeal. In the course of the trial three of the accused persons had died in prison and three were acquitted and discharged at the conclusion of the trial.

G The two appellants were found by the High Court of Bendel State (as it then was) not guilty of the offence of conspiracy but guilty of offence of murder as charged and incurred the mandatory sentence of death by hanging on 31st July 1991. Their appeals to the Court of Appeal were

H dismissed on 17th September, 1998. These appeals are from the decision of the Court of Appeal.

The background facts, taken largely from the summation of the facts by Achike, JCA, (as he then was) who delivered the leading judg-

ment of the Court of Appeal, with which Muhammed and Rowland, JJ.C.A. concurred, were as follows: On the night of 24th May, 1986 Abel Emunemu ("the deceased") Josephine, Michael Eyeta ("PW 1"); David Emunemu ("PW 2"), Grace Edema ("PW 3") Moses Eseguoro ("PW 4") and others attended a burial ceremony in a neighbouring village B called Otumara at which PW 3 was one of the chief mourners. The deceased and the others had attended the ceremony on the invitation of PW3. The two appellants, among several others, were present at the ceremony. In the course of the ceremony, at about 3 am on 25th May, C 1986, the deceased was alerted by one Umuboro (7th accused) that some Otumara boys were planning to attack him and those with him on their way home because the deceased, it was alleged, was befriending one Josephine who had once been a girl friend of one of the Otumara boys D and because the deceased had the effrontery of bringing her to their village. The deceased, with the help of PW1, sent Josephine away at about 12 midnight. After the 7th accused had come back again to warn the deceased and his group that the Otumara boys had gone to waylay them on the road, the deceased, PW2 and PW4, against the advice of E PW3, decided to go back to Iggun though an alternative road which, unknown to them, was the route where their assailants were waiting. On their way home, they were chased by a group of boys who were armed, among whom were the two appellants. At a nearby bush the deceased F was matcheted to death. PW2, and PW4 gave eyewitness accounts of the killing of the deceased by the appellants and others.

At their trial the appellants pleaded not guilty to the two counts, respectively of conspiracy and murder.

The 1st appellant's case at the trial was that he was present at G the burial ceremony which started in the evening of 24th May, 1986 and continued on 25th May, 1986 where he was the master of ceremony. As the ceremony was about to start, people from other villages came. Upon H hearing a shout of "thief" thief" between 11pm and 12 midnight by one Eduriere and his wife, people at burial ceremony ran towards Eduriere's house where he and the others who ran there were told that the thieves had run towards Iggun village. After he had gone to his house and re-

turned to Eduriere's house, he saw some people who had run towards Iggun returning to Otumara saying that the thief had been killed. Thereafter he went home and slept. He denied that he killed the deceased or conspired with anyone to kill him. He repudiated his statement to the police Exhibit 8.

The 2nd appellant's case was that he was at the burial ceremony on 24th May, 1986 and that he was there till 25th May, 1986 when he went home at about 3.00 am. When he was at the party he did not hear any shout of "thief, thief". He denied that he saw anyone being killed in the night of 24th May, 1986 and early hours of 25th May, 1986 or seeing anybody being pursued that night. His defence was a complete denial.

The main witnesses for the prosecution were the 2nd and 4th prosecution witnesses the substance of whose evidence the trial judge summarized thus:

" On their way back home from the ceremony, 2nd and 4th p.ws. heard a gun shot and a loud voice ordered them to stop. The deceased, 2nd and 4th p.ws. began to run towards the direction of Iggun. They were pursued by some people and after a while they dashed into the bush. The deceased and the 2nd p.w. dashed into the bush on the left and hid behind some grasses known as Awolowo grass whilst the 4th p.w. dashed to the right. It was a bright moonlit night. Shortly afterwards the 6th accused person whom the 2nd P.W saw very clearly and who the 2nd P.W had known before 24/5/86 came to where they were hiding and began to inflict matchet cuts on the deceased. The other accused persons joined the 6th accused person to beat the deceased. The 4th P.W. also ran into the bush but dashed to the left hand side while the deceased and 2nd P.W. dashed to the right close to where he was hiding about 18 feet (6 metres) away, saw the 6th and 8th accused persons inflict several matchet cuts on the deceased while the other accused persons beat the deceased with stick. The deceased died on the spot. Thereafter the 6th, 8th and the other accused persons carried the deceased corpse towards a direction."

The trial judge believed the evidence of these witnesses whom he said impressed him as witnesses of truth. He rejected the denial of the appellants.

On the appellants' appeal to the Court of Appeal the issues that were canvassed related to alleged contradictions in the evidence of PW2 and PW4 and identification of the appellants.

The Court of Appeal resolved both issues against the appellants. That court held [per Achike JCS (as he then was)] that "the discrepancy B or mix up in this appeal (sic) as specifically addressed by the learned counsel for each of the appellants and respondent, in so far as they are not substantial and fundamental to the issues in question before the trial court, cannot be fatal to the prosecution's case." In regard to the ques- C tion of identity, the court below held first, that the identity of the 1st appellant was not in issue throughout the case. Nevertheless the court below considered the evidence on record relating to identification of the appellants and concluded thus:

*"In all the circumstances, having regard to the positive and un- D shaken evidence of PW2 and PW4 of identification of 1st and 2nd ap-
pellant which the trial judge accepted and rightly, in my view, acted
upon, I am bound to resolve the second issue in favour of the respon-
dent."* E

On this further appeal to this court the main issues canvassed though expressed in different words were much the same as were can-
vassed in the court below. The argument was repeated by counsel on
behalf of both appellants in this court as in the court below, that there F
were obvious and irreconcilable conflicts and discordancies in the pros-
ecution witnesses' evidence, and, by counsel on behalf of the 1st appel-
lant, that that appellant was not properly identified as the killer or one of
the killers of the deceased. It was argued that the absence of a formal
identification parade left a gap in the case of the persecution. G

This appeal turns, in the final analysis, on facts. One discon-
certing feature of the arguments presented before this court is in ignoring
the fact that this is a further appeal and the facts are no more at large.
This court was addressed, largely, as if we were trying the matter at first H
instance. Hence, scant and perfunctory attention was paid to the reasons
given by the court below for rejecting the contention advanced by coun-
sel for the appellants before it.

