

SUPREME COURT OF NIGERIA
19TH JANUARY, 2001. SC. 43/1999
CORAM :- A. G. KARIBI-WHYTE, M. E. OGUNDARE,
S. U. ONU, O. ACHIKE, S. O. UWAIFO, JJSC.

THE STATE APPELLANT
V.
1. JOHN OGBUBUNJO & ANOR. RESPONDENTS
2. NJOKU AMAECHI

CRIMINAL LAW - Murder - Appeals - Unconvincing and unsatisfactory circumstantial evidence - Conviction must be set aside.

CRIMINAL LAW - Murder - Ingredients of the offence - Must be wholly proved by prosecution - To ground a conviction.

CRIMINAL PROCEDURE - Extra judicial statements - Error of lower court in considering them - Cannot vitiate a judgment unless miscarriage of justice is occasioned thereby

CRIMINAL PROCEDURE - Extra judicial statements - Not tendered and admitted in evidence at trial - Was wrongly considered

CRIMINAL PROCEDURE - Murder - Conviction - Burden of proof - There must be proof beyond reasonable doubt - For conviction to stand.

EVIDENCE - Circumstantial evidence - Can ground a conviction - Only if there are no coexisting circumstances - Which can weaken its cogency.

EVIDENCE - Circumstantial evidence - Nature - Evidence of surrounding circumstances - If not capable of proving a proposition with accuracy of mathematics - Cannot establish an offence beyond reasonable doubt.

EVIDENCE - Circumstantial evidence - Quality and standard - Must be

cogent, compelling, irresistible and unequivocal - Against the accused.

EVIDENCE - Proof - Suspicion - Can never amount to proof - Court must not convict on mere evidence of suspicion.

JUDGMENTS - Appeals - Reason for lower court's decision - Though wrongful - Will not lead to reversal by the Supreme Court - If that decision is right.

FACTS

The respondents were amongst 6 accused persons charged with the offence of murder in the Imo State High Court. They had been accused of murdering one Celestine Amucha in Imo State. One of the accused died before the trial and the rest were tried based on the circumstantial evidence of seven prosecution witnesses as there was no eye witness to the alleged murder of the deceased. One of the prosecution witnesses was able to determine that the deceased had died of severe hemorrhage having had her hands cut off at the wrist.

All the accused denied committing the offence, most denying knowledge of the deceased and setting up various defences. At the end of proceedings the respondents were convicted and sentenced to death while the others were acquitted and discharged. On appeal the Court of Appeal allowed their appeals and returned a verdict of discharge and acquittal. The State has now appealed to the Supreme Court formulating the following issues.

ISSUES FOR DETERMINATION

1. *Whether the learned Justices of the Court below were justified in using UNTENDERED NON-EXHIBITED EXTRA JUDICIAL STATEMENTS of the Prosecution (Appellant's) Witnesses No.2 and 6, to DISCREDIT the Appellant's case and thereafter basing its DISCHARGE AND ACQUITTAL of the Respondents on that MANIFESTLY FLAWED AND ERRONEOUS PROCEDURE*

2. *WHETHER the learned Justices of the court below were justified in holding that the Prosecution's Witnesses testimony was unreliable and*

of doubtful credibility and thereafter reversing the trial court's judgment by acquitting the respondents.

3 Whether the court below was right in its decision in setting aside the judgment of the trial High Court which convicted and sentenced the Respondents for murder and substituting a verdict of discharge and acquittal in favour of the respondents.

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

Murder - Ingredients of the offence

1. Having established the cause of death of the deceased, it remains for the prosecution to establish that the act of the respondents caused the death of the deceased and that such act was intentional with the knowledge that death or grievous bodily harm was its probable consequence. From the totality of the evidence adduced before the trial court, I am of the firm view that the prosecution failed to prove these essential ingredients of the offence as no iota of evidence was shown that it was the respondents who cut off the wrist from the deceased's hand which resulted in the severe haemorrhage that caused her death. (p. 232 F)

Circumstantial evidence - Quality and standards

2. In the light of the arguments proffered by both sides in this case, a careful consideration of the circumstantial evidence available on record will show that it fell far short of the quality and standard required in law to sustain the conviction of the respondents. The available circumstantial evidence was neither cogent, complete and unequivocal nor did it lead to the irresistible conclusion that the respondents and no one else cut off the hands of the deceased from the wrist which led to the severe haemorrhage that caused her death. (p. 233 D)

Circumstantial evidence - Nature

3. In the instant case, there is no evidence of surrounding circumstances which by undersigned coincidence is capable of proving the proposition that the respondents committed the offence of murder with the accuracy

of mathematics. Rather what we have from the prosecution is evidence of mere suspicion against the respondents, evidence of equivocation, of uncertainties, of hearsay and rumours, which in a criminal court cannot suffice to establish any offence beyond reasonable doubt. It is trite law that it is not sufficient to say “if the respondents are not the murderers, I know of no one else who is. There is some evidence against them and none against anyone else. Therefore, they must be found guilty.” Such line of reasoning is unsound. See the decision of this court in VALENTINE ADIE V. THE STATE (1980) ANLR 39 page 49 (p. 236 G)

Circumstantial evidence - Can ground a conviction

4. By a long line of cases beginning with Sala v Sati (1938) 3 WACA 10 it was laid down that to support a conviction on the question of circumstantial evidence, it must not only be cogent, complete and unequivocal but compelling and lead to the irresistible conclusion that the prisoner and no one else is the murderer; it must leave no ground for reasonable doubt. Put in another way, the evidence must be cogent and compelling as to convince a jury of the guilt of the accused. Such evidence is also expected to lead - irresistibly to the guilt of the accused and inconsistent with any other rational conclusion. There must be no other co-existing circumstances, which can weaken such inference. See Joseph Lori & Anor V The State (1980) 8 - 11 SC 81. (p. 237 G)

Proof - Suspicion

5. The prosecution’s case in the case on appeal herein is so riddled with suspicion in all its ramifications that no reasonable tribunal would convict on the evidence adduced thereon. There is nothing in the entire evidence before the trial court that points irresistibly to the commission of the offence by the respondents. Suspicion however strong is no substitute for proof by cogent evidence. (pp. 239 D & 242 E)

Murder - Unsatisfactory circumstantial evidence

6. Since the trial court erroneously convicted and sentenced the respondents to death for murder on the basis of an insufficient, unconvincing,

incomplete and totally unsatisfactory circumstantial evidence, the court below was perfectly justified in its decision setting aside such a perverse, unsound and manifestly unjust decision. (p. 240 G)

Consideration of extra judicial statement was wrongful

B

7. I am of the firm view that the court below was wrong in considering the extra-judicial statements made by PW.2 and PW.6 to the Police which had some contradictions with their sworn evidence at the trial when the extra-judicial statements had not been tendered and admitted in evidence at the trial. This is the more so that learned defence counsel did not confront PW.2 and PW.6 with these earlier alleged inconsistent statements pursuant to section 209 of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990. (p. 241 C)

D

Judgments - Reason for lower Court's decision

8. I am also of the opinion that notwithstanding the said error made by the court below, its judgment is perfectly right and unassailable. I am further of the view that what this court has to decide is whether the decision or judgment of the court below is right, not whether its reasons were.... I am of the firm view therefore that the decision of the court below is quite right and unimpeachable even though some of its reasons as complained of by the Appellant may be wrong. The decision is right because as hereinbefore demonstrated, the circumstantial evidence adduced by the prosecution, if any at all, was not sufficient to link the respondents with the offence charged. (pp. 241 G/242 C)

G

Extra judicial statements - Error of lower court

9. Even if the court below erred in considering the extra-judicial statements of PW.2 and PW.6, it is trite law that it is not every error or mistake on the part of a lower court that will vitiate a judgment but only where such error or mistake is so fundamental as to occasion a miscarriage of justice. See Mufutau Aremu & Anor. V. The State (1991) 7 NWLR (Part 201) 1 page 19, paragraphs E - F.

