

SUPREME COURT OF NIGERIA
7TH APRIL, 2000. SC. 56/1999
CORAM:- M. L. UWAIS CJN, A. B. WALL, I. L. KUTIGI,
A. I. KATSINA-ALU, A. O. EJIWUNMI, JJSC

ALFRED AIGBADION	V.	APPELLANT
THE STATE		RESPONDENT

CRIMINAL LAW - Defence - Investigation - Any defence put up by an accused person - Must be investigated thoroughly in order to render it false or unlikely.

CRIMINAL LAW - Murder - Offence of - Proof - What the prosecution must prove.

CRIMINAL PROCEDURE - Evidence - Circumstantial evidence - Conviction based on circumstantial evidence can be obtained - But such evidence must be positive, unequivocal and lead irresistibly to the conclusion - That it is the accused that committed the offence.

EVIDENCE - Murder - Contradiction in the evidence of the prosecution witness - It is the duty of the prosecution to explain the contradiction.

MURDER - Evidence - Proof - Standard of proof - Where the prosecution had not established its case - Beyond any reasonable doubt - The doubt must be resolved in favour of the appellant.

FACTS

In the High Court of Edo State sitting in Benin City, the appellant was charged with the murder of his girlfriend - Victoria Ojo. The case of the prosecution at the trial was that the appellant and the deceased were friends. During the night of the 4th day of December, 1993 they were together in the room occupied by the appellant. The appellant stopped a

taxi at about 5.00 am on the 5th day of December, 1993 to take the deceased to the Central Hospital Benin City. The deceased was taken to the hospital. A doctor examined her after about 2 hours and certified her dead. On the 17th day of December, 1993 a post-mortem examination was conducted in the hospital mortuary on the corpse of the deceased by P.W.3, Chief consultant pathologist at the Central Hospital. The body of the deceased was identified to him by P.W. 2, a brother of the deceased. P.W. 3 testified that the over all picture of all he saw on the corpse was that of strangulation with a ligature (or rope). He further stated that the wounds on the corpse could not have been self inflicted and the deceased could not have committed suicide. However under cross-examination P.W. 3 contradicted himself by saying that it is very difficult to say whether the wounds were self inflicted or inflicted by someone else." On the 5th day of January 1993 P.W. 2 went to Ogida Police station, Benin City and lodged a complaint about the death of the deceased. Police Sergeant Nyene Franklin, P.W .4, was assigned to investigate the case. He invited the appellant to the police station. At the police station the appellant was charged with the murder of the deceased. The appellant made two statements under caution, Exhibits A and B.

The case for the defence is based on the testimony of the appellant only. The testimony is substantially in line with his statements to the Police. He testified that the deceased had been his lover secretly without the knowledge of her parents. He denied killing the deceased. He stated that they both returned to Benin City from their village Ikenobore. They went to bed together at about 10.00 p. m. That between 1.00 am and 2.00 am the deceased woke from sleep and informed him that she had stomach pain. He sympathized with her. After that she began to roll on the bed. Two of his co-tenants in the house sat with him and were showing sympathy to the deceased. At about 5.00 am he stopped a taxi in front of his house. Himself together with the two co-tenants took the deceased into the taxi which conveyed her and him together to the Central Hospital. On arrival at the hospital he obtained a patient's card in her name. The card was issued by one Johnbull whose surname he could not remember. Johnbull was a member of the staff of the hospital and was working at the

counter. After obtaining the card the nurses asked him to wait for the doctor. It took about two hours before the doctor arrived and certified the deceased dead. He said that he did not strangle her to death.

In his judgment the learned trial judge rejected the appellant's defence. He accepted the evidence of P.W. 2. The appellant was found guilty of the offence and was sentenced to death. Aggrieved, the appellant appealed against the conviction to the Court of Appeal, Benin Division. That court dismissed the appeal. The appellant has further appealed to the Supreme Court raising two issues while the respondent raised a single issue.

ISSUES FOR DETERMINATION

"(i) Whether the evidence of PW 3, a doctor Abu, was full-proof of the case against the Appellant by circumstantial evidence

Whether there is sufficient circumstantial evidence to sustain the charge of murder preferred against the Appellant."

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

Criminal Procedure - Evidence

1. In a criminal case a conviction based on circumstantial evidence can be obtained by the prosecution. However, to do so the evidence adduced by the prosecution must be positive, unequivocal and leads irresistibly to the conclusion that it is the accused person that commits the offence charged. I hold that the circumstantial evidence adduced by the prosecution against the Appellant is neither unequivocal nor positive and it does not irresistibly lead to the guilt of the Appellant. The appeal, therefore, succeeds and it is hereby allowed. (p. 1311 H/1314 G)

Criminal law - Murder

2. In the present case there is no doubt that the deceased was at all material time in company of the Appellant before she was taken to the hospital on the 4th day of December, 1993 where she was pronounced dead. The questions the prosecution must prove are: what caused the death of the deceased? And who caused the death? (p. 1312 A)

Evidence - Murder

3. It is the duty of the prosecution to explain the contradiction in the doctor's evidence either under re-examination of the witness or in their address to the court after the defence closed their case. This the prosecution failed to do. (p. 1313 B)

Evidence - Proof

4. The prosecution had not established conclusively at the trial that it was the Appellant that killed the deceased beyond any reasonable doubt. Since the doubt lingers from the cross-examination of P.W. 3 that either the deceased or the Appellant could have caused the death, the doubt must be resolved in favour of the Appellant. (p. 1313 D)