The court below while acknowledging that there may have been some discrepancy in the evidence of PW 2 and PW4 who were said to have given conflicting evidence as to the respective side of the side of the road in which they were hiding had said:

B *"The question is what do I make of this discrepancy as to the resultant directions to which the deceased, PW 2 and PW 4 found themselves..... Whether they were on the same side of the road or on different sides of the road, to my mind, is not necessarily controlling. The substantiality of their positions or directions may become relevant*
 C *and material to the determination of the crucial issue raised in the appeal only if it related to the quality of their evidence with regard the fact (sic) of the murder of the deceased."*

Having thus directed itself, that court went on to say:

D *"Bearing in mind that the evidence discloses that the incident occurred at the earlier hours of the morning of 25/5/86 (sometime after 3 a.m), it seems to me that the visibility of that fateful night and the positional location of PW 2 and PW3 vis-a-vis the deceased at the time*
 E *deceased was allegedly killed are undoubtedly matters of crucial importance in order to give credence or otherwise to the evidences of these two star eye witnesses."*

After considering the combined purport of the evidence of PW 2 and PW 4, the learned Justice came to a clear conclusion thus:

F *".....the discrepancy or mix-up in this appeal as specifically addressed by the learned counsel for each of the appellant and the respondent in so far as they are not substantial and fundamental to the issues in question before the trial court cannot be fatal to the prosecution's*
 G *case."*

The approach adopted by counsel for the appellants on this appeal was to reiterate the argument that there were inconsistencies in the statement (Exh 1) of PW 2 and his evidence on oath and between the
 H evidence of 2 PW PW 4. The alleged inconsistencies were deduced from a comparison of these materials. In the statement Exhibit 1 PW 2 stated inter alia:

"As we were going home at a spot I heard a sound of gun and

people stated to pursue us I was with Moses and Abel at this time while the two girl (sic) had left. As they are pursuing us I ran to the bush and hid while others ran into another direction. Later I started to hear shout from my brother Abel that he was killed by some people,"

Part of his testimony highlighted by counsel for the 1st appellant is as follows: B

"As we were going we heard a gun shot from behind us. The deceased Moses and I began to run..... while we ran along the road for a while, the deceased and I diverted into the bush on the left hand side of the road and we hid behind some grass known as shell Awolowo grass.... shortly afterwards, the 6th accused person came to where the deceased and I were hiding. There was bright moonlight and I was able to recognize him. I saw him inflict matchet cut on the deceased. He did not inflict matchet cut on me. The other 5 accused persons and some not now here beat the deceased with sticks to death". C

For his part, PW4 testified that:

"We ran for a while along the road before we decided to enter the bush. Three of us myself, the deceased and the 2nd PW ran to the right hand side of the road. In the bush I hid my self on the left while the deceased and the 2nd pw hid themselves on the right. I was about 18 feet away from the deceased and the 2nd pw. While we were hiding there in the bush some of the group of boys came to meet us in the bush I saw from where I was hiding the 6th and 8th accused persons inflict matchet cuts on the deceased while some others attached the deceased with sticks." D

Counsel for the 2nd appellant, in addition to all these combed the evidence, as it were with a fine comb, to rake up what he conceived to be inconsistent statements which, largely, go to minute details such as who was holding what weapon. The upshot of all this exercise is the criticism that the Court of Appeal should have held that there was no proper evaluation of the evidence. E

The High Court and the Court of Appeal were concurrently of the opinion that whatever discrepancy, inconsistency or contradiction there were in the evidence of pw2 and pw 4 as to the side of the road to which the witnesses and the deceased ran were immaterial and that what F

was important was whether or not from the positions they were in the bush, they could recognize the appellants. The trial judge believed and accepted the evidence of the 2nd and 4th prosecution witnesses that "from where they were hiding in the bush they were able to recognize the accused persons while the assault on the deceased was taking place."

On this appeal, nothing of substance has been urged to show that the High court and the Court of Appeal were in error in holding that the discrepancies and contradictions pointed out were immaterial. **Discrepancies or contradictions in the evidence of a witness or witnesses may be said to be material where they go to an issue of fact which must be determined before a proper verdict can be arrived at in the case or where in the circumstances in which they occurred they were such as to cast a doubt on the credibility of the witness or witnesses.** The case of Onubogu v. The State [1974) NSCC 358 fell into the first category. In that case in which the charges against the accused person included one of unlawful wounding, contradictions in the evidence of prosecution witnesses related to the weapon allegedly used, - a spear - and in regard thereto there were contradictions as to the whereabouts of the spear on the day in question, about how and when it was used and when it got to the hands of the police. In that case, "the whole case for the prosecution depended on whether there is cogent and credible evidence as to the existence and use of the spear either in or outside the house of the appellants at the time of the fight." [see page 366 of the Report]. The materiality of the contradictions in the evidence in that case being on an issue vital to the case was unmistakable.

Whether contradictions in the evidence of a witness affects the quality of the evidence of the witness is primarily for the trial court to determine having regard, no doubt, to the rest of the evidence of the witness and the fact or facts in respect of which such contradictory evidence has been given. The duty of the trial court is to determine whether there were contradictions, and if there were, to advert to them and then take them into consideration in the evaluation of the credit of the witnesses.

In this case, there was nothing material in the location of

the witnesses at the material time. What was material was whether they had an opportunity of seeing what was going on. Whether one was on the right side of the road while another on the left does not by itself raise an inference of absence of such opportunity. It was for the defence to have sought to cast doubt on the assertion that they saw what was going on by suggesting that such opportunity depended on which side of the road a particular witness was. No such suggestion was made. The evidence which the trial judge believed clearly showed that whatever the location of the witnesses they had an opportunity of seeing the incident they testified to.

In regard to the credibility of the witnesses, the trial court was entitled to consider the evidence of the witnesses against the background of the rest of the evidence of the case. The trial judge believed the two witnesses. As regards the 1st appellant, he also referred to the statement of that appellant, Exhibit "8" wherein the appellant had admitted his presence when the alleged "thief", the deceased, was being "cut" with "cutlass". Rightly, he held that: Exhibit '8' went a long way to support the case of the prosecution except that he denied inflicting machet cuts on the deceased." It is trite law that when a statement made by an accused contains both admissions and denials, the prosecution is entitled to use the admissions as well.