In the instant case, the Appellant has failed to show that the said error of

the court below occasioned a miscarriage of justice in that it led to the discharge and acquittal of the respondents when the evidence on record does not warrant such a verdict. (p. 242 G)

B *Murder - Conviction - Burden of proof*

10. In view of the foregoing, the convictions of the respondents cannot be allowed to stand for reasons that their guilt could not be proved beyond reasonable doubt. Consequently, the court below was perfectly right in my view, in its decision setting aside the trial court's judgment and substituting therefore a verdict of discharge and acquittal in favour of the respondents. (p. 243 B)

NOTABLE POINTS OF INTEREST

D KARIBI-WHYTE JSC

1. Extra judicial statements cannot be used as evidence in a trial

It is a well settled principle of the administration of justice in our courts that only evidence properly authenticated, either by the oral testimony of a party or the written statement tendered and admitted during proceedings can be evidence in a trial. Extra judicial statements which remain in that category however credible they may appear, cannot be used as evidence in a trial. (p. 250 C)

F *2. Effect of expunging lower court's inadmissible evidence*

However, where it is uncertain or impossible to say with some degree of certainty that the Court whose judgment is appealed against would have reached the same decision if the inadmissible evidence had not been admitted, an appellate court would have no alternative but to quash the conviction and sentence of the court if there had been a conviction and sentence, or in any case set aside the judgment entered by virtue of the inadmissible evidence (p. 251 B)

H

OGUNDAREJSC

3. Joint trial with interwoven evidence - One acquittal should upturn the conviction of the others

I think the learned Justice of the Court of Appeal was right. If the trial Judge did not find it safe to convict the 2nd, 3rd and 5th accused persons, B on the evidence before him, I cannot see how he, with respect, could find it safe to convict the 1st and 4th accused persons (now Respondents) on the same evidence interwoven and inseparable as it were, it would appear that the learned Judge simply applied a rule of the thumb. (p. 259 C) C

ACHIKEJSC

4 Wrong admission of evidence may not vitiate an earlier judgment

A decision which is otherwise sound cannot be set aside by reason only of wrongful admission of evidence where such erroneously admitted D evidence cannot reasonably be said, on appeal, to have affected the decision and the said decision would have remained the same had such evidence not been admitted. (p. 262 B)

5. Criminal trial - Burden of proof lies on the prosecution

I think the Respondents' submission is well-founded. It is firmly established that the burden of proof of guilt of the accused in every criminal trial remains on the prosecution; see Patrick Njoven & ors v The State F (1973) 1 NMLR 331. There is very little difference if the guilt is being substantiated by the prosecution in reliance on eye-witness evidence or circumstantial evidence. (p. 263 C)

REPRESENTATION

J. C. Duru Esq., Administrator General, Imo State for the Appellant
B. E. I. Nwofor for the Respondents.

CASES REFERRED TO

Edwin Ogba v The State (1992) 2 NWLR (Part 222) 164

Akinfe v The State (1988) 3 NWLR (Part 85)

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

Onah v The State (1985) 3 NWLR (Part 12) 236

Philip Omogodo v The State (1981) 5 SC 5

Gbadamosi v The State (1992) 9 NWLR (Part 266) 465

Afolabi v Commissioner of Police (1961) All NLR 682

B Ekpe v The State (1994) 9 NWLR (Part 368) 268

Ukorah v The State (1977) 4 SC 167

Fatoyinbo v A .G Western Nigeria (1966) WNLR 4

Atano v A .G Bendel State (1988) 2 NWLR (Part 75)201

C **BOOK REFERRED TO**

Wills on circumstantial evidence . 7th Edition pg 324

LEAD JUDGMENT BY ONU JSC

D On 26th October, 2000 we heard this appeal which emanates from
the decision of the Court of Appeal, Port Harcourt Division (hereinafter
referred to as the Court below). We peremptorily and unanimously
dismissed it, having earlier carefully read the Briefs of both parties and
E listened to the arguments of their Counsel. I thereafter indicated that I
would give my reasons today for so doing. Before proceeding to do so,
however, I wish to pause here and pry into the case's historical journey
briefly as follows:

F Criminal proceedings in this case were initiated by an information
filed at the instance of the Attorney-General of Imo State in the Mbano/Etiti
Judicial Division Holding at Etiti and before Pats-Acholonu, J. as he then
was. The proceedings were against six accused persons including the
respondents herein, namely, John Ogbubunjo and Njoku Amaechi for the
G offence of murder contrary to section 319 of the Criminal Code, Capt. 30,
Vol. 11, Laws of Eastern Nigeria, 1963, applicable in Imo State. By the
particulars of the offence, the respondents and four others were alleged
to have murdered one Celestina Amucha on or about 25th day of
H September, 1988 in Obollo Mbano within jurisdiction. With the death of
one Harrison Amucha, the original second of the 6 accused persons in
custody, plea was taken from the remaining five whose identities consisted
of John Ogbubunjo (now 1st accused/1st respondent), Francisca Amucha

(3rd accused), Njoku Amaechi (4th accused/respondent) and Janet Ameachi (5th accused).

In the trial that ensued, the prosecution called seven witnesses in an endeavour to prove the charge while all five accused including 1st and 4th respondents testified in their defence, calling no witness in the process. B

The prosecution's case was based on a purported circumstantial evidence and none of the seven witnesses called was an eye-witness to the alleged murder of the deceased. A summary of such purported circumstantial evidence may be made as follows:

1. The deceased, Celestina Amucha, on 25/9/88 was in her house when PW1 (Juliana Amucha) called to see her but later left her house in the company of 1st, 2nd, 3rd accused persons and one Harrison (the accused person that died before plea was taken) never to be seen alive again. C D

2. PW2 on the other hand, in his own evidence, stated that on 25/9/88, he went to the house of Celestina Amucha (the deceased) to take the things he (witness) asked her (deceased) to buy for her, that he saw 1st accused (a friend of the deceased) as well as 2nd and 4th accused and that 1st accused informed Harrison (deceased) that he had been waiting for him for their appointment but he did not see him. The 1st, 2nd and 3rd accused and Harrison (deceased) as well as the deceased (Celestina Amucha) he added, then left and after that day he did not see Celestina (deceased) alive again. She further stated that when Celestina, the deceased did not come back and she asked Francisca of her where about, she received the reply that she (Celestina) was helping the 1st accused/appellant in preparing palm oil. She thereupon summoned her husband's relations the next day to inform them that Celestina who went out with the accused person as she had mentioned had not returned while the only time she saw her again was when her body was exhumed from the grave. PW2, it was further stated, testified to how in the night of 25/9/88, he heard a female voice from 4th accused's house saying: E F G H

"Umuahia, Chineke, do you want to kill me? Please, allow me to say some prayers."

Adding, that when in the morning he went to 4th accused's house,

he did not see human blood. PW3 testified to the effect that he only heard of the death of the deceased; that he was requested by his people to ask Harrison the whereabouts of Celestina and that Harrison informed him “he (sic) the accused persons kill (sic) the deceased.”

B PW4 when examined-in-chief said that at the Mbanjo Police Station, one young man telephoned him to say that the deceased had died and was killed by the 1st accused.

C The evidence of PW6, Godwin Ohaji, was to the effect that in September, 1989 during the new yam festival, he went to the house of the 4th accused person and saw 1st, 2nd and 3rd accused persons eating and drinking with a “plumpy yellow woman.” That the Police later started looking 1st accused and asked him to locate him but that when he met him, (1st accused) the latter denied knowing or seeing the “plumpy yellow D woman” even though she had been his friend. The witness further said that the 2nd, 4th and 5th accused persons told him that the deceased was buried in their land and described the place leading him to discover the grave of the deceased, though denying under cross-examination saying so E to the Police in his statement.

Dr. Godwin Metuka, who testified as PW5, said he performed post mortem examination on the body of the deceased and gave the cause of death as “severe haemorrhage” adding that he found that the hands of the deceased were cut off from the wrist.

F In their defence, all the accused persons denied committing the offence and with the exception of the 3rd accused denied knowledge of the deceased. The 2nd accused set up a defence of alibi contending that he was at Aba on the material date of the commission of the alleged G offence.

At the end of the trial and after counsels’ submission, the learned trial Judge, Pats-Acholonu, J. (as he then was), delivered his judgment on 27/7/90 convicting and sentencing the 1st and 4th accused persons (now H respondents) to death while discharging and acquitting the 2nd, 3rd and 5th accused persons respectively.

The respondents as appellants were dissatisfied with the decision and so appealed to the court below, which court allowed their appeals and

returned a verdict of discharge and acquittal in their favour each, the learned Justice of Appeal who wrote the leading judgment, (Katsina-Alu, J. CA as he then was) and concurred in by Okezie and Onalaja J.J. C.A.

The State has now appealed to this Court by a Notice of Appeal dated 19th April, 1996 and filed on 26/4/96 which containing eight grounds of appeal. From the eight grounds, two issues christened “LIVE and BURNING” have been identified as arising for our determination, to wit:

1. Whether the learned Justices of the Court below were justified in using UNTENDERED NON-EXHIBITED EXTRA JUDICIAL STATEMENTS of the Prosecution (Appellant’s) Witnesses No.2 and 6, to DISCREDIT the Appellant’s case and thereafter basing its DISCHARGE AND ACQUITTAL of the Respondents on that MANIFESTLY FLAWED AND ERRONEOUS PROCEDURE Grounds 1, 3, 5, 6 and 7 of Appeal.

2. WHETHER the learned Justices of the court below were justified in holding that the Prosecution’s Witnesses testimony was unreliable and of doubtful credibility and thereafter reversing the trial court’s judgment by acquitting the respondents.