Criminal law - Defence

5. Any defence put up by an accused person whatsoever whether stupid or spurious must be investigated thoroughly in order to render it false or unlikely. It is when this happens that the trial court will be able to reject it. (p. 1314 E)

NOTABLE POINTS OF INTEREST

KATSINA-ALU JSC

1. How a court should treat uncontradicted evidence

If therefore the story of an accused stands uncontradicted then it is to the facts as put forward by him that the trial judge would relate the applicable law - The State v. Oka (1975) 9-11 SC 17. (p. 1318 B)

2. The burden to establish an accused person's guilt

I must also re-state here that the burden of proof of an accused person's guilt is always on the prosecution. That burden does not shift on the accused who in law is under no obligation to prove his innocence. (p.1318H)

EJIWUNMI JSC

3. Suspicion cannot amount to prove

Bearing in mind that the evidence on record revealed that it was only the

appellant and the deceased were together in their room on the fateful night, and that it was the appellant who carried the deceased to the hospital, where she was pronounced dead, it is manifest that suspicion must naturally fall on the appellant as the murderer. But suspicion, no matter how grave cannot amount to proof that the appellant committed the offence for which he was charged! What this means is that it is not enough for the prosecution to suspect a person of having committed a criminal offence, there must be evidence which identified the person accused with the offence and that it was his act which caused the offence. (p. 1319 E)

4. When a court may act upon circumstantial evidence

It is of course settled law that circumstantial evidence can be used to determine the guilt of an accused person. It has been stated that circumstantial evidence is as good as, sometimes better than, any other sort of evidence, and what is meant is that there is a number of circumstances which are accepted so as to make a complete and unbroken chain of evidence. If that is established to the satisfaction of the jury they may well and properly act upon such circumstantial evidence. The learned author of Wills on Circumstantial Evidence 7th Edition (1936) p. 324 also said thus:-

"In a case in which there is no direct evidence against the prisoner but only that kind of evidence that is called circumstantial, you have a two - fold task; you must first make up your minds as to what portions of the circumstantial evidence have been established, and then when you have got that quite clear, you must ask yourselves, is this sufficient proof? It is not sufficient to say, 'if the accused is not the murderer, I know of no one who is. There is some evidence against him, and none against any one else'. Therefore, I will find him guilty. Underlining mine. (p. 1321 F)

REPRESENTATION

Appellant absent and unrepresented

Respondent unrepresented

CASES REFERRED TO

Ukorah v. The State. (1977) 4 S. C. 167

Lado v. State (1999) 70 LRCN 1705 at p. 1729 B - C

Adio v. The State (1986) 2 NWLR (Part 24) 581

B Oladejo v. The State (1987) 3 NWLR (Part 61) 419

Igho v. The State (1978) 11 N. S. C. C. 166

Nwaeze v. The State (1996) 2 NWLR (Part 428) 1

Abieke v. The State (1975) 9 - 11 S. C. 97 at p. 104

Adio v. The State (1986) 2 NWLR (Part 24) 581

C Myres v. D. P. P. [1965] A. C 1001

Alonge v. I. G. P [1959] 4 FSC 203

Umeh v. The State [1973] 2 SC 9

Obua v. The State [1976] 2 SC 141

D

LEAD JUDGMENT BY UWAIS CJN

The Appellant was charged in the High Court of Edo State, sitting in Benin City, with the murder of his girlfriend - Victoria Ojo, on the
E 5th day of January 1993, He was found guilty of the offence and was sentenced to death by the learned trial judge (Edokpayi. J.).

The case for the prosecution at the trial was that the Appellant and the deceased were friends. During the night of the 4th day of December, 1993 they were together in the room occupied by the Appellant at No.
F 21 Uselu/Lagos Road, Benin City. The Appellant stopped a taxi early morning at about 5.00 a. m on the 5th day of December 1993 to take the deceased to the Central Hospital Benin City. The deceased was taken to the hospital. On the 17th day of December 1993, a post-mortem examination was conducted in the hospital mortuary on the corpse of the deceased
G by Dr. Suleiman Abu, (PW 3) Chief Consultant Pathologist at the Central Hospital. The body of the deceased was identified to him by one John Ojo, P. W. 2, a brother of the deceased. On examining the body, P. W. 3.
H found that "rigor mortis has passed away. There was a grooven (a depression mark) on the neck. In the front, of the grooven was flat and it had a grey base. The depth of the groove was about 3 millimetres. There was no ligature attached. It was just a groove (a depression mark). From the

front this groove extended upwards and backwards at an angle of thirty degrees to the back of the neck where it disappeared behind the left ear lobe. On the left from it went upwards and backwards at the same angle of thirty degrees to the back to the same left ear lobe where it again disappeared. Every thing was to the left. Both eyes were covered with blood B under what is called conjunctival. The tongue protruded between the clenched teeth. The larynx, trachea, the plureal that covers the lungs and the pericardium that covers the heart were covered with showers of spots of haemorrhages. The face general looked puffy. There were three deep C marks on the right side of the neck as made by end of the digits of the finger The dissection of the neck showed moderate bruising of the mussles of the neck which also affect the top of the voice box All the other systems of the corpse were examined and they were normal."