Where, in a criminal case, a finding of fact is supported by evidence believed by the trial judge, an appellate court will be loath to interfere with such finding unless it is evidently perverse. Where such finding is a concurrent finding of fact of the trial judge and the court of first appeal, a court of second appeal, such as this court, will only interfere in very exceptional circumstances when not to do so will perpetrate miscarriage of justice.

"In the present case, the crucial finding of fact made by the trial judge and confirmed by the Court of Appeal that the 2nd and 4th prosecution witnesses, from where they were hiding in the bush, were able to recognize the appellants while the assault on the deceased was taking place is amply supported by the evidence which he believed. Counsel for the appellant who strenuously implied by their submission that the two

witnesses should not have been believed have chosen to be silent on the vital evidence, believed by the trial judge, that it was the two witnesses who had at the earliest opportunity as soon as they escaped from the scene of crime, reported the incident to the 1st pw and who had taken
 B the police, led by the 6th pw, to the scene where the clothes of the deceased, stained with blood were found, and from where tracks of blood led to the bank of a river where the corpse of the deceased was found. It is evident that had the witnesses not witnessed the incident as they described, they would not have been able to lead the police to the
 C place where the deceased was killed."

Turning to the question of identification of the appellants, the court below (per Achike JCA (as he then was) said:

"Where, as in this case, the learned trial judge had before him
 D positive and unchallenged eye-witness account of the sordid murder of the deceased attested to by pw 2 and pw 4 by their proximity to the scene of matcheting of the deceased, on a bright moon-lit early hours of the morning, and the assailants had been up equivocally identified to the
 E satisfaction of the court, he is entitled to believing the witnesses and act on their evidence. See Azeez v. The State (1986) 2 NWLR (part 106)773."
**The question whether appellant was properly identified or not is a question of fact to be considered by the trial court: Orimoloye v. The State (1984) NSCC 654, 657 per Karibi-Whyte, JSC). It is trite law,
 F now, that it is not in every case that an identification parade becomes necessary: See Adeyemi & Ors v. The State (1991) 1 NWLR (part 170) 679.**

The present case, rather than be case of "mistaken identity", was one of recognition of persons already known to the witnesses prior to the incident. The 1st appellant who by his statement Exhibit 8 admitted his presence but only denied the part he was alleged to have played in the course of the commission of the crime, could hardly
 H successfully complain of mistaken identity. The 2nd appellant's case on this appeal is not focussed on the question of identity but on a general unreliability of the witnesses. The position is not such as to justify any interference by this court with the concurrent findings of the two courts

below on the fact that the appellants were recognized by the 2nd and 4th prosecution witnesses as active participants in the crime.

One aspect of the case which has been perfunctorily mentioned in the 1st appellant's brief but need some attention is the nature of injury suffered by the deceased as found on an autopsy carried out on the corpse. In arguing that the prosecution had not proved its case beyond reasonable doubt, it was pointed out, as the fact was, that "the autopsy reveals that the body which the doctor examined had a gun-shot wound on the forehead but the so-called eye-witnesses (PW2 and PW4) did not confirm that there was any bullet wound on the deceased." Where it is suggested that a piece of evidence cast some doubt on the prosecutions' case, it is helpful to show, unless such is evident, what aspect of the case becomes doubtful by reason of the evidence. In the present case it is plainly illogical to say that the mere fact that the doctor found bullet wounds on the deceased case doubt on the evidence of the second and fourth prosecution witnesses when there was no evidence that the bullet wound was inflicted prior to the time the appellants and others had carried the body of the deceased away after the incident witnessed by the witnesses.

What needs be dealt with briefly, though not made an issue by the appellants, is whether in view of the evidence of the doctor (PW 5) as to the cause of death, it could be said that the appellant caused or participated in the killing of the deceased. The medical officer (PW 5) described the injuries he found on the corpse of the deceased as consisting of laceration caused by "sharp instrument such as a cutlass" on the head, back of the root of the head and across the neck shattering the skull bone with brain matter visible and "pillet (sic) wounds" on the jaw. He certified that the cause of death was, in his opinion, "hemorrhage shock due to acute blood loss from multiple injuries." Cross-examined, he said: Both the gun short (sic) wounds and laceration from cutlass killed the deceased."

The evidence accepted by the trial judge was that the appellants were among a group of armed persons who, in execution of a threat to attack the deceased, had laid ambush for the deceased, the 2nd pw and

the 4th pw and assaulted the deceased, with the two appellants inflicting
matchet cuts on the deceased. After the attack the 1st appellant was one
of those who carried the deceased from the scene of the crime. There
was no evidence on record that the gun shot wound found on the de-
ceased was inflicted before the body was carried away. Be that as it
may, it is sufficient for the purpose of the appellants' conviction that the
injuries they directly inflicted on the deceased was an operative cause of
his death. Besides, the evidence accepted by the trial judge was clear,
that the appellant had embarked on a joint enterprise with the other at-
tackers armed with all sorts of dangerous weapons including guns, the
objective of which was to attack the deceased and those that were with
him. The facts of the present case have broad similarity with the facts in
Muonwem v. The Queen (1963) 3 NSCC where as found by the Federal
Supreme Court (at page 74):

*"In the present case we consider that the orders of five (attack-
ers) to one (victim), the use of the baton , and the signs of severe beating
about the head, chest and knees of the deceased, coupled with the throw-
ing of his body into the river as soon as he appeared to be dead, all
indicate an assault of such violence as to justify the judge in holding that
there was a common intention at least to do grievous harm and that the
killing of the deceased in circumstances amounting to murder was a proven
consequence of the prosecution of that intention."*

As have been said, counsel for the appellants have not made any
issue of the gun-shot wound found on the deceased other than, as earlier
noted, the untenable submission that it should have cast some doubt on
the prosecution's case. This aspect of the evidence adduced in the case
has been adverted to, merely to support what I understand to be the
implied position of counsel for the appellants that not much issue could
be made of that piece of evidence in relation to the appellants' responsibil-
ity for causing the death of the deceased.