The respondents on the other hand have through their counsel submitted one lone issue for determination as follows:

3 Whether the court below was right in its decision in setting aside the judgment of the trial High Court which convicted and sentenced the Respondents for murder and substituting a verdict of discharge and acquittal in favour of the respondents.

Before the argument of these issues, it is my view after taking a careful look at them that the respondent’s lone issue above will suffice to dispose of the points in controversy.

ARGUMENT OF LONE ISSUE

Having carefully listened to the submission of counsel on both sides and read the Briefs of Argument proffered by them I wish to say as follows:

The essential ingredients that the prosecution must establish in order to prove its case beyond reasonable doubt to justify a conviction of the respondents (they were 1st and 4th accused persons in the trial court) for murder are:

1. That the deceased has died

2. That the death of the deceased has resulted from the act of the accused.

3. That the act of the accused was intentional with knowledge that death or grievous bodily harm was its probable consequence. See (i) Edwin Ogba v. The State (1992) 2 NWLR (Part 222) 164 at page 198, paragraph G.

(ii) Akinfe v. The State (1988) 3 NWLR (Part 85).

(iii) Oteki v. Attorney-General, Bendel State (1986) 2 NWLR (Part 24) 648

(iv) Onah v. The State (1985) 3 NWLR (Part 12) 236.

As was clearly stated by this court per Nnamani, JSC in Philip Omogodo v. The State (1981) 5 SC. 5 at pages 26-27:

“In a murder case as in the instant one, the prosecution cannot succeed in establishing the guilt of the accused unless it not only established the cause of death but established in addition that the act of the accused caused the death of the deceased.”

See also Gbadamosi v. The State (1992) 9 NWLR (Part 266) 465 at 478 and 479; Afolabi v. Commissioner of Police (1961) All NLR 682 (Reprint) and Ekpe v. The State (1994) 9 NWLR (Part 368) 268 at 269.

In the instant case the prosecution called PW5, Dr. Benjamin Ibezim, who testified as follows:

“The most significant finding was that the hands were cut off from the wrist. All other structures were intact. There was no sign of strangulation. The deceased must have died of severe haemorrhage.”

Having established the cause of death of the deceased, it remains for the prosecution to establish that the act of the respondents caused the death of the deceased and that such act was intentional with the knowledge that death or grievous bodily harm was its probable consequence. From the totality of the evidence adduced before the trial court, I am of the firm view that the prosecution failed to prove these essential ingredients of the offence as no iota of evidence was shown that it was the respondents who cut off the wrist from the deceased’s hand which resulted in the severe haemorrhage that caused her death. Nor was evidence by the

prosecution through any of the witnesses called indicate that he or she was an eye-witness. This was confirmed by the learned trial Judge in his judgment when he observed:

"There was no one who swore or could swear with any degree of certainty that he saw the deceased being killed and buried."

Thus, the prosecution in the instant case relied on circumstantial evidence in an attempt to prove the remaining vital ingredients of the offence under probe. Mindful of the fact that the law is that where direct evidence is not available, circumstantial evidence which is cogent, and pointing irresistibly and unequivocally as well as compellingly at the accused, is admissible to support a conviction. See this Court's decision in Ukorah v. The State (1977) 4 SC. 167 at 174; Fatoyinbo v. A.G Western Nigeria (1966) WNLR 4; Atano v A.G. Bendel State 1988) 2 NWLR (Part 75) 201 and Edwin Ogba v. The State (supra) at page 98, paragraph H.

In the light of the arguments proffered by both sides in this case, a careful consideration of the circumstantial evidence available on record will show that it fell far short of the quality and standard required in law to sustain the conviction of the respondents. The available circumstantial evidence was neither cogent, complete and unequivocal nor did it lead to the irresistible conclusion that the respondents and no one else cut off the hands of the deceased from the wrist which led to the severe haemorrhage that caused her death. To amplify this point, a critical appraisal of the evidence of PW1, PW2, PW3, PW4 and PW6 by me becomes necessary and imperative as follows:

The evidence of PW1, Juliana Amucha, was to the effect that on 25/9/88 she saw the deceased, the 1st, 2nd, and 3rd accused and Harrison (The accused person who later died before the commencement of trial) go out. She did not see the deceased alive again. This evidence neither helped in any way to establish who cut off the deceased's hands later resulting in her death as testified to by PW5, Dr. Benjamin Ibezim nor the finding of the learned trial Judge that the accused was not present on the date of the commission of the offence on 25/9/88, more so when the witness asserted that she saw 2nd accused person in the company of the deceased. One may then ask, if PW1's evidence that she saw 2nd accused person

with certain other persons in the company of the deceased was shown to be false by the findings of the learned trial Judge to the effect that the 2nd accused was somewhere else at Aba, is there any reason why her evidence that she also saw the 1st, 2nd, 3rd accused person and Harrison with the deceased could be readily believed?

Coming to the evidence of PW2 (Bernard Iwuji), the respondents' counsel's submission was that this witness's evidence did not advance the case of the prosecution a bit. Led in examination in Chief, he stated that on 25/9/88, he saw the accused person with some persons including his own sister and two other women in 4th accused's house. He did not add by showing that the deceased was also present thereat. However, he asserted that in the night of the same 25/9/88, he heard a female voice from the house of the 4th accused saying:

D *"Umuahia, Chineke, do you want to kill me. Please allow me to say some prayers."*

Now, PW2 could not identify the particular female voice he was alluding to raised the said alarm. Quite apart from the fact that this witness did say with particularity that the voice was that of the deceased, he could not aver whom the unknown female voice was addressing. Worse still, PW2 went to the house of the 4th accused (now 2nd respondent on the appeal herein) the following morning and did not see any human blood there to show that any person was killed. It was not of course enough for PW2 to slay as he did in his testimony before the learned trial Judge:

"The voice of the person I heard was that of a woman."

He should have gone further to say whether it was the voice of the deceased. Be it remembered that the respondents and the other accused persons did not stand trial for the murder of "a woman" but for the murder of the deceased, - a certain specific woman by name Celestina Amucha as contained in the information.

I now proceed to consider the evidence of PW3, Alexander Amucha and brother-in-law to the deceased, which of course, was through and through hearsay. Said he when he testified before the trial court:

"Celestina is now dead. I learnt of her death by way of information. I was asked by my people to ask Harrison the whereabouts of Celestina."

On being further examined he said:

“Harrison told me that he (sic) accused persons killed (sic) the deceased”

The evidence of PW4, Francis Maduwuba and brother in-law of the deceased, was also every inch hearsay. The hallmark of its hearsay nature culminated at the point he told the learned trial Judge while still being examined in chief as follows:

“There at the Police Station, one young man telephoned me and told me that the woman we were looking for is now dead and is killed by 1st accused.”

From the foregoing, it can be palpably seen that the evidence of PW3 and PW4, which was largely hearsay evidence, considerably weakened the circumstantial evidence if circumstantial evidence it was that was adduced by the prosecution.

PW6, Godwin Ohaji whose evidence was taken next did nothing to improve the quality of the prosecution’s case either. Firstly, he testified that the date of the events deposed to by him occurred “sometime in September, 1989.” This is at variance with the charge for which the accused stood trial - for which see page 1 of the Record herein - which stated under particulars of offence that the offence was committed “on or about 25th day of September, 1988.” The substance of PW6’s evidence was that “sometime in September, 1989” during their new yam festival he went to 4th accused’s house and saw 1st, 2nd and 3rd accused persons eating and drinking there with “a plumpy yellow woman.” Police later started looking for the 1st accused person (now 1st respondent) and asked him to locate the accused but when he met him, the 1st accused denied knowing or seeing “the plumpy yellow woman.”

It is instructive to note that throughout his evidence, PW6, like PW2 did not say that he saw the deceased in 2nd respondent’s house; rather he merely talked about seeing “a plumpy yellow woman” whose name was not disclosed. Since PW6 knew Celestina Amucha, the deceased (see page H 50) line 28 of the record) nothing stops him from mentioning her name if indeed she was among those he saw in the 2nd respondent’s house. A “Plumpy yellow woman” as testified by PW6 cannot without more be

equated to be the deceased. This is because none of the prosecution witness including PW6 who knew the deceased in her lifetime described her appearance while giving evidence and none specifically stated she is “plumpy and yellow.”

B Even though PW6 testified further on page 52, lines 16 - 22 of the record that the 2nd, 4th and 5th accused persons told him that the deceased was buried in their land and described the place which led him to discover the grave of the deceased, however, under cross-examination, he admitted that he heard rumours and that he did not say so to the Police in his statement.

C PW7 was Sgt. Godwin Metuka who was detailed to investigate this case. His evidence appears on pages 53 - 57 of the record and contains nothing against the respondents. His evidence under cross-examination on D page 56 lines 23 - 28 of the record is to the effect that there is nothing to link the respondents with the death of the deceased. This is borne out by the following question and answer:

E “Q. In your statement of report of 4th November, 1988, you indicated that there is nothing to link the accused persons with the death of the deceased. Are you still sticking to that report or are you denying it?