When John Ojo (P. W. 2) was informed of the death of the de- D ceased he went to the mortuary at the Central Hospital. Benin City, where he saw her corpse. On the 5th day of January, 1993 he went to Ogida police station, Benin City and lodged a complaint about the death of the deceased. Police Sergeant Nyene Franklin, P. W . 4, was assigned to in- E vestigate the case. He was taken to the Appellant's house by P. W. 2. where he invited the Appellant to the police station. At the police station the Appellant was charged with the murder of the deceased. The Appel- F lant volunteered a statement under caution - (Exhibit B) in which he stated that the deceased had been his girlfriend. That although they both lived in Benin City and belonged to the same village - Ikenobore, each one stayed at his separate house in Benin City. On the 5th day of December, 1993 (sic) the Appellant and the deceased left Ikenobore together and returned G to Benin. That on arrival in Benin they went to the house of the Appellant together. That they went to bed later at about 1.00 .am on the 6th day of December, 1993 (sic) the deceased woke up the appellant and complained that she was suffering from stomach ache. That at about 5.00 a. m. the Appellant hailed a taxi to take her to the Central Hospital. That the de- H ceased was carried into the taxi by the Appellant who was assisted by a co-tenant of his. That all the other co-tenants in the house were aware of the deceased's illness at the time that she was being taken to the hospital.

That the Appellant obtained a patient's card at the hospital from one Johnbull who was an employee of the hospital. That the Appellant became a friend of the deceased in 1990 and they had a minor quarrel only once over the money he gave her for Christmas celebration in 1990. That the deceased
B had a child for another man whom the Appellant had never met. That the Appellant had no reason or cause to strangle the deceased.

The investigation of the case was transferred from P.W. 4 to Daniel Iwerieboh (P. W. I) now a retired Inspector of Police, on the 6th day of
C January, 1994. He decided to take another statement from the Appellant under caution (Exhibit A). In the statement the Appellant stated as follows. "I left Ikenobore village to Benin City at about 4.30. While she arrived in my house at about 9.00 p. m. of same 3/12/93. I took my bath with her and we went to bed. I had sex with her ones (sic) At about 2.00
D a. m. she started complaining about stomach pain. I enquired from her what happened, she told me that it is the usual stomach pain. She had been having stomach pain. I went outside and looked for a vehicle at about 5.00 a. m. of 4/12/93 I got a vehicle and I conveyed her to Central
E Hospital Benin City where she was certified dead. She did not die in my house. I cannot tell whether she on her way to the hospital because was not a doctor. It was in the hospital that she was certified dead by the doctor. I did not poison her. I did not administer any drug on her when she
F started complaining of the stomach upset. As I was in the ward with the corpse, the doctor told me to go outside and my relations later informed me that she is death (sic). I decided to go and inform Solomon who later told Ighowonyi and they went to our village to tell the deceased's family about the incident. I was in Ighowonyi's house yesterday 5/1/93 when Police
G came and arrested us that we know (sic) the cause of Victoria's death. When she was in my house, she was rolling on the ground. She did not vomit and she did not stew. (sic)

The case for the defence is based on the testimony of the Appel-
H lant only. He testimony that the deceased had been his lover secretly without the knowledge of her parents. He denied killing the deceased. He admitted that they both returned to Benin City from Ikenobore. They went to bed together at about 10.00 p.m. That between 1.00 and 2.00 a.m.

the deceased woke up from sleep and informed him that she stomach pain. He sympathized with her. After that she began to roll on bed. Two of his co-tenants in the house sat with him and were showing sympathy to the deceased. At about 5.00 a.m. he stopped a taxi in front of his house. Himself together with the two co-tenants took the deceased into the taxi B which conveyed her and him together to the Central Hospital. On arrival at the hospital, he obtained a patient's card in her name. The card was issued by one Johnbull whose surname he could not remember. Jonhbull was a member of the staff of the hospital and was working at the counter. C After obtaining the card the nurses asked him to wait for the doctor. It took about two hours before the doctor arrived and certified the deceased dead. He said that he did not know at what time she died but that she died at the Central Hospital and that he did not strangle her to death.

Under cross-examination the Appellant said that he did not know D Jonhbull before obtaining the patient's registration card from him. He said that he was alone with the deceased up to 1.00 a.m. in the night in his room before the decease begun to have stomach pain. That he was joined in his room by his two co-tenants from about 1.00 a.m. to 5.00 a.m. to E look after the deceased. The co-tenants accompanied him to the hospital when conveying deceased there in the taxi. He denied knowing one Emmanuel mentioned in the testimony of P.W. 4 to be the father of the deceased's child.

In his judgment, the learned trial judge rejected the Appellant's F defence. He accepted the evidence of the Chief Consultant Pathologist (P. W. 3). Learned trial judge considered the evidence called by the prosecution to be circumstantial. He ended his judgment by summarizing thus

"On the whole, I accept the evidence of the prosecution witnesses G and reject the evidence of the Accused person when he said the deceased died of stomach ache and when he said that he did not strangled the decease to death. I find as a fact that the accused person strangled Victoria Ojo to death in circumstances which amount of (sic) murder. H This is a clear case of cool blooded murder. In consequence, I find that the prosecution has proved its case of murder against the accused person beyond reasonable doubt." (parenthesis mine)

Aggrieved by the decision the Appellant appealed against the conviction by the learned trial judge to the Court of Appeal, Benin Division. The appeal which was heard by Achike, J. C. A, as he then was, together with Akintan and Rowland, JJ. C. A., was dismissed. The Appellant, therefore, appealed further to this Court.