Notwithstanding the commendable industry of counsel for the
appellants in searching the records for contradictions and discrepancies
in the evidence of the two eye-witnesses to the incident, at the end of the
day, nothing has been usefully urged to justify an interference by this

court with the concurrent findings of fact by trial court and the Court of Appeal on the material issue. Equally commendable are the efforts of counsel for the respondent who in the respondents' brief of argument has ably demonstrated that the conclusions reached by the Court of Appeal cannot be faulted. I feel no hesitation in agreeing with him. B

I find no substance in these in appeals . I would dismiss the appeals of the appellants accordingly.

BELGORE JSC

I had the opportunity of reading in advance, after conference, the judgment of my learned brother, Ayoola JSC and I agree with him that this appeal has no merit. The efforts of the learned counsel for the appellants, commendable though they are, have not in the slightest way D the weight of evidence against the appellants' guilt. I find no merit in this appeal and I also dismiss it in affirming the decision of Court of Appeal which upheld the judgment of trial Court.

KUTIGI JSC (Dissenting)

The Appellants were tried and convicted of the offence of murder contrary to section 319 (1) of the criminal code. They were sentenced to death. Their appeals to the Court of Appeal failed as their convictions and sentences were confirmed. They have now further appealed to this Court. F

The question I ask myself is-what and where is the evidence against the appellants? That evidence can only be found in the testimonies of the two eye-witnesses for the prosecution. The witnesses are P.Ws. 2 & 4. G

P.W.2 on page 8 of the record amongst others -

"Shortly afterwards the 6th accused person (meaning 1st appellant) came to where the deceased and I were hiding. There was bright moon light and I was able to recognize him. I saw him inflict matchet cut on the deceased. He did not inflict matchet cut on me. The other five H

(5) accused persons and some not here now beat the deceased with sticks to death. Thereafter, the accused persons carried the body of the deceased to an unknown destination."

P.W.4 also testifying on page 14 of the record had this to say -

B *"I saw from where I was hiding the 6th and 8th accused persons (meaning 1st and 2nd appellants respectively) inflict machete cuts on the deceased while some others attacked the deceased with sticks. I kept mute in my hiding place and saw what was being done to the deceased."*

C It is clear from the above testimonies that P.W.I only saw the 1st appellant (6th accused) inflict machete cut on the deceased while P.W.4 said he was both the 1st and 2nd appellants inflict machete cuts on the same deceased. Both P.Ws. 2 & 4 also saw other people beat the deceased with sticks. In fact, according to P.W. 2 "the deceased was beaten with sticks to death." He was therefore not "macheted" to death. It is also clear that none of the two eye witnesses stated in his evidence on what part of the body of deceased the machete cut/cuts was/were inflicted. I will soon elaborate on this vital omission in the case of the prosecution.

E Now, against the testimonies of these eye witnesses (P.Ws.2 & 4) is the evidence of the Medical Officer (P.W.5) who performed the post mortem examination on the body of the deceased. His evidence on page 21 of the record reads in part -

F *"I examined the corpse and found blood stain all over the body. There was a deep cut on the forehead..... The skull bone was scattered with the brain matter visible..... There were Pillet holes on the right angle of the right eye brow, base of lower eye lid and right cheek. There were three pillet wounds on the jaw. There were multiple abrasion all over the body..... I certify that the cause of death in my opinion was haemorrhage shock due to acute blood loss from multiple injuries. The laceration would have been caused by a sharp instrument like a cutlass. The pillet wounds would have been caused by a gun shot."*

H Under cross-examination by counsel for the 2nd appellant, P.W.5 said -

"Both the gun shot wounds and laceration from cutlass killed the deceased".

Neither P.W.2 *nor* P.W.4 *who were the only eye witnesses* said any of the appellants herein was armed with any gun nor fired any gun shots at the deceased on the fateful day. So that even if P.W. 2 & 4 were believed that they saw the appellants inflict machete cuts on the deceased (and they did not name or identify the part of the body cut), it certainly cannot be said or concluded that the deceased died as a result only of the matchet cuts. The Medical evidence above has shown that both the gun shot wands and machete cuts jointly killed the deceased. The logical conclusion therefore is that the prosecution has failed to prove that it was the act of the appellants that killed the deceased. And having failed to prove that vital ingredient of the offence of murder, the charge therefore failed.

I must also add that there being no evidence from either P.W.2 or P.W.4 that the matchet cuts were inflicted on the head of the deceased as found by the P.W.2 & P.W.4 contradicted each other on whether it was only 1st appellant (according to P.W.2) or both 1st & 2nd appellants (according to P.W.4) that inflicted matchet cuts on the deceased, it will in my view be unsafe to hold any of them responsible for the alleged matchet cuts on the deceased. This was not a question of detail. It was a question of substance as to who did so who did or committed the criminal act which led to the death of the deceased. The issue was never resolved. P.W.2 & 4 probable never witnessed the same incident as they claimed. I must also add that P.W. 2 and P.W.5 also contradict each other because while P.W.2 (an eye witness) said the deceased was beaten with sticks to death, P.W.5 (the doctor) said the deceased died "as a result of gun shot wounds and laceration from cutlass." Who is speaking the truth? The benefit of doubt, as always, must be given to the appellants herein. That has always been the law.

On the whole these appeals must succeed and they are hereby allowed. The judgments and orders of the Court of Appeal and of the trial High Court are hereby set aside. The appellants are each discharged and acquitted.

UWAIFO JSC (Dissenting)

From the totality of the evidence adduced by the prosecution in this case I do not think the convictions of the appellants for murder can be regarded as safe. There is no doubt that the deceased was gruesomely murdered. The real question is by whom. The evidence at first consideration appears capable of implicating the appellants. This has turned out, in my opinion, to be deceptive. I shall endeavour to show that the evidence is unreliable.