A. Still maintain that the statement is correct.”

F Speaking of the nature of circumstantial evidence, Lord Hewart, Lord Chief Justice of England, observed in the case of TAYLOR 7 ORS. V. R. 21 Cr. APP. R.20 at page 21 thus:

“It is evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics.”

G **In the instant case, there is no evidence of surrounding circumstances which by undersigned coincidence is capable of proving the proposition that the respondents committed the offence of murder with the accuracy of mathematics. Rather what we have H from the prosecution is evidence of mere suspicion against the respondents, evidence of equivocation, of uncertainties, of hearsay and rumours, which in a criminal court cannot suffice to establish any offence beyond reasonable doubt. It is trite law that it is not**

sufficient to say “if the respondents are not the murderers, I know of no one else who is. There is some evidence against them and none against anyone else. Therefore, they must be found guilty.” Such line of reasoning is unsound. See the decision of this court in **VALENTINE ADIE V. THE STATE (1980) ANLR 39 page 49** which B cited with approval a passage in **EMPEROR V. BROWNING** 39 A.C. 322; also in **WILLS ON CIRCUMSTANTIAL EVIDENCE** 7th Edition 324.

In Valentine Adie v. The State (supra) Uwais, JSC (as he then was) aptly stated on page 49 thus:

“As we indicated in Ukurah (supra) there is a great need for a trial C court to tread cautiously in the application of circumstantial evidence for the conviction of an accused for any offence with which he is charged. The Romans - we pointed out, with approval, in Ukurah (supra) at page 177 - had a maxim that it is better for a guilty person to go unpunished than D for an innocent one to be condemned and Sir Edward Seymour speaking on a Bill of Attainder in 1696 laid greater emphasis on this maxim when he stated that he would rather that ten guilty persons should escape than one innocent should suffer.” E

Unfortunately, in this case, the trial court did not tread cautiously in the application of circumstantial evidence before convicting the respondents.

In the case of Edwin Ogba v. The State (supra) in which this Court upheld a conviction based on circumstantial evidence, the facts were that F the appellant had a fight with two men. He used broken bottles in the fight. One of the two men in the fight had stab wounds inflicted from a sharp object. This, according to the expert medical evidence, is consistent with a broken bottle. There was evidence that the deceased was one of those G involved in the fight. He was the one injured. He died within 24 hours of the injury. There was evidence of PW.7 and of the deceased’s dying declaration that the injury was inflicted on him by the accused.

By a long line of cases beginning with Sala v Sati (1938) 3 WACA 10 it was laid down that to support a conviction on the question of H circumstantial evidence, it must not only be cogent, complete and unequivocal but compelling and lead to the irresistible conclusion that the prisoner and no one else is the murderer; it must leave no

ground for reasonable doubt. Put in another way, the evidence must be cogent and compelling as to convince a jury of the guilt of the accused. Such evidence is also expected to lead - irresistibly to the guilt of the accused and inconsistent with any other rational conclusion. There must be no other co-existing circumstances, which can weaken such inference. See Joseph Lori & Anor V The State (1980) 8 - 11 SC 81; Uwe Esai & Ors V The State (1976) 11 SC 39; Philip Omogodo v The State 1981) 5 SC 5 at 24.

On the role suspicion play in circumstantial evidence the following cases are instructive:

1. In Tepper v. The Queen (1952) AC..480 at 489 where Lord Normand said:

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

2. In Onah v. The State (1985) 3 NWLR (Part 12) 236 at 244, where Obaseki, JSC observed thus:

“The High Court and all courts of law are in duty bound to give critical examination to evidence adduced before them and ensure that the innocent are not punished or the guilty set free . They should act on evidence and not hunches, rumours or suspicion so as to ensure that justice in its purest form is administered in the courts to all and sundry.”

See also Idapu Emine v. The State (1992) 7 NWLR (Part 204) 480 at pages 495 - 496; Valentine Adie v. The State (1980) 1 -2 SC. 116 at 122; Clark v. The State (1986) 4 NWLR (Part 55) 581; Bozin v. The State (1985) 2 NWLR (Part 465; Popoola v. C.O.P. (1964) NMLR and Ogwa Nweke Onah v. The State (1985) 3 NWLR 236 at 244; (1985) 12 SC. 59 etc.

where this court held variously that:

“Suspicion, however strong, cannot take the place of legal proof.”
“Suspicion, however grave does not amount to proof.” Court must in its consideration of a criminal case give critical consideration of it to avoid

suspicion and rumour;” “court cannot act on suspicion” etc; to mention but a few. “Indeed, suspicion is no evidence. Items of evidence raising suspicion which put together have not the quality of being corroborative evidence in the true sense cannot found a conviction.”

See the observations of Kolawole, J.CA in Clark v. The State (supra) at page 325, where the learned Justice held inter alia:

“Suspicion may be many and sometimes grave, yet they will amount each to suspicion and no further. Combining them do not elevate them beyond the realms of suspicion. They will remain suspicion.”

See also Ben Okafor v. Police (1965) NMLR 89 at 90/91; Onah v. The State (supra); Adio & Anor v. The State (1986) 2 NWLR 381 at 593; Babalola v. The State (1989) 4 NWLR 381 at 593; Babalola v. The State (1989) 4 NWLR (Part 115) 264 at 268 and Okoduwa v. The State (1980) 8 - 11 SC. 335 and 354.

The prosecution’s case in the case on appeal herein is so riddled with suspicion in all its ramifications that no reasonable tribunal would convict on the evidence adduced thereon.

For instance, there are several co-existing circumstances that greatly weakened, diluted and completely destroyed whatever circumstantial evidence that was adduced by the prosecution.

Firstly, there is no evidence that the respondents had any fight or quarrel at all with the deceased.

Secondly, there was the evidence of PW.2 that after he heard a female voice in the night shouting “Umuahia, chineke, do you want to kill me. Please allow me to say some prayers,” he went to the 4th accused’s (that is, 2nd respondent’s) house (from where the voice came) in the very next morning but did not see any human blood there. Surely, it is natural to expect PW.2 to see human blood in the house of the 4th accused if indeed the deceased’s hands were cut off there and which led to severe haemorrhage that caused her death having regard to the expert medical evidence of PW.5. But fortunately for the respondents, PW.2 said that he did not see any human blood in the house of the 4th accused which was the place from where the alleged female voice came.

Thirdly, unlike in the case of Edwin Ogba v. The State (supra), there

was no evidence of any dying declaration made by the deceased that the injury was inflicted on her by the respondents.

Fourthly, no blood-stained dangerous weapon such as an axe, a cutlass or any sharp instrument was found in the possession of the respondents or seen in their houses. If as stated by PW.5, the deceased's hands were cut off from the wrist and she bled profusely to death, then this must have been done with a sharp instrument which could be an axe, a cutlass or any similar instrument and such an instrument will be blood-stained.

Fifthly, there was the hearsay evidence of PW.3 and PW.4 already alluded to hereinbefore.

Sixthly, there was the story told by PW.6 about a "plumpy yellow woman" whose identity was not disclosed and no prosecution witness who knew the deceased in her lifetime described her as a "plumpy yellow woman."

Seventhly and finally, there was the evidence of the Police investigator, PW.7 Sergeant Godwin Metuka who emphatically stated that there was nothing to link the accused persons with the death of the deceased. See page 65 lines 23-28 of the record.

In the light of all these co-existing circumstances which totally destroyed the circumstantial evidence adduced by the prosecution, the learned trial Judge was in serious error when in his judgment on page 82 lines 1 to 5 of the record he held that:

"...the 1st and 4th accused were responsible in particular for the death of the deceased. The evidence adduced point irresistibly to them in particular being responsible."

Nothing can be farther from the truth on a proper appraisal of the evidence on record.

Since the trial court erroneously convicted and sentenced the respondents to death for murder on the basis of an insufficient, unconvincing, incomplete and totally unsatisfactory circumstantial evidence, the court below was perfectly justified in its decision setting aside such a perverse, unsound and manifestly unjust decision.

In the instant appeal, nothing in the form of a tenable and valid argument or reason exists in the Appellant's Brief to show that the decision of the court below was wrong. The entire contentions of the Appellant in its Brief in the instant appeal could fairly be summarised in one sentence. It is that since the statements made by PW.2 and PW.6 to the Police were not tendered and admitted in evidence as exhibits at the trial court, such statements do not form part of the record of proceedings before the court below for that court to have considered them in gauging the credibility of PW.2 and PW.6, vis-a-vis their oral testimonies in court and holding them to be unreliable witnesses whose evidence cannot support the conviction of the respondents.