Appellant's brief of argument in this Court was at first prepared by Emmanuel C. Ukala, Esq. of counsel and was filed on 8th April, 1997. However, this was substituted with another brief prepared by Alhaji F. A.. Oso which was filed with leave on the 11th day of October, 1999. The Respondent's brief of argument which was filed on the 3rd day of December, 1999 is in reply to the latter brief filed by Alhaji F. A.. Oso. The reason for all this is that the notice of appeal filed by the Appellant on the 15 January, 1998 from Benin Prison contained two grounds of appeal which Alhaji F. A. Oso considered incompetent. He, therefore, applied to this Court for inter alia extension of time to appeal on fresh grounds of appeal. Leave was granted and he filed the Appellant's brief of argument in support of the three grounds contained in the notice of appeal which he filed on behalf of the Appellant.

Two issues for us to determine have been postulated in Appellant's later brief. They are -

- (i) *Whether the evidence of PW 3, a doctor Abu, was full-proof of the case against the Appellant by circumstantial evidence*
- (ii) *Whether the decision of the High Court was properly sustained by the court below."*

For the Respondent, only one issue has been formulated. It is -

- "Whether there is sufficient circumstantial evidence to sustain the charge of murder preferred against the Appellant."*

At the hearing of the appeal before us on the 6th day of January, 2000 neither of the parties appeared or was represented by counsel. We, therefore, took the appeal as argued on the parties' briefs of argument pursuant to Order 6 rule 8 (6) of the Supreme Court Rules, 1985.

As all the issues raised by the parties meet the grounds of appeal in the notice of appeal filed by the Appellant's counsel after obtaining the Courts leave to do so, I will consider the issue formulated by the Respon-

dent together with the Appellant's issue no. 1.

Appellant contends that the plank and super-structure on which the prosecution case was based at the trial is the evidence of P.W. 3, which the learned trial judge accepted in toto and the Court of Appeal supported the finding. He argues that the wounds found on the deceased by P. W. 3, which was said to be the cause of her death, had not shown how the deceased came by them and consequently that piece of evidence is vague, ambiguous and equivocal. The evidence did not support the prosecution case, which is circumstantial, because it was not so conclusive as to irresistibly lead to the guilt of the Appellant. It is further argued that the conclusion reached by the Court of Appeal on the testimony of P.W. 3 cannot be cogent and compelling in view of the ambiguity surrounding the evidence. The Appellant canvassed that the prosecution failed to search the house of the Appellant in order to find the ligature or rope or clothing with which the deceased was said by P.W. 3 to have been strangled. Appellant contends that it is the duty of the prosecution to prove its case beyond reasonable doubt irrespective of the fact that the evidence relied upon by the prosecution is circumstantial; and there is no onus on the accused to prove his guilt - Ukorah v. The State, (1977) 4 S. C.. 167 and Lado v. State, (1999) 70 LRCN 1705 at p. 1729 B - C.

On the Appellant's statement that the deceased complained to him of stomach ache, which was her usual illness, the prosecution failed to investigate the truth or otherwise of this by contacting the deceased's parents; and yet the trial court wrongly made it the responsibility of the Appellant to do so, when it stated -

"The statement of the accused person to the police and his evidence in court are suggesting the fact that Victoria Ojo died of stomach ache which used to worry her. This suggestion is not backed up with any evidence from any relation of the deceased or any medical doctor. The only medical evidence which I accept as uncontradicted evidence on that issue of stomach ache is that of Dr. Suleiman Abu, the Chief Consultant Pathologist in the Central Hospital Benin City, who examined the corpse of Victoria Ojo."

The Court of Appeal wrongly accepted this finding by the trial

court, it is said.

Appellant complains also against the finding by the trial court on the testimony of P.W. 4 when it held -

"I do not believe that Victoria Ojo died a natural death and I do not believe that the died of any stomach ache. I do not believe that Victoria Ojo died from any other cause other than by strangulation by ligature. Police Sergeant No. 129386 namely NYENE FRANKLIN who testified as the fourth prosecution witness in this case gave these pieces of evidence which I believe"

and Appellant classifies the evidence as follows -

"(i) That the deceased had already died before her corpse was rushed to the hospital.

(ii) That there was no card to show that the deceased was admitted in the Central Hospital before her death.

(iii) That the deceased was in sex love (sic) with one Emmanuel and that the accused person threatened to kill the deceased if she refused or failed to dissociate herself from Emmanuel or if she failed to discontinue her love with Emmanuel. All efforts made by the witness to trace Emmanuel failed."

He then argues that P.W. 4 did not state in his testimony how he came by these facts nor name the persons from whom he got the information. It is submitted that such evidence should not have been believed by the trial court. That the points raised in Exhibits "A" and "B" by the Appellant were unresolved and the Courts below wrongly placed on the Appellant the duty to resolve them. It is canvassed that the chain of the evidence adduced by the prosecution is incomplete and therefore the Appellant should not have been convicted - Adio v. The State, (1986) 2 NWLR (Part 24) 581 and Oladejo v. The State, (1987) 3 NWLR (Part 61) 419.

In reply, it is submitted on behalf of the Respondent that the circumstantial evidence adduced by the prosecution was cogent and compelling and irresistibly pointed to the guilt of the Appellant. That at all material time before the deceased died and up to the time the corpse was deposited at Central Hospital, Benin City, Appellant was with the deceased and he was the last person to have been seen with her when she was alive.