The appellants and six others were arraigned on a two-court charge of conspiracy to murder and the murder of one Abel Emunemu on or about 25 May, 1986 at Otumara village in Orerokpe Judicial Division of the erstwhile Bendel State (but now in Delta State). The counts were brought under section 324 and 319 (1) respectively of the criminal code (Cap. 48) Vol.11, Laws of the Bendel State of Nigeria, 1976. The first three accused died in prison. The 4th, 5th and 7th were acquitted and discharged. The appellants who were the 6th and 8th accused persons were found not guilty of conspiracy but guilty of murder and each sentenced to death on 31 July, 1991. Their appeals to the Court of Appeal were dismissed on 17 September, 1998.

On further appeal to this court, each of the appellants has set down issues for determination as follows: The 1st appellant asks:

"(a) Whether the Court of Appeal was right to uphold the judgment of the trial High Court in the face of the obvious and irreconcilable conflicts and discrepancies in the prosecution witnesses' evidence?"

(b) Whether the 1st appellant was properly identified as the person who killed the deceased ?

(c) Whether the prosecution proved its case beyond reasonable doubt to warrant the Court of Appeal to uphold the conviction of the 1st appellant by the trial court?"

The 2nd appellant asks in almost similar questions:

"(i) Whether the evidence of p.w.2 and p.w.4 was sufficiently credible and/or reliable to justify the conviction of the 2nd appellant?"

(ii) Whether the prosecution proved the case against the 2nd appellant beyond reasonable doubt?"

(iii) *Whether the learned Justices of the Court of Appeal were right in the circumstances in affirming the conviction of the 2nd appellant?"*

The deceased was killed on the night between 24 and 25 May, 1986. On the night of 24 May, 1986 a group of people including the deceased, the P.W.1, P.W.2, P.W.3, P.W.4 and one Josephine who did not testify, attended a burial ceremony in a neighbouring village Otumara from Igun village. Grace Edema (p.w.3) was one of the Chief mourners. The two appellants and others were present at the ceremony. As the ceremony progressed, to use the words p.w.3, "one of Esi's sons, one Johnbull and the 7th accused person and about 5 others came to me. Esi's son was holding a pistol while the 7th accused person held a bottle and a machete. The three of them i.e Esi's son, Johnbull and the the 7th accused person and others ordered me to produce Josephine the deceased's girl friend from where I was hiding her and that it was I who made it possible for Josephine to become the deceased's girl friend."

This witness (P.W.3) then further narrated what happened. She said the people later left but came back from the direction of the old Otumara-Igun road holding a gun, a cutlass and a bottle. She said in addition: "Those boys who came to me threatened that they were going to lay ambush for the deceased. As soon as the boys left me I ran into the bush," She said she stayed in the bush till the following morning because of the threat she received from the said boys.

The 7th accused was Bacol Umukoro who was acquitted and discharged at the trial. It should be noted carefully the role the P.W.3 alleged the said 7th accused played in the threat to lay ambush for the deceased. It was he who was said to hold a bottle and machete while one Esi's son held a pistol. However, P.W. 2 (David Emunemu) gave some information both in his statement to the police (exhibit 1) and his evidence in court. In his statement to the police he said 7th accused (to whom he then referred as Becon - i.e. Bacol) told him and others at Otumara village that night that "some people were waiting on the road to fight us. The boy who told us the story is called Becon. Later Becon told us that the people have moved to Okpara water side road so we

decided to go and pass new road and go home." I must quickly add here that from the evidence it was along the said new road the deceased was eventually attacked and killed.

This was further revealed in P.W.2's evidence when he said inter alia: "while at the burial ceremony the 7th accused person came to the deceased and I and told the deceased to my hearing that some Otumara boys were planning to attack us on our way back home. He left. Thereafter the 7th accused person came back to us to inform us that the group of boys who planned to attack us on our way back home had gone to lay in wait on the old Otumara-Igun road. This was about 2.00 am. in the early morning of 25/5/86..... Having been alerted by the 7th accused person of the imminent danger, we the deceased, Moses and I decided to return home via the new Otumara-Igun road at about 3.00 am Moses, the deceased and I left the place passing through the new Otumara-Igun road."

It must become a matter of grave concern as to the real role played by the said 7th accused when the evidence of P.W.2 and P.W.3 are considered together. He was seen by p.w. 3 to have held a bottle and a machete when he went with others to threaten her that they were going to lay ambush for the deceased. That was clearly indicative of being among those who decided to harm the deceased. He approached the deceased, P.W.2 and others to warn them that some people were planning to lay ambush for them, saying that this was going to take place along the old Otumara-igun road. That was a feigned role, it would appear, of trying to help the P.W.2, the deceased and others flee from danger, telling them along which road the danger lay. Whereas he was indeed leading them to danger. It would seem he succeeded in agitating them not to take that old road but the new road along which in fact the attack had been organized to take place.

The learned trial judge relied on the evidence of P.W. 2 and P.W.4, Moses Esegworo, to convict the appellants. The evidence of those witnesses is therefore very crucial. I will deal first with the evidence of P.W.2. He said that as he, Moses and the deceased left the place of the burial ceremony and were going along the new Otumara-Igun road, they

heard gunshot from behind them and began to run. He then said inter alia:

"while we ran along the road for a while, the deceased and I diverted into the bush on the left hand side of the road and we hid behind some grass known as Awolowo grass. Moses diverted to the bush on the right hand side of the road. Shortly afterwards the 6th accused person came to where the deceased and I were hiding. There was bright moon- light and I was able to recognize him. I saw him inflict machete cut on the deceased. He did not inflict any machete cut on me." (Emphasis mine) C

At the moment I wish only to draw attention to the portion of this piece of evidence of P.W.2 which says the deceased and the witness were hiding in the same place and that he saw the 6th accused (now 1st appellant) inflict machete cuts on the deceased. D

This is the so-called eye-witness account believed and relied on by the learned trial judge and somehow endorsed by the lower court. I have used the word 'somehow' advisedly, and I shall show why later in this judgment. If that evidence stands, the 1st appellant would be rightly E convicted on it. But the statement to the police by this witness was admitted as exhibit 1. In that statement which this witness admitted in evidence making, he said that as he, the deceased and Moses were going home that night some people began to pursue them after they heard gun F shot. He then said:

"As they were pursuing us I ran to the and hid while other ran into another direction. Later I started to hear shout from my brother Abel that he was killed by some people. I was afraid and I hid in the bush." G

The 'others' referred to above who ran to another direction were obviously Abel (the deceased) and Moses (p.w.4). The discrepancies between this statement to the police (exh.1) of P.W.2 made on 25 May, 1986 and his testimony in court given on 20 June, 1988 are very material H and crucial. They cannot under any argument be wished away. No explanation of any sort was given for such discrepancies. In his statement to the police, the witness and the deceased were not hiding in the

same place. The witness was hiding alone. He was hearing the voice of the deceased that some people were killing him. He did not say he saw them. It is therefore proper to infer that he did not see them. So he did not (or could not) see 1st appellant inflict machete cuts on the deceased.