I am of the firm view that the court below was wrong in considering the extra-judicial statements made by PW.2 and PW.6 to the Police which had some contradictions with their sworn evidence at the trial when the extra-judicial statements had not been tendered and admitted in evidence at the trial. This is the more so that learned defence counsel did not confront PW.2 and PW.6 with these earlier alleged inconsistent statements pursuant to section 209 of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990. My view is strengthened by earlier decisions of this Court in:

- (i) Benson Esangbedo v. The State (1989) 4NWLR (Part 113) 57 at page 66, paragraphs D - G.
- (ii) Danladi Ozaki & Anor. V. The State (1990) 1 NWLR (Part 124) 92 at page 125, paragraphs F - H.
- (iii) Isaac Sambo v. The State (1993) 6 NWLR (Part 300) 399 page 417, paragraphs G - H, page 418, paragraphs A - C.
- (iv) Samuel Theophilus v. The State (1996) 1 NWLR (Part 423) 139 at page 151, paragraphs F - H, page 152, paragraphs A - B.

I am also of the opinion that notwithstanding the said error made by the court below, its judgment is perfectly right and unassailable. I am further of the view that what this court has to decide is whether the decision or judgment of the court below is right, not whether its reasons were. See the cases of:

- (i) R. A. Ukenjiana v. J.I. Uchendu 12 WACA 45 on page 46.

(ii) Abel Nkado & 2 Ors. V. Ozulike Obiano & Anor. (1997) 5 NWLR (Part 503) 31 page 56, paragraph F.

(iii) Allied Bank of Nig. Ltd. V. Jonas Akubueze (1997) 6 NWLR (Part 509) 374 page 404, paragraphs A - B.

B Now, what was the judgment of the court below? The judgment was the orders it made on 28/3/96 when it determined the appeal. See Ex P. Dhinery 12 QBD 342. See also Paul Cardoso v. John Bankole Daniel & Ors. are contained in the leading judgment delivered by Katsina-Alu J.C.A. (As he then was) on page 170 lines 5 - 11 of the record to the effect that:

C *"I would therefore allow the appeal and set aside their conviction and sentence. The appellants are accordingly acquitted and discharged"*
I cannot agree more.

I am of the firm view therefore that the decision of the court below is quite right and unimpeachable even though some of its reasons as complained of by the Appellant may be wrong. The decision is right because as hereinbefore demonstrated, the circumstantial evidence adduced by the prosecution, if any at all, was not sufficient to link the respondents with the offence charged. There is nothing in the entire evidence before the trial court that points irresistibly to the commission of the offence by the respondents. Suspicion however strong is no substitute for proof by cogent evidence. See:

F (i) Igboji Abieke v. The State (1975) 9 - 11 SC. 97

(ii) Michael Alor v. The State (1997) 1 NWLR (Part 501) 511 page 517, paragraphs B - C.

G Even if the court below erred in considering the extra-judicial statements of PW.2 and PW.6, it is trite law that it is not every error or mistake on the part of a lower court that will vitiate a judgment but only where such error or mistake is so fundamental as to occasion a miscarriage of justice. See Mufutau Aremu & Anor. V. The State (1991) 7 NWLR (Part 201) 1 page 19, paragraphs E - F.

H In the instant case, the Appellant has failed to show that the said error of the court below occasioned a miscarriage of justice in that it led to the discharge and acquittal of the respondents when the

evidence on record does not warrant such a verdict. On the contrary, the evidence on record fell far short of the standard required to prove the guilt of the respondents beyond reasonable doubt. See Egbe v. King (1950) 13 WACA 105 at 106. Indeed, any lingering doubt as persisted in the instant case, must be resolved in favour of the accused person. See Kalu v. The State (1988) 4 NWLR (Part 90) 503 and Iortim v. The State (1997) 2 NWLR (Part 490) 711.

In view of the foregoing, the convictions of the respondents cannot be allowed to stand for reasons that their guilt could not be proved beyond reasonable doubt. Consequently, the court below was perfectly right in my view, in its decision setting aside the trial court's judgment and substituting therefore a verdict of discharge and acquittal in favour of the respondents.

It was for these reason that on 26th October, 2000 I dismissed this appeal as totally lacking in merit, affirmed the decision of the court below that set aside the judgment of the trial High Court which convicted and sentenced the respondents to death.

KARIBI-WHYTEJSC

On the 26/10/2000, after hearing Counsel in this appeal, the Court unanimously agreed to summarily dismiss the appeal as being without merit and reserved our reasons for today. I hereby hereunder give my reasons.

On the 28th March, 1996, the Court of Appeal, Port Harcourt Division, allowed the appeal against the conviction of John Ogbubunjo and Njoku Amaechi by Acholonu J of Imo State High Court, sitting at Etiti, on 27/7/90 for the offence of murder contrary to section 319(1) of the Criminal Code.

The Appellants in the Court of Appeal who are now Respondents before us were acquitted and discharged on the ground that the prosecution failed to prove the case against them beyond reasonable doubt. The appeal before us is by the State against the judgment of the Court below. Appellant has filed eight grounds of appeal, which are as follows -

“Ground 1 - MISDIRECTION IN LAW

The Court below misdirected itself in law.

PARTICULARS OF MISDIRECTION IN LAW

(i) In its judgement, the court below held thus: “PW2 and PW6 are, B no doubt, the star witnesses for the prosecution. Both witnesses made statements to the police, but these were not tendered in evidence, at the hearing. These statements however form part of the record of proceedings, transmitted to this court.” (Underlining mine).

(ii) It was a misdirection in law for the court below to have held that C the statements of PW2 and PW6 which were not tendered in evidence, at the hearing of the case, in the court of first instance, formed part of the record of proceedings transmitted to it.

Ground 2 - MISDIRECTION IN LAW

D The Court below misdirected itself in law.

PARTICULARS OF MISDIRECTION IN LAW

(i) In its judgment, the court below held as follows:- “That being so, I think this court has a duty to look at, and consider these statements in E this appeal, having regard to the seriousness of the offence and also in the interest of justice.” (Underlining mine).

(ii) It was a misdirection in law, for the court below to have imposed on itself the duty of looking at, and considering the said statements of PW2 and PW6 in the appeal - which statements were not before the court of first F instance and which did not, and ought not to have formed part of the record of proceedings, in the appeal.

Ground 3 - MISDIRECTION IN LAW

The Court below misdirected itself in law.

G PARTICULARS OF MISDIRECTION IN LAW

(i) In its judgment, the court below held as follows: “The failure to tender the statements in evidence should not, and does not preclude the trial court from making reference to them, in its attempt to do justice, bearing H in mind, that the ultimate goal is to do justice.” (Underlining mine).

(ii) It was a misdirection in law, for the court below to have held that the failure to tender the statements in evidence should not and does not preclude the court of first instance from making reference to them, as

there was nothing before that court to make reference to.

Ground 4 - MISDIRECTION IN LAW

The court below misdirected itself in law.

PARTICULARS OF MISDIRECTION IN LAW

(i) In its judgment the court below held thus: “On the state of evidence B before the Learned trial judge, and particularly the doubtful credibility of the star witnesses - PW 2 and PW6, the trial judge should with the same yardstick with which he weighed their evidence against the 2nd, 3rd and 5th accused, have found their evidence against the appellants equally C unreliable and unsafe.” (Underlining mine).

(ii) It was a misdirection in law, for the court below to have held the evidence of PW2 and PW6 to be of doubtful credibility, unreliable and unsafe, as there was noting in the record of proceedings, to support that finding. D

Ground 5 - ERROR IN LAW

The decision is erroneous, on point of law.

PARTICULARS OF ERROR IN LAW

(i) In its judgment, the court below held thus: “Although in his E evidence in court, he said he saw the 1st appellant in the house of the 2nd appellant, in his statement to the police made on 5/12/88 when the facts were still very fresh in his mind, he said he saw the appellants and some others at the family square, eating and drinking ... It is clear from the above F statement that PW2 did not see the 1st appellant, the deceased, and any other person, on the fateful day, in the house of the 2nd, as he claimed, in his evidence in court, about one and half years after the incident. It will be seen clearly therefore, that PW2 contradicted himself on this material point.” (Underlining mine). G

(ii) It was an error in law, for the court below to have held that the PW2 contradicted himself with his statement made on 5/12/88 - which said statement was not tendered in evidence at the hearing, before the court of first instance. H

Ground 6 - ERROR IN LAW

The decision is erroneous on point of law.

PARTICULARS OF ERROR IN LAW

(i) In its judgment, the court below held as follows: “I come now to the evidence of PW6 - Godwin Ohaji ... Although in his evidence, he said the 2nd appellant and two others who were acquitted and discharged, gave him adequate description of the place where the deceased was buried, his statement to the police on 21/11/88 when the event was still very fresh in his mind was silent on this vital question.... It will be seen that PW6 also contradicted himself on this material point.” (Underlining mine).