Therefore, the evidence adduced by the prosecution negated any possibility of someone else strangulating the deceased - Peter Igho v. The State. (1978) 11 N. S. C. C. 166. That the statements by the Appellant to the Police (Exhibits A & B) and his testimony at the trial have not suggested that any other person, apart from him, had access to her and the opportunity to kill her. That the evidence of P.W. 3 expressly excluded the possibility of the deceased dying from stomach ache or committing suicide as all other systems of her body, apart from his findings, were normal. It is argued that the ligature used in strangulating the deceased needed not to be produced by the prosecution since it would not add any weight to the evidence adduced by the prosecution. On the testimonies of P.W. 1 and P.W. 4, it is submitted that nothing was wrong with their evidence. That it was the responsibility of the Appellant to submit the names of his co-tenants who stayed with him in his room from 1.00 a.m. to 5.00 a.m in the night of deceased's illness and accompanied him to the hospital with the deceased but he failed to do so. It is submitted that the failure of the tenants at Appellant's house to make statement to P.W. 1 was usual as the tenants were abhorred by the action of the Appellant in killing a person that was closely intimated to him. That it would have been a wild goose chase for the police to attempt to trace the co-tenants whose names were not revealed to them by the Appellant in either Exhibits A or B or in conversation with the Police. It is contended on the authority of the decision in Peter Igho v. The State (supra) at p. 167 that where the facts accepted by a trial court are circumstantial and call for an explanation and none is forthcoming from the accused, such circumstantial evidence is sufficient as proof of the offence charged. Finally, it is submitted that the evidence adduced by the prosecution, though circumstantial, is unequivocal, positive and pointed irresistibly not only to the fact that the deceased was strangulated to death but also that no one else other than the Appellant committed the act - Nwaeze v. The State, (1996) 2 NWLR (Part 428) 1.

Now there can be no doubt that it is trite that **in a criminal case a conviction based on circumstantial evidence can be obtained by the prosecution. However, to do so the evidence adduced by the prosecution must be positive, unequivocal and leads irresistibly to the con-**

clusion that it is the accused person that commits the offence charged. In the present case there is no doubt that the deceased was at all material time in company of the Appellant before she was taken to the hospital on the 4th day of December, 1993 where she was pronounced dead. The questions the prosecution must prove are: what caused the death of the deceased? And who caused the death?

The prosecution alleged that she died from strangulation and that the Appellant was her killer. Since the onus is on the prosecution to prove this beyond reasonable doubt, the evidence adduced by the prosecution needs to be examined critically in order to see if the cause of death had been established. The opinion expressed by P.W. 3 who conducted post-mortem examination on the body of the deceased was relied upon by the prosecution. His findings have been stated earlier in this judgment. His opinions from the findings are contained in his testimony as follows:-

"The over-all picture of all I saw on the corpse was that of strangulation with a ligature (or rope) In my opinion the deceased died of strangulation by ligature The wounds and all I saw on the corpse is consistent with strangulation with a ligature which can be a rope or piece of cloth. The wounds on the corpse could not have been self inflicted. From all I found on my examination of the corpse the deceased could not have committed suicide. There was no problem with the stomach of the deceased. The deceased did not any stomach ache or from any other cause other than by strangulation by Ligature."

The case for the defence is that deceased suffered from stomach ache and she was taken to the hospital under that condition from which she died. The evidence of P.W. 3 just quoted negated the fact that there was anything wrong with the stomach of the deceased or that she died as a result of the stomach ache. The learned trial judge preferred the prosecution evidence on this point to that of the defence as he was entitled to do, being a finding of fact.

However, there is one aspect of the opinion evidence given by P.W. 3 under cross-examination which the learned trial judge did not seem to advert his mind to. P.W. 3 said thereunder - "It is very difficult to say whether the wounds were self inflicted or inflicted by some one else." This

clearly contradicts the positive opinion expressed by the witness in his evidence-in-chief that - "The wounds on the corpse could not have been self-inflicted. From all I found on my examination of the corpse the deceased could not have committed suicide." The effect of this contradiction is: should the learned trial judge rely on the evidence of P.W. 3 to hold that it was the Appellant that committed the death of the deceased by strangulating her? **It is the duty of the prosecution to explain the contradiction in the doctor's evidence either under re-examination of the witness or in their address to the court after the defence closed their case. This the prosecution failed to do.**

This brings me to the second question which I posed. Who caused the death? The doctor's answer under cross-examination is that it is difficult to say whether it was the deceased or the Appellant. There is no admission by the Appellant that he strangled the deceased. The Appellant was categorical in his testimony when he said under examination-in-chief - "I did not kill Victoria on 5/12/93 I did not strangle Victoria Ojo to death." It is clear, therefore, that **the prosecution had not established conclusively at the trial that it was the Appellant that killed the deceased beyond any reasonable doubt.** The Court of Appeal was in grave error when it misdirected itself by holding (per Rowland, J. C .A.)

It is the law that suspicion no matter how strong cannot by itself establish the guilt of the accused. See Igboji Abieke & Anor. v. The State, (1975) 9 - 11 S. C., 97 at p. 104. The account of strangulation arising from the autopsy as furnished by P.W. 3 is eloquently vivid, lucid, detailed and satisfactory as they are intimidating, compelling and unchallenged. Consequently, even in the absence of direct evidence, the circumstantial evidence of the death of the deceased by strangulation is so cogent and compelling that they lead to the irresistible conclusion that the appellant who had the last opportunity of being in the company of the deceased committed the offence charged. See Saka Oladejo v. The State, (1987) 3 N. W. L. R. (Part 61) 419 and Opoola Adio & Anor. v. The State, H (1986) 2 NWLR (Part 24) 581 it follows that I am satisfied that the prosecution proved their case to the hilt in the sense that they proved their case beyond reasonable doubt." (underlining mine).