B But in his testimony all that evidence was abandoned and a completely new scenario created as already reproduced above. Now he was able to say (or remember) that he and the deceased hid in the same place and that he saw the 1st appellant inflict matchet cuts on the deceased, not that he heard his voice from a distance saying he was being killed. How
C can this witness be ever accepted as a reliable witness and his evidence in court believed in the circumstances? And that evidence is then used to convict the 1st appellant for murder? That is exactly what the two courts below did.

D As for the P.W.4, his statement to the police is not available. In his testimony on these material issues, he said inter alia:

"The people with whom I left Igun for Otumara were Grace (i.e. P.W.3), the deceased, 2nd P.W., Josephine Akpmodaye and 1st P.W. while we were there the 7th accused person came to us because of Josephine. He left. A short while thereafter the 7th accused person came gain a 2nd time and told us that the boys who wanted to attack us had insisted on attacking us and that they had moved towards Okpara Water Side....."

F This evidence shows again the role played by the 7th accused whose intention, perhaps, was to give these people a wrong impression as to where the attack was planned to take place. Later the witness went further to say:

G *"When it was near day break we decided to return to Igun, through the new road. As we were going and at a bend I heard a voice saying stop. This was followed by a gun shot. On hearing the gun we took to our heels. We ran for a while along the road before we decided to enter
H the bush. Three of us myself, the deceased and the 2nd P.W. ran to the right hand side of the road. In the bush I hid myself on the left while the deceased and the 2nd P.W. hid themselves on the right. I was about 18 feet away from the deceased and the 2nd P.W. while we were hiding there*

in the bush some of the group of boys came to meet us in the bush. I saw from where I was hiding the 6th and 8th accused persons inflict matchet cuts on the deceased while some others attacked the deceased with sticks"

The evidence of this witness is different from that of the P.W.2. The P.W.2 said he and the deceased ran into the bush on the left hand side of the road while the P.W.4 ran to the right hand side of the road. He said only the 6th accused (i.e. 1st appellant) came to where he and the deceased were hiding and there inflicted matchet cuts on the deceased, an incident he saw while both of them were hiding in the same place. But P.W.4. said it was the 6th and 8th accused (i.e. 1st and 2nd appellant) who inflicted matchet cuts on the deceased. These are material contradictions in the evidence of witnesses relied on to convict for murder. These contradictions have not been explained.

I may simply refer to some other strange differences in the evidence of these two witnesses. They may be considered unimportant by a cursory view of them but it is my view that they ought to be treated as part of a wholly unsatisfactory performance of witnesses who cannot really be trusted in the circumstances. The P.W.2 said he left the bush around 6.00 a.m for home crying and then went to report to P.W.1 who immediately followed him to the police station. On his part P.W.4 said: "I remained in the bush until it was dawn and I went to report to 1st P.W. what had happened to the deceased. I left the bush alone. Thereafter I left for the police station Eku with the 1st P.W. to report the incident."

It must appear a bit curious that P.W.4 who claimed to be only 18 feet away from P.W.2 in the bush would leave the bush alone without P.W.2 with whom he allegedly ran into that bush in fear for their lives. In the same way P.W.2 said he left the bush for home crying. Each appears to have claimed that only he and P.W.1 went to report to the police. However, P.W.1. said: "At about 6.00 a.m I heard on David Jami (i.e. P.W.2) cry aloud saying that Abel Emunemu had been killed. Thereafter I went to the police station Eku to report the incident. One police man followed me and David to Otumara where Abel was killed." This piece of evidence completely excludes P.W.4. The question is, who has told the story the way it was? Even as regards where the corpse of the

deceased was recovered from, there were differences which should ordinarily not exist from eye-witness account. While P.W.1 and P.W.2 said the corpse was recovered near the river bank or on a side of the river, P.W. 6 Inspector Remigious Okoro (1.P.O) said the corpse was
B dumped into the river and a search party he organized succeeded in retrieving it; and P.W.4 also said the corpse was recovered from the river. One begins to be regarded by the two courts below as the star and eye-witnesses. No explanation of any kind was given for such discrepancies. Both counsel for the appellants submitted that with such material
C contradictions, the evidence of P.W.2 and P.W. 4 became unreliable and should have been discountenanced by the court. I find merit in that submission.

The contradictions in the evidence of P.W.2 and his extra-judicial statement (exhibit 1) and between his evidence and that of P.W.4 in this case are such that it is not possible to escape the consequences of the principles laid down in Onubogu v. The State (1974) 9 NSCC 358. It was held by this court in that case that where a witness has made a
E statement to the police before trial which is inconsistent with the evidence he gives in court and he gives no cogent reasons for the inconsistency, the court should regard his evidence as unreliable. Similarly, where one witness called by the prosecution contradicts another prosecution
F witness on a material point, the prosecution cannot choose whose evidence to accept as between them if there is no foundation for accepting the evidence of one of them in preference to the evidence of the other.

This court later reiterated the principles in Onubogu the case of Jizurumba v. The State (1976) 10 NSCC 156 but added that where a
G satisfactory explanation has been given for the inconsistencies in a portion of the evidence as to a particular point, the trial court may accept the other portions of the evidence of the witness instead of a total rejection although it should be slow to do so, depending on the circumstances of
H the case. It is plain to me that a partial acceptance of evidence of a witness owing to inconsistencies may be engaged in only when it is possible to sever the evidence and relate it to specific issues in controversy. Or where the inconsistencies do not detract from undisputed facts of a

case. For example, in the present case it is not in dispute that the deceased was murdered. So no matter the inconsistencies in the evidence of P.W.2 and P.W.4, that fact to which they testified that he was murdered remains. But where the evidence of a witness is the basis of the case being made by the prosecution and has, by its nature, an entangling quality, then material inconsistencies in the evidence which undermine the reliability of the witness must lead to a total rejection of the evidence. There is nothing in the present case to permit the court to accept and act on any portion of the evidence of P.W.2 and P.W.4. The evidence as to whether they witnessed the killing of the deceased and by whom formed the basis of the prosecution's case and was material, and indeed crucial. Since from their performance they were certainly unreliable witnesses, in my opinion their evidence was totally discredited. It is most unsafe to rely on it to convict the appellants or to uphold their convictions.