(ii) It was an error in law, for the court below to have held that the statement of PW6 to the police contradicted himself on oath, when the said statement was not tendered in evidence, at the hearing, before the court of first instance.

Ground 7 - ERROR IN LAW

The decision is erroneous, on point of law.

PARTICULARS OF ERROR IN LAW

(i) In its judgment, the court below held: “Quite plainly, the evidence of PW2 and PW6 is inconsistent with their previous statements, which they made when the event was still very fresh in their minds. (Underlining mine).

(ii) It was an error in law, for the court below to have held that the evidence of PW2 and PW6 was inconsistent with their previous statements, when the said previous statements were not tendered in evidence, at the hearing before the court of first instance.

Ground 8 - ERROR IN LAW

The decision is erroneous on point of law.

PARTICULARS OF ERROR IN LAW

(i) In its judgment, the court below held as follows: “I have no doubt in my mind that if the statements of PW2 and PW6 were tendered, the learned trial judge would have treated their oral testimonies as unreliable and this would have dealt a fatal blow to the prosecution’s case. As it is he used this ‘unreliable’ evidence to convict the appellants” (Underlining mine).

(ii) *It was an error in law, for the court below to have held that the court of first instance used ‘unreliable’ evidence to convict the respondents, as there was nothing on the face of the record of proceedings to show that*

the evidence of PW2 and PW6 was unreliable."

Both parties have filed their briefs of argument in this appeal. Both counsel have adopted their briefs of argument and relied on them in their argument before us. Learned Counsel to the Appellant has formulated the following issues for determination as arising from the grounds of appeal filed. B

1. Whether the learned justices of the Court below were justified in using untendered non exhibited extra judicial statements of the prosecution (Appellants) witnesses No.2 & 6 to Discredit the Appellants case and thereafter basing its Discharge and Acquittal of the Respondents on that manifestly flawed and erroneous procedure. C

Grounds 1, 3, 5, 6 & 7 of Appeal.

1. Whether the learned Justices of the Court below were Justified in holding that the Prosecution witnesses testimony was unreliable and of doubtful credibility and thereafter reversing the trial Court's judgment by acquitting the Respondents. Grounds 4 & 5 of Appeal." D

On the other hand, learned Counsel for the Respondents formulated only one issue for determination which is stated hereunder as follows- E

"Whether the Court below was right in its decision in setting aside the judgment of the trial High Court which convicted and sentenced the Respondents for murder and in substituting a verdict of discharge and acquittal in favour of the respondents."

It is helpful to state the facts of this case in brief. On the 25th September, 1988, the Respondents together with three others took the deceased, Celestina Amucha from Umuze II in Etiti Local Government Area of Imo State to the neighbouring Obollo Village to attend their annual new Yam Festival. The deceased a widow had been residing with 2nd accused, the younger brother of the deceased's dead husband. The 2nd and 4th accused persons returned to Umuze II without the deceased on the 27th September, 1988. When confronted with the absence of the deceased on their return to Umuze II, the 2nd and 4th accused said they left the deceased at Obollo because she had volunteered to remain behind to assist the wife of the 1st Respondent who had recently been delivered of a baby. There was anxiety that the deceased had not returned. After search for F G H

the deceased, there was information which led to the discovery of the body of the deceased in a shallow grave in the farm of the 2nd Respondent in whose house the deceased was last seen alive. The deceased was last seen on the 25th Sept., 1988 in Obollo in company of others including the 2nd

B accused merry-making during the celebrations of the New Yam Festival.

After investigation, five persons John Ogbubunjo, Harrison Amucha, Samuel Njoku, Francisca Amucha, Njoku Amaechi and Janet Amechi were charged with the murder of the deceased under section 319(1) of the Criminal Code. Harrison Amucha died before plea was taken at the trial C Court. The remaining accused persons pleaded Not guilty to the charge on the 18th December, 1989. The trial opened on the 1st of March, 1990. At the conclusion of the hearing, the Prosecution had called seven witnesses including a Medical Doctor who performed the autopsy on the D deceased. Each of the accused persons gave evidence. None of them called any witness to testify.

None of the prosecution witnesses was an eye witness to the commission of alleged offence. The case of the Prosecution was founded E entirely on the circumstantial evidence that the deceased who was in the company of the 1st, 2nd and 3rd accused persons and was last seen with them, was subsequently discovered dead and was buried in a shallow grave in the farm of the 2nd, 4th and 5th accused persons (see the evidence F of PW6). The 1st accused was said to have denied ever knowing the deceased when questioned by the Police; when he was known to be her friend - (See the evidence of PW6).

The evidence of PW2 was that in the night of 25/9/88 he heard a female voice from the house of the 4th accused saying;

G “Umuahia, Chineke, do you want to kill me. Please allow me to say some prayers.”

This witness testified that he did not see any human blood around when the next morning he went to the house of the 4th accused. The H evidence of PW3 was that Harrison Amucha who died before plea was taken informed him that he (Harrison) killed the deceased. PW4 also in his testimony stated that he was told by telephone that the deceased was killed by Harrison.

The medical evidence was that the hands of the deceased were cut off from the wrist and that the cause of death was severe haemorrhage.

All the accused persons except the 3rd denied committing the offence, and knowing the deceased. The 3rd accused admitted knowing the deceased. The 2nd accused set up an alibi, that he was at Aba on the material date of the alleged commission of the Offence. B

In a reserved judgment delivered on the 27th July, 1990, the learned trial Judge acquitted and discharged the 2nd and 3rd and 5th accused persons. He convicted and sentenced to death the 1st and 4th accused persons. C

Dissatisfied with the judgment the 1st and 4th accused persons appealed to the Court of Appeal. On the 28/3/96 their appeal was allowed, their convictions and sentence set aside. A verdict of discharge and acquittal was substituted. D

The State has appealed against this judgment, relying on the eight grounds of appeal set out above. I have also reproduced the issues for determination formulated by the parties. The two issues formulated by Appellant's Counsel cover the eight grounds of appeal filed. It appears to me obvious that the first issue which relates to the admissibility of the untendered extra judicial statements of prosecution witnesses even if successful will not result in the reversal of the judgment. This is because the Court of Appeal in considering the judgment of the trial court and the conviction and sentence of the accused persons said; F

"As can be seen from the evidence called by the prosecution, the prosecution case before the High Court was based solely on circumstantial evidence. There was no eye witness account of the event leading to the death of Celestina Amadi. On the state of the evidence before the lower court, can it be said that the prosecution proved beyond reasonable doubt that the appellant killed the deceased? The learned trial Judge thought so." G

(See p.160 lines 16-25)

I agree with this view as it accords with the evidence before the learned trial Judge. The appeal seems to have been decided on the failure of the prosecution to prove beyond reasonable doubt the murder of the deceased H

based on the circumstantial evidence linking the accused persons.

I shall deal briefly and summarily with the first issue for determination relating to the admissibility of the untendered, extra judicial statements of the PW2 and PW6. Learned Counsel to the Respondents has rightly
 B conceded that the court below was in error in considering and taking into account the extra judicial statements of PW2 and PW6 tot he Police which were in contradiction with their sworn testimony at the trial. Learned Counsel for the Appellant is right in the criticism that the court below was
 C wrong in unilaterally treating statements in proof of evidence as evidence tendered at the trials. It is a well settled principle of the administration of justice in our courts that only evidence properly authenticated, either by the oral testimony of a party or the written statement tendered and admitted during proceedings can be evidence in a trial. Extra judicial statements
 D which remain in that category however credible they may appear, cannot be used as evidence in a trial.

Learned Counsel for the Appellant has contended, and this is conceded by Counsel to Respondent that the statements of PW2 and PW6
 E relied upon by the Court below are extra judicial statements, which are inadmissible as evidence in the proceedings. But the further contention of the Appellant that the appeal ought to be allowed on that ground alone is erroneous.

F Section 227(1) of the Evidence Act provides that,

*“The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the
 G same if such evidence had not been admitted.”*

This provision has been applied in this court recently in Okoro v. State (1998) 14

NWLR, 181, where Iguh JSC stated the position thus;

H *“The law is well settled that the wrongful admission of evidence shall not of itself be a ground for the reversal of a decision where it appears on appeal that such evidence cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence*

has not been admitted.” - See Ezeoke v. Nwagbo (1988) 1 NWLR (pt. 72) 616 at 630; Umeojiako v. Ezenamuo (1990) 1 NWLR (pt. 126) 253 at 270; Monier Construction Co. Ltd. v. Azubuike (1990) 3 NWLR (pt. 136) 74 at 88.”