Since the doubt lingers from the cross-examination of P. W. 3 that either the deceased or the Appellant could have caused the death, the doubt must be resolved in favour of the Appellant.

It is pertinent to mention that the investigation of this case by the police, that is P. W. 1, leaves much to be desired. The accused said in his statement Exhibit A that his co-tenant helped him together with the taxi driver to carry the deceased to the taxi. Attempt to trace the co-tenant was half-heartedly carried out. The mother of the so-called co-tenant stayed in the same house as the Appellant and she said that the "co-tenant" lived elsewhere and used to visit her only. No further effort was made by the police to trace him. Again the Appellant mentioned Johnbull in the same statement. No serious investigation about this was conducted to find out if he existed; and if so, whether he issued patient's registration card to the Appellant. It seems also the Appellant was not asked by the police to produce the card which he said was issued to him by Johnbull, if at all. The taxi driver concerned could have been traced too by the police to confirm if deceased was alive when she was put in his taxi but no evidence was given if this was done. All these are necessary steps which ought to have been taken if the prosecution were to prove their case against the Appellant beyond reasonable doubt. In other words the investigation of the case was shoddy and incomplete. **Any defence put up by an accused person whatsoever whether stupid or spurious must be investigated thoroughly in order to render it false or unlikely. It is when this happens that the trial court will be able to reject it.**

Be that as it may, the next issue for determination is whether the decision, of the trial court was properly sustained by the Court of Appeal. This can be disposed of summarily for it has been answered already. The answer is in the negative.

In conclusion, **I hold that the circumstantial evidence adduced by the prosecution against the Appellant is neither unequivocal nor positive and it does not irresistibly lead to the guilt of the Appellant. The appeal, therefore, succeeds and it is hereby allowed.** The decisions of both the trial court and the Court of Appeal are set aside. The verdict of guilty of murder pronounced by High Court against the Appel-

lant is hereby quashed and the sentence of death passed on him by the same court is also hereby set-aside. Consequently I find the Appellant not guilty and he is acquitted and discharged.

WALI JSC

I have been privileged to read in advance a copy of the lead judgment of my learned brother Uwais, CJN and I entirely agree with the reasons advanced therein for allowing the appeal.

There is no direct evidence to the incident that led to the death of the deceased. The only available evidence is circumstantial. But before a court can convict on this type of evidence, the facts leading to the death of the deceased must be proved to show irresistibly that it was the act of the accused and no other, that caused the death. See Stephen Ukorah v. The State [1977] 4 SC 167. The allegation against the accused is that he murdered the deceased by strangulation. P. W. 3 the Doctor who performed the post-mortem gave the following evidence-

"In my opinion the deceased died of strangulation by ligature. All other systems of the corpse is consistent with strangulation with a ligature which can be rope or piece of cloth. The wounds on the corpse could not have been self-inflicted. From all I found on my examination of the corpse the deceased could not have committed suicide. There was no problem with the stomach of the deceased. The deceased did not die of any stomach ache or from any other cause than by strangulation."

When he was cross-examined on this evidence, he said -

"It is very difficult to say whether the wounds were self-inflicted or inflicted by someone."

This seems to contradict his evidence that the wounds he observed on the neck could not be self-inflicted, and therefore possibility of suicide could not be ruled out, contrary to his evidence.

The next witness for the prosecution is P. W. 4, part of whose H evidence stated as follows: -

"I found out

(i) that the deceased had already died before her corpse was

rushed to the Hospital.

(ii) that there was no card to show that deceased was admitted in the Central Hospital before her death."

When cross-examined he said-

B *"I concluded that the deceased died at home before her corpse*
was rushed to the Hospital because there was no card in the Hospital
showing that she was ever admitted into the hospital alive I did not
C *include in my interim report that accused person threatened to kill the*
deceased if she did not stop her love affairs with one Emmanuel I did not
D *go to the out patient department in the Hospital to find out if the de-*
ceased was admitted into the hospital alive."

The basis of his conclusion that the deceased was rushed to the hospital
after her death is very shaky so also the question that she was not admitted
D in the Hospital before her death as he did not check from the out-patient
department of the Hospital to see whether a card was issued to her. His
conclusion that the deceased died at the appellant's home before the corpse
was taken to the Hospital was based on what he was told; it is hearsay and
E inadmissible as it does not fall within the exceptions provided by the Evi-
dence Act. See Myres v. D. P. P. [1965] A. C 1001. It is for the prosecu-
tion to prove its case beyond reasonable doubt and until that is done the
accused has no duty to call evidence in rebuttal. The prosecution's evi-
F dence is shaky in this case and in my view the accused is entitled that the
benefit of such doubt be resolved in his favour. See Alonge v. I. G. P
[1959] 4 FSC 203; Okogbue v. C. O. P [1965] NNLR 232; Umeh v. The
State [1973] 2 SC 9 and Obua v. The State [1976] 2 SC 141.

It is for these and the more elaborate reasons contained in the lead
G judgment of my learned brother Uwais CJN that I find myself also unable
to sustain the conviction and sentence passed on the appellant which are
hereby quashed. The appeal succeeds and the appellant is hereby dis-
charged and acquitted.