The evidence of P.W. 2 and his statement to the police should have been discountenanced. The evidence of P.W. 4 which purported to speak of the same incident but in contradiction of the evidence of P.W.2 will lead to a miscarriage of justice if acted upon in the circumstances. There is no other evidence in whatever form to support the charge brought by the prosecution against the appellants. I believe the wrong persons were convicted for the murder of the deceased. Through what obviously was contrived evidence. The person who appeared to have been the mastermind of the crime was unfortunately lost focus of and was consequently able to go scot-free. The burden to prove the guilt of the appellants in this case beyond reasonable doubt lay squarely on the prosecution: See Onafowokan v. The State (1987) 3 NWLR (pt.61) 538 at 544-545; (1987) 2 NSCC (vol. 18) 1101 at 1105 where this court observed:

"It is a cardinal principle of our criminal law that in all cases, the burden of proving that any person has been guilty of a crime or wrongful act, subject to certain exceptions (which are not applicable here), is on the prosecution; and if the commission of a crime is directly in issue in any civil or criminal proceedings, it must be proved beyond reasonable doubt... Thus in a Privy Council case of R v Basil Ranger Lawrence

(1932) 11 N.L.R. 6, Lord Atkin at p.7 observed that 'it has to be remembered that it is an essential principle of our criminal law that a criminal charge has got to be established by the prosecution beyond reasonable doubt.' Three years later in Woolington v D.P.P. (1935) A.C. 426 at

B P.481 Lord Sankey L.C. said that:

'If at the end of and on the whole case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner as to whether the prisoner killed the deceased with malicious intentions, the prosecution has not made out the case and the prisoner is entitled to an acquittal.'

C See also Okogbue v Commissioner of Police (1965) NMLR 232 where this court held that 'the burden of proving the accused guilty rests through on the prosecution.' In that case, the Court found that the prosecution
D failed to prove its case beyond reasonable doubt; and the appeal was allowed."

I need not repeat that where there are material discrepancies in the prosecutions' case on relevant issues, a reasonable doubt as to the
E guilt of the accused exists. The case cannot therefore be said to be proved according to the standard required and the accused is entitled to an acquittal. That is the situation in this case. A similar unsatisfactory case presented itself in The Queen v. Abdullahi Isa (1961) 1 All NLR 668
F at 671-672; (1961) 2 SCNLR 347 where the Federal Supreme Court said at p.350 per Ademola CJF:

*"We feel bound to say that these contradictions we have brought out in the evidence of the three witnesses relied upon by the learned trial judge are of vital importance and that if they had received such consideration as they deserved in the hands of the learned trial judge, we do not think he would have arrived at the conclusions he did. Further, the evidence of the 7th witness for the crown, to our mind, has left one in a state of uncertainty as to the truth of the evidence of the 2nd witness for
G the crown. On the whole, the evidence does not show that degree of uncertainty which should be the criterion in a criminal trial. Rather, there is room for doubt whether it was the appellant who actually stabbed the deceased in this case."*

My view of the present case is that it cannot be said with certainty that the P.W. 2 and P.W.4 really witnessed the Killing of the deceased going by their unreliable evidence. It cannot be accepted on the strength of the evidence as a whole that the appellants committed the crime of murder. This evidence of P.W. 2 was commented on by the lower court as per the leading judgment of Achike JCA as follows:

Bearing in mind that the evidence discloses that the incident occurred at the earlier hours of the morning of 25/5/86 (sometime after 3 a.m.), it seems to me that the visibility on that fateful night and the positional location of P.W.2 and P.W.3. (sic: P.W. 4) vis-a-vis the deceased at the time the deceased was allegedly killed are undoubtedly matters of crucial importance in order to give credence or otherwise to the evidence of these two star eye witnesses. P.W.2 in his testimony stated he heard the deceased shouting that he was killed by some people; he also said they used cutlass and that they carried the body to a place he did not see. Not guided by any evidence from P.W.2 as regards his distance from the deceased, it is certainly doubtful to me that this piece of evidence without more, could have lent much weight to the prosecution's case. Even P.W.2's evidence-in-chief did not improve the situation. Although this witness said he saw the 6th accused inflict machet cut on the deceased under the bright moon-light, nevertheless in so far as he failed to show his relative proximity from the deceased that piece of evidence, on proper evaluation, would be worth very little. P.W. 2's further testimony in answer to the cross-examination by counsel to the 2nd appellant, i.e. 8th accused, was equally wholly unhelpful in this regard. In other words, the evidence of P.W.2 as evaluated above, with or without the mix-up or discrepancy, would have been very little."

In very simple language, the lower court held that the evidence of P.W.2 had little or on worth. That was the evidence of one of two witnesses relied on by the learned trial judge. Having thus cavilled at the evidence of P.W.2, the learned Justice of the Court of Appeal made some attempt to rally behind and save the prosecution's case by relying on the evidence of P.W.4. But, in my respectful view, he made the matter worse for the prosecution when he observed:

".....the missing link in the prosecution's case as regards the relative positions of the deceased from P.W.2 and P.W.4 was supplied by P.W.4 when he testified that he was about 18 feet away from the deceased and P.W.2. Under the bright moon-light and a distance of 18 feet away, B P.W.4. could have been advantageously placed to see the deceased's assailants, and with P.W. 2 obviously closer to the deceased, he was even in a better position to observe the killing of the deceased ,his Brother, on that ill-fated day." (Emphasis mine)

C But the learned Justice had already found that P.W. 2's evidence was not worth much. It would be a contradiction in terms of that finding to now say that P.W.2 was in a better position than P.W.4 to observe the killing of his brother because of his closer proximity to him, and yet credit as probative by sheer semantics the evidence of P.W.4 who was father away D from the alleged position of both the deceased and P.W.2. I do not think this way of going about an inadequate evidence can safely lead to a conviction in a serious crime of murder. The learned Justice failed to appreciate that even from the alleged 'closer proximity' of the P.W.2 to the E scene of crime, P.W.2 said he saw 1st appellant inflict machet wounds on the deceased whereas P.W.4 who was father away said it was both 1st and 2nd appellant. On what basis then can P.W.2 be adjudged to be in a 'better position to observe the killing of the deceased' when he saw F something different from P.W.4 and how can the two be believed on the issue?