The law is that an appellate court will not quash a conviction or reverse a judgment where it is clear that expunging the admitted inadmissible evidence will not alter the decision of the court appealed against - See Queen v. Haske (1961) 2 SCNLR.90. However, where it is uncertain or impossible to say with some degree of certainty that the Court whose judgment is appealed against would have reached the same decision if the inadmissible evidence had not been admitted, an appellate court would have no alternative but to quash the conviction and sentence of the court if there had been a conviction and sentence, or in any case set aside the judgment entered by virtue of the inadmissible evidence - See Queen v. Thomas (1958) SCNLR.98; Ajayi v. Fisher (1956) SCNLR.279.

In The Queen v. Olubunmi Thomas (1958) SCNLR.98, the Federal Supreme Court laid down the test applicable in determining the effect of wrongful admission of evidence on the judgment appealed against. The Court said,

“The question which must be posed therefore is, would the learned trial Judge have reached the same decision if the inadmissible evidence had not been admitted? It is impossible for us to say what effect that evidence may have had on the mind of the learned trial Judge and although we think that there was sufficient evidence without the inadmissible evidence to convict the appellant, we cannot say with certainty that the learned trial Judge must inevitably have come to the same conclusion. That being so we have no alternative but to allow this appeal, quash the conviction and sentence and order a verdict of acquittal to be entered.”

Applying the principles enunciated above, the question is whether on expunging the admitted inadmissible evidence, the judgement of the court below would have been different? The evidence of PW2 and of PW6 which were used in the court below were the statements made to the Police which were not tendered and admitted in evidence and were therefore not evidence in the proceedings. Expunging the inadmissible evidence we still

have the basis on which the Court of Appeal considered the correctness of the judgment of the trial Judge. That is on the issue of whether the circumstantial evidence available and established has satisfied the required burden of proof. I hold that expunging the admitted inadmissible evidence will make no difference to the decision of the court below.

The formulation of issue 2 is vague and confused. It would seem that learned Counsel was attacking the basis of the judgement of the Court below without formulating concisely the issue involved. As I have already pointed out in this judgment, the Court below held that the prosecution which had the onus of proving the case against the accused beyond reasonable doubt relying on the evidence of the Prosecution witnesses failed to discharge this onus because of the unreliability of the evidence of the prosecution witnesses linking the respondents with the commission of the alleged crime.

In arguing this issue, learned counsel relied in his submission on issue 1 in respect of the unsubstantiated alleged doubtful of p.w. 2 and p.w.6. In referring to the circumstantial evidence, he referred to the discovery of the body of the deceased in the farm of the 2nd respondent. Counsel also submitted that the deceased was last seen alive in the house of 2nd respondent. Learned counsel for the appellant regards these factors as nexus in the unbroken chain of circumstantial evidence together with the unchallenged uncontradicted evidence of the prosecution witness that the deceased was last seen in the company of the accused persons. As he said it *"clearly pin the said respondents inextricably to the crime and the entire locus from 1st respondents house to 2nd respondents residence where the deceased, the "plump yellow woman" was last seen alive and well. Before the very sad and melancholic events of her gruesome murder, the subject matter of this appeal."*

Learned counsel to the respondents in his submission stated the essential ingredients of the offence of murder, and pointed out what the prosecution is required to prove beyond reasonable doubt. . It was submitted, the prosecution having established the cause of death of the deceased, must also establish that the act of the respondents caused the death. It must also be established that the act was intentional.

Respondents submitted that the prosecution failed to prove these essential ingredients of the offence with which respondents were charged. There was no evidence that respondents were responsible for cutting off the hands of the deceased through which she bled to death. It is important to observe that none of the prosecution witnesses was an eye witness to the event resulting in death of the deceased. The prosecution relied entirely on circumstantial evidence to establish the case against the Respondents. B

Learned Counsel to the Respondents analysed the evidence of the prosecution witnesses PW1, PW2, PW3, PW4, PW6 and submitted that it was not cogent, complete and unequivocal, and did not lead to the irresistible conclusion that Respondents and no one else were responsible for the death of the deceased. C

It is common ground in this appeal that there was no eye witness to the murder of the deceased. Although eye witness or other direct evidence is the ideal in the establishing of guilt, there are situations where circumstances can clearly and forcibly suggest that the accused and no one else must have committed the offence with which he is charged - See Fatoyinbo v. A-G. Western Nigeria (1966) WNL.R.4. In relying on such circumstantial evidence to determine guilt of the accused, the evidence relied upon must if accepted, make a complete and unbroken chain so as to constitute sufficient proof that the accused person committed the offence with which he is charged - See Ukorah v. State (1977) 4 SC. 167. D E F

This Court has pointed out the risk of relying on circumstantial evidence to find guilt. It has been said that the Court must be very cautious before basing its conviction on circumstantial evidence - See Adie v. State (1980) 1-2 SC. 116. It seems to me in the case before us the learned trial Judge fell into the error of assuming that if the Respondents are not the murderers of the deceased, there could in the circumstance be no one else. There is some evidence against them and none against any other persons. They are therefore guilty. G

It is important to appreciate the fact that the burden on the prosecution is to prove the guilt of the accused in respect of the offence charged beyond a reasonable doubt and that there are no other co-existing circumstances which will weaken the inference of drawing the guilt of the H

accused. - See Omogodo v. State (1981) 5 SC.5.

I agree with the submission of learned Counsel to the Respondents that in this case, there is no evidence of surrounding circumstances which is capable of the inference that the Respondents and no other persons would have committed the offence with which they were charged. All the evidence relied upon for their guilt were equivocal and not compelling. For instance, there was no evidence that the deceased had any quarrel with the Respondents or any of them. The evidence of PW2 who heard a distress shout at night coming from the residence of the 4th accused did not see human blood in the morning when he went to that house. No blood stained dangerous weapons were found in the houses of the Respondents who were alleged to have cut off the hands of the deceased. Reference to a “plump yellow woman” whose identity was not disclosed is equivocal and can fit many such persons.

In the light of the above factors it is difficult to come to the conclusion that the circumstantial evidence as to the guilt of the Respondents was unequivocal, irresistible and compelling. The learned trial Judge should not have found the accused persons guilty on the evidence before him. The Court of Appeal was right to have set aside the conviction and sentence. In conclusion I should refer to the error of the Court below in considering the extra judicial statements of the PW2 and PW6 which were not tendered or admitted into evidence at trial but was relied upon in determining the guilt of the Respondents. Since the appeal was decided on the circumstantial evidence surrounding the death of the deceased and linking the Respondents to the commission of the offence, the expunging of the inadmissible evidence will not affect the judgment. No miscarriage of justice occurred for relying on the inadmissible evidence.

The well settled principle is that we sit here to decide whether the decisions or judgment of the court below is right, and not whether its reasons are right - See Ukejianya v. Uchendu 12 WACA.45, Allied Bank H of Nigeria Ltd. v. Akubueze (1997) 6 NWLR (pt 509) 374, 404.

In the instant case, the decision of the court below reversing the learned trial Judge was as follows - at pp. 170-171 -

“On the state of the evidence before the learned trial Judge, and

particularly the doubtful credibility of the evidence of the star witnesses PW2 and PW6 the trial Judge should with the same yard stick with which he weighed their evidence against the 2nd, 3rd and 5th accused, have found their evidence against the appellants equally unreliable and unsafe. I agree with learned Counsel for the Appellants that the case against them was not proved against reasonable doubt.” B

In effect the Court below was saying that the prosecution which set out to prove the guilt of the Respondents based on circumstantial evidence has failed to discharge that onus. The circumstantial evidence relied upon by the prosecution has failed to link the Respondents with the offence charged. There is no evidence succeeded in raising suspicions. That is certainly not guilt. Accordingly the Court below allowed the appeal of the appellants and set aside the conviction and sentence of the learned trial Judge. D

The Court of Appeal was right in setting aside the conviction and sentence of the Respondents by the learned trial Judge. There is no doubt in my mind that the evidence relied upon by the learned trial Judge not being unequivocal, cogent and compelling, and not pointing directly at the Respondents as those who only could have committed the offence of murder of the deceased with which they were charged, fell short of the standard of proof required for their conviction. - See Abieke v. The State (1975) 9-11 SC. 97, Queen v. Moses (1960) 5 SC. 187. The prosecution having failed to prove the legal standard of proof required for conviction of the Respondents the only course open to the court is to acquit and discharge the Respondents. That is what the learned trial Judge should have done but failed to do. The Court below was right in setting aside the conviction and sentence. - See Nasamu v. State (1979) 6-9 SC.153, Esai v. State (1976) 11 SC.39. F G

I dismissed the appeal on the 26th October, 2000 for the reasons I have given in this judgment.

H

OGUNDARE JSC

On 26th October 2000 I dismissed this appeal and indicated then that I would give my reasons for so doing today. I have had the advantage of a preview of the reasons given by my learned brother Onu JSC for he too B dismissing the appeal. I agree with the reasons given by him.