H

KUTIGI JSC

I read in advance the judgment just rendered by my learned brother Uwais, C.J.N. I agree with his reasoning and conclusion. I find merit in the appeal. It is accordingly allowed. I set aside the conviction and sentence of the lower courts. The Appellant is discharged and acquitted. B

KATSINA-ALU JSC

I entirely agree with the judgment of my learned brother Uwais, C JN in this appeal. In criminal trials the onus is on the prosecution to prove beyond reasonable doubt the guilt of the accused person. Failure to do so will lead to the discharge of the accused person - Onubogu v. The State (1974) 9 SC 1; Stephen v. The State (1986) 5 NWLR (part 46) 978. C

There was no direct evidence of what took place in this case. The evidence was circumstantial. It would be said that the only direct evidence of what took place between the appellant and the deceased was given by the appellant. His evidence in-chief in this regard reads: D

"I did not kill Victoria Ojo on 5/12/93. On 1/12/93 myself and Victoria Ojo both left Benin City for our Village at Ikonobore. On 5/12/93 we both returned to Benin City from that Ekonobore Village at about 6 p.m. that day. At about 10 p.m. we both went to bed and slept. Around 1 a.m. and 2 a.m. that night she woke up and told me that she was again feeling stomach pain. I then greeted her. After that she started rolling here and there on the bed and myself and two of my co-tenants sat with her and started greeting her. At about 5 a.m. that night I stopped a taxi at the front of the house and myself and my two co-tenants took Victoria Ojo into the taxi and took her to the Central Hospital in Benin City. As I got to the Central Hospital, I obtained a card in her name. The card was issued by one Johnbull whose surname I cannot now remember. Johnbull who is a staff of the Central Hospital was the person on the counter that morning. After obtaining that card the Nurses asked me to wait for the Doctor. It was almost two hours before the Doctor arrived and certified Victoria Ojo dead and he told me so. I then went and informed the parents of Victoria Ojo of her death, parents then followed me to the Central E F G H

Hospital to see with their eyes the corpse of their daughter. I do not know when Victoria Ojo died. She died in the Central Hospital there. I did not strangle Victoria Ojo to death."

This evidence was not challenged or contradicted. The law, as I know it, is that such evidence will be accepted as proof of a fact it seeks to establish: See Nwede v. The State (1985) 3 NWLR 444. If therefore the story of an accused stands uncontradicted then it is to the facts as put forward by him that the trial judge would relate the applicable law - The State v. Oka (1975) 9-11 SC 17. In the present case, the learned trial judge and indeed the Court of Appeal were easily carried away by the testimony of PW 3 Dr. Suleiman Abu who performed the post mortem examination. But even at this, the Court below relied only on his evidence in-chief. His evidence under cross-examination was completely disregarded. PW 3 in his evidence in-chief was emphatic that:

The wounds on the corpse could not have been self inflicted. From all I found on my examination of the corpse the deceased could not have committed suicide. There was no problem with the stomach of the deceased. The deceased did not die of any stomach ache or from any other cause other than by strangulation by ligature."

When cross-examined, he prevaricated. He said:

"It is very difficult to say whether the wounds were self inflicted or inflicted by someone else."

Clearly his evidence under cross-examination has created a doubt as to who inflicted the injuries suffered by the deceased.

As I have already pointed out, the appellant's account of the events on the fateful night was unchallenged. It is also to be noted that this piece of evidence is substantially in line with his statement to the Police made on 5/12/93.

Clearly the evidence given by the appellant did not come as a surprise to the prosecution. They had been put on notice by virtue of exhibit 'B'. They failed to controvert the evidence and it would seem plain that the trial judge's conclusion was unwarranted and not justified by the evidence before him. I must also re-state here that the burden of proof of an accused person's guilt is always on the prosecution. That burden does

not shift on the accused who in law is under no obligation to prove his innocence.

In the result, I also allow the appeal of the appellant. His conviction is quashed, and the sentence of death set aside. In consequence he is acquitted and discharged.

B

EJIWUNMI JSC

I have had the advantage of reading in draft, in advance, the judgment just delivered by my learned brother, Uwais, CJN, and I find myself in agreement with the opinion expressed therein on all the issues for determination in his appeal. I accordingly adopt the opinions as my own.

This is a murder appeal brought to this Court by the appellant against the decision of the Court of Appeal affirming the conviction and sentence of death entered against the appellant by the High Court.

The victim of the murder was the lady friend of the appellant. The facts in this appeal have been admirably set down by my learned brother Uwais CJN, and I do not need to go over them, except where necessary for my opinion on the main issue for determination in this appeal, which is:-

"Whether there is sufficient circumstantial evidence to sustain the charge of murder preferred against the appellant?"

Bearing in mind that the evidence on record revealed that it was only the appellant and the deceased were together in their room on the fateful night, and that it was the appellant who carried the deceased to the hospital, where she was pronounced dead, it is manifest that suspicion must naturally fall on the appellant as the murderer. But suspicion, no matter how grave cannot amount to proof that the appellant committed the offence for which he was charged! What this means is that it is not enough for the prosecution to suspect a person of having committed a criminal offence, there must be evidence which identified the person accused with the offence and that it was his act which caused the offence.

It is thus clear that in a criminal trial the onus lies throughout upon the prosecution to establish the guilt of the accused beyond reasonable doubt. Even where an accused in his statement to the police admitted

committing the offence, the prosecution is not relieved of that burden. See Ameh v. The State (1978) 6-7 SC. 27.