By the foregoing observation of the lower court, the uncertainty of the evidence relied on by the prosecution was made manifest and acknowledged, and there was only one safe decision open to it in respect G of those appeals before it. That decision was to allow the appeals, acquit and discharge each of the appellants. I am of the view that the prosecution did not prove the charge against the appellants. I have no difficulty in allowing the appeal of each of the appellants. I accordingly do so and H set aside the conviction of each of the appellants. I enter a verdict of not guilty and order the acquittal and discharge of each appellant.

EJIWUNMI JSC

This appeal stems from the judgment of the Court below confirming the judgment of the trial Court wherein the appellants were found guilty of the offence of murder punishable under section 319 (1) of the criminal code cap 48 vol. 11 Laws of Bendel State of Nigeria 1979. B

It is manifest from the judgment of the court below, that the testimony of PW 2, PW 4 relied upon by the trial court to convict the appellants found favour with that court. This is evident from the judgment of Achike JSC (as he then was). At page 148 of the Printed Record, C he said thus:-

"Undoubtedly, the positive, convincing and virtually unchallenged evidence of PW2 and PW4 of identification of 1st and 2nd appellants from a distance of about 18 feet from the deceased at a point where he was killed point unequivocally to the fact that the appellants were the assailants of the deceased, moreso as the witnesses were not discredited. See Anyanwu v. State (1986) 5 NWLR (pt. 43) 412 and Oremoloye v. The State (1984) 10 SC 138, where as in this case, the learned trial Judge had before him positive and unchallenged eye-witnesses accounts of the sordid murder of the deceased attested to by PW2 and PW4, and by their proximity to the scene of matcheting of the deceased, on a bright moon light early hour of the morning, and the assailants had been unequivocally identified to the satisfaction of the court, he is entitled to believe the witnesses and act on their evidence. See Azeez v. The State (1986) 2 NWLR (Pt. 106) 773" D E F

It is thus clear from the above quoted portion of the judgment of the court below, that the evidence of PW2, and PW4 remained the crucial evidence that led to the affirmation of the trial court. However, learned counsel for the appellants have in their briefs of arguments argued very strongly that the evidence of those witnesses do not measure up to the standard of proof to establish the guilt of an accused in a criminal case. They have in particular, stressed that there are material discrepancies and/or contradictions in the evidence of these witnesses. G H

I therefore consider that it is necessary to examine the evidence of 2nd PW and 4th PW, and also how the learned trial judge considered

their evidence before placing reliance thereon to convict the appellants.

The relevant portion of the evidence of the 2nd PW reads thus:-

"Moses, the deceased and I left the place passing through the new Otumara-Igun road. While we ran along the road for a while, the deceased and I left the place passing the new Otumra-Igun road. While we ran along the road for a while, the deceased and I diverted into the bush on the left hand side of the road and we hid behind some grass known as Shell or Awolowo grass. Moses diverted to the bush on the right hand side of the road. Shortly afterwards the 6th accused person (1st appellant) came to where the deceased and I were hiding. There was bright moon light and I was able to recognize him I saw him inflict matchet cut on the deceased. He did not inflict any matchet cut on me". And that of PW 4 read thus:-

"Three of us myself, the deceased and the 2nd PW ran to the right hand side of the road. In the bush hid myself on the left while the deceased and the 2nd PW hid themselves on the right. I was about 18 feet away from the deceased and the 2nd PW. While we were hiding here in the bush some of the group of boys came to meet us in the bush. I saw from where I was hiding the 6th and 8th accused persons inflict matchet cuts on the deceased while some others attacked the deceased with sticks. I kept mute in my hiding place and saw what was being done to the deceased. This incident happened between 4.00 am and 5.00 am, and moon was shining bright. I remained where I was until the deceased was killed. After killing the deceased, the people who killed him including the 6th and 8th accused persons carried the corpse to a destination I did not know."

The learned trial Judge in his review of those pieces of evidence at p. 46 of the printed record said., at lines 24 - 34, thus :-

"It was a bright moonlight night, shortly afterwards the 6th accused person whom the 2nd PW saw very clearly and who the 2nd PW had know before 24/5/86 came to where they were hiding and began to inflict matchet cuts on the deceased. The other accused person joined the 6th accused person to beat the deceased. The 4th PW who ran into the bush but dashed to the left hand side while the deceased had dashed to

the left hand side which the deceased and 2nd PW dashed to the right close to where he was hiding about 18ft away saw the 6th and 7th accused persons inflict several machet cuts on the deceased. While the other accused persons beat the deceased with stick."

The cardinal principle in a criminal trial is that the burden of proving the guilt of an accused rests on the prosecution. The standard of proof required of the prosecution to discharge that burden has long been settled as proof beyond reasonable doubt. See Oteki v Attorney-General Bendel State (1986) 2 NWLR (pt.24) 648. And in order to discharge that burden, it is essential in a prosecution for murder, for the prosecution to prove:-

"(a) Death of the deceased by a voluntary act of the accused.

(b) With intent to cause such death or cause grievous bodily harm to the deceased."

It is my humble view that the case against the appellants was established beyond reasonable doubt. The alleged discrepancies in the evidence of the 2nd PW and 4th PW, cannot be said to have materially altered the fact that these witnesses gave evidence which was believed, and quite properly, as to the perpetrators of this offence.

In the result I will dismiss this appeal for the above reasons and the fuller reasons given in the judgment of my brother Ayoola JSC.

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