In the instant case, the appellant both in his statement to the police and his oral testimony gave a consistent account of how the deceased was carried to the hospital during the fateful night. This was after she persistently complained that she was suffering from acute stomach pains. A complaint, which it was claimed, the deceased had always suffered from.

The learned trial judge in the course of his judgment apparently disbelieve that evidence when he said thus:-

"The statement of the accused person to the police and his evidence in court are suggesting the fact that Victoria Ojo died of stomach ache which used to worry her. This suggestion is not backed upon with any evidence from any relation of the deceased or any medical doctor. The only medical evidence which I accept as uncontradicted evidence on that issue of stomach ache is that of Dr. Suleiman Abu, the Chief Consultant Pathologist in the Central Hospital Benin City who examined the corpse of Victoria Ojo."

Apparently, the Court of Appeal accepted that evidence upon which the learned trial judge convicted the appellant. And the Court below thereafter affirmed the judgment of the trial Court. Now, the question then is whether the court below was right to have upheld the judgment of the trial court for the reasons given. In this regard, it is necessary to examine the evidence of Dr. Suleiman Abu, Chief Consultant Pathologist, the 3rd PW, who performed post mortem examination on the body of the deceased. The relevant portion of the evidence of 3rd Prosecution witness reads thus:

"The over all picture of all I saw on the corpse was that of strangulation with a ligature (or rope) In my opinion the deceased died of strangulation by ligature The wounds and all I saw on the corpse is consistent with strangulation with a ligature which can be a rope or piece of cloth, the wounds on the corpse could not have been self inflicted. From all I found on my examination of the corpse the deceased could not have committed suicide. There was no problem with the stomach of the deceased. The deceased did not die of any stomach ache or from other cause other than by strangulation."

It is therefore manifest from the above excerpt from the evidence of PW 3, DR. Suleiman Abu, that the death of the deceased was not caused by stomach ache. But he then went on to state affirmatively that the deceased was strangled to death with a ligature. But under cross-examination, he now said thus:-

"It is very difficult to say whether the wounds were self inflicted or inflicted by someone else."

It is manifest from the evidence of the 3rd PW under cross-examination that he obviously had doubts, which must be considered as grave, about how the wounds he saw on the body of the deceased was inflicted. However, a careful reading of the records did not show that the trial court adverted to this aspect of the evidence of 3rd PW, unfortunately, also, the Court below, did not also consider the effect of that evidence under cross-examination upon the credibility of the 3rd PW., as to the cause of death of the deceased. And without more, the Court below went on to hold that:-

"The account of strangulation arising from the autopsy as furnished by PW 3 is eloquently vivid, lucid, detailed and satisfactory as they are intimidating, compelling and unchallenged. Consequently, even in the absence of direct evidence, the circumstantial evidence of the death of the deceased by strangulation is so cogent and compelling that they lead to the irresistible conclusion that the appellant who had the last opportunity of being in the company of the deceased committed the offence charged".

It is manifest from the above excerpt from the judgment of Rowland JCA, that circumstantial evidence was used to affirm the conviction of the appellant. It is of course settled law that circumstantial evidence can be used to determine the guilt of an accused person. It has been stated that circumstantial evidence is as good as, sometimes better than, any other sort of evidence, and what is meant is that there is a number of circumstances which are accepted so as to make a complete and unbroken chain of evidence of. If that is established to the satisfaction of the jury they may well and properly act upon such circumstantial evidence.

The learned author of Wills on Circumstantial Evidence 7th Edition (1936) p. 324 also said thus:-

"In a case in which there is no direct evidence against the prisoner but only that kind of evidence that is called circumstantial, you have a two - fold task; you must first make up your minds as to what portions of the circumstantial evidence have been established, and then when you have got that quite clear, you must ask yourselves, is this sufficient proof? It is not sufficient to say, 'if the accused is not the murderer, I know of no one who is. There is some evidence against him, and none against any one else'. Therefore, I will find him guilty. Underlining mine.

With the greatest respect to the learned Justices of the Court below, it seems to me that they fell into error in using circumstantial evidence to affirm the conviction of the appellant, in the instant appeal. It is very clear that the only reason the appellant was convicted was because he was the person who brought the deceased to the hospital and was with her in the room before she died. There was no evidence of any kind to suggest that the appellant had done anything to the appellant to raise the inference that she murdered her by strangulating her. Even the evidence of the 3rd PW, to which I have referred to above, lacks veracity to support the use to which it was put. The evidence to be acceptable must be consistent with the prisoner's guilt and inconsistent with any other rational conclusion. It is also necessary before drawing the inference of accused's guilt to be sure that there was no other co-existing circumstances which would weaken such inference, See Obalum Anekwe v. The State (1976), 10 SC 255; 264; Tepper v. Queen (1952) AC 480 at 489; P C Stephen Ukorah v. The State (1977) 4 SC 167 at 174, 176-177; Valentine Adie Adie v. The State (1980) 1-2 SC, 116, 122; Loki v. State (1980) 8-11 SC 81.

In the instant appeal, the evidence led by prosecution was totally unsatisfactory, and I am unable to uphold the judgment of the Court below. For the above reasons and the fuller reasons given in the leading judgment of the learned Chief Justice of Nigeria, I will also allow the appeal, I abide with the consequential orders made in the said judgment.