Two issues have been formulated by the Appellant for the determination of this appeal, to wit:

C “1. Whether the learned Justices of the Court below were justified in using UNTENDERED NON-EXHIBITED EXTRA JUDICIAL STATEMENTS of the Prosecution (Appellant’s) Witnesses Nos. 2 & 6 to DISCREDIT the Appellant’s case and thereafter basing its DISCHARGE and ACQUITTAL of the Respondents on that MANIFESTLY FLAWED AND ERRONEOUS PROCEDURE.

D 2. Whether the learned Justices of the Court below were justified in holding that Prosecution’s Witnesses testimony was unreliable and of doubtful credibility and thereafter reversing the trial court’s judgment by ACQUITTING the Respondents Grounds 4 & 5 of Appeal”

E On issue (1) the Court of Appeal was clearly in error to make use of the extra judicial statements made by PW2 and PW6 in discrediting them. These statements were not in evidence at the trial and the witnesses had no opportunity of affirming or denying making those statements. Not F being in evidence the Court below ought not to have alluded to them in its consideration of the appeal before it. For the reasons I shall, however, give later in this judgment this error does not occasion any miscarriage of justice. And, although, issue (1) is resolved in Appellant’s favour, it is of little comfort to it.

G Issue (2) is the main plank on which this appeal was fought. The Respondents had been convicted by the trial High Court of the offence of murder, based on the circumstantial evidence led at the trial. On appeal to the Court below, that Court was of the view that the circumstantial H evidence relied on by the trial Court was not cogent enough to justify a conviction. On appeal to this Court by the prosecution (the State), it was contended that the Court below was in error to disturb the finding of guilt made by the trial court based on the evidence before it, circumstantial

though it be.

The learned trial Judge had found -

(i) "...the deceased was last seen in the company of the 1st, 3rd, 4th and 5th accused people and more particularly in the house of the 4th accused."

B

(ii) None of them was able to account as to what happened to the deceased after she was last seen in their company. They did not say where she went. Their defence is simply that she was unknown to them yet evidence is awash as to her being seen in their company, as to her being friendly to the 1st accused,"

C

(iii) "...a woman's voice being heard shouting in the night to the effect that some people wanted to kill her."

It is on these facts that he remarked that

"I have carefully shown how the only persons who tell and who could be accountable for the facts of whatever kind that befell on the deceased could be no other than 1st and 4th accused in particular. They were linked to her missing and must add too to the eventual finding at the place of burial, up to their neck."

E

And concluded:

"There is no doubt in my mind that following the logic of the analysis made and the sequence of facts as adumbrated above, the 1st and 4th accused were responsible in particular for the death of the deceased. The evidence adduced point irresistibly to them in particular being responsible."

F

I may at this stage mention that there were six persons originally charged for the offence. One died before trial commenced and the remaining five, including the Respondents herein, stood trial. The case against them all was both interwoven and inseparable, yet, at the conclusion of trial the learned trial Judge acquitted 3 and convicted the 2 Respondents herein. They appealed to the Court of Appeal which Court allowed their appeal and discharged and acquitted them both.

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That Court, per Katsina-Alu JCA, as he then was, erroneously made use of the extra judicial statements of PW2 and PW6 to the police but which were not in evidence at the trial, to discredit them. Had that been all there was to this appeal I would not have hesitated in setting-aside its

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judgment. But Katsina-Alu JCA considered the substance of the evidence of these two witnesses, who were no doubt the Appellant's star witnesses and observed:

"This (that is, the credibility issue) aside, the evidence of PW2 and PW6 in this case, ought to have been more critically examined than the trial court appeared to have done. The evidence of PW2 only succeeded in establishing grave suspicion against the appellants. Although he alluded to an alarm he heard in the night from the 2nd appellant's house to the effect that a certain unidentified female was in danger of being killed, yet he neither verified the cause of the alleged alarm nor knew the person who raised the alarm. He further testified that he found no blood stains in the house of the 2nd appellant when he called at the house the very next morning." (Words in brackets are mine)

On PW6, the learned Justice of the Court of Appeal observed:

"The evidence of PW6 does not fare any better. It also sought to cast grave suspicion on the appellants. I must point out here that no blood stained weapon such as cutlass, axe or knife used in cutting off the deceased's hands was recovered from the appellants or at all."

Katsina-Alu JCA then proceeded to consider the approach of the learned trial Judge to the evidence. He observed:

"As already stated, the appellants were jointly tried with the 2nd, 3rd and 5th accused and the appellants' case was closely interwoven with and inseparable from that against the 2nd, 3rd and 5th accused. Although the learned trial Judge in his judgment at page 80 stated that:

'There was no singular challenge to the avalanche of evidence tending to link the 3rd and 2nd accused persons with the death of the deceased.'

he proceeded at page 82 that:

'I find nothing against the 2nd accused. With regards to 5th and 3rd accused they may or may not have played a part. I have my doubts and so I resolve that doubt in their favour."

and went on to say -

"As I have already stated, the case of the appellants was closely interwoven with and inseparable from that against the 2nd, 3rd and 5th

accused who were acquitted by the learned trial Judge. It is now settled law that where the appellant was tried jointly with another and their case was interwoven, and inseparable, the conviction of the appellant cannot stand where the 2nd accused was acquitted. See Abudu v. The State (1985) 1 NWLR (Pt.1) 55. In law, an accused person is under no obligation to B prove his innocence. The burden of establishing his guilt beyond reasonable doubt rests throughout on the prosecution. See Patrick Njoven & Ors. v. The State (1973) 1 NMLR 331. Failure to do so will lead to the discharge of the accused person - Onubogu v. The State (1974) 9 SC 1; Ikemson v. The State (1989) 2 NWLR (pt. 110) 455.” C

I think the learned Justice of the Court of Appeal was right. If the trial Judge did not find it safe to convict the 2nd, 3rd and 5th accused persons, on the evidence before him, I cannot see how he, with respect, could find it safe to convict the 1st and 4th accused persons (now D Respondents) on the same evidence interwoven and inseparable as it were, it would appear that the learned Judge simply applied a rule of the thumb.

My learned brother Onu JSC has stated the law on circumstantial evidence and has reviewed the evidence of the witness. I agree entirely E with his statement of the law and his review of the evidence. Based on the law and the facts found by the trial court I cannot be of the same mind with the learned trial Judge that those findings of fact pointed irresistibly to the Respondents as being responsible for the death of the deceased Celestina F Amucha. According to the evidence of PW5, Dr. Benjamin Ibezim, who performed an autopsy on the corpse of the deceased -

“The most significant finding was that the hands were cut off from the wrist. All other structures were intact. There was no sign of strangulation. The deceased must have died of severe haemorrhage. One G of the arteries over the hand was cut. She would be expected to die within 10 minutes - a slow and painful death.”

The question arises: where is the evidence direct or circumstantial - as to who was responsible for severing the hands from the wrist in the manner H described by Dr. Ibezim? None that I could deduce from the evidence on record. In the circumstance it would be wrong to convict any or both of the respondent for the murder of Celestina Amucha.

It is for the above reasons and the fuller reasons given by my brother Onu JSC that I too dismissed this appeal on 26th October, 2000.

ACHIKE JSC

B On 26th October, 2000 after hearing counsel in this appeal, the Court unanimously agreed that this appeal lacked merit. I then dismissed the appeal and indicated that I would give my reasons for so doing today.

C Following the death of the deceased, Celestina Amucha on 25/9/88, six persons including the two respondents were arraigned before the Etti High Court for the offence of murder. Before the trial took off, one of the accused, Harrison, died. After due trial, three of the accused persons were acquitted while the two respondents were convicted for the murder of the D deceased based on circumstantial evidence, there being no eye-witness account of the offence. On appeal, the Court of Appeal allowed the appeal. Dissatisfied with this decision, the State, as appellant, has now appealed to this Court on eight grounds of appeal.

E The parties filed and exchanged briefs of argument.

The Appellants formulated two issues for determination, namely:

F “1. Whether THE LEARNED Justices of the Court below were justified in using UNTENDERED NON-EXHIBITED EXTRAJUDICIAL STATEMENTS of the Prosecution (Appellant’s) Witnesses No.2 & 6 to DISCREDIT the Appellant’s case and thereafter basing its DISCHARGE AND ACQUITTAL of the Respondents on that MANIFESTLY FLAWED AND ERRONEOUS PROCEDURE.

G 2. WHETHER the learned Justices of the court below were justified in holding that the prosecution’s Witnesses testimony was unreliable and of doubtful credibility and thereafter reversing the trial court’s judgement by ACQUITTING the Respondents Grounds 4 & 5 of Appeal

For the Respondents, on the other hand, one Issue was identified:

H “1. Whether the Court below was right in its decision on setting aside the judgment of the trial High Court which convicted and sentenced the Respondents for murder and in substituting a verdict of discharge and acquittal in favour of the respondents.”

As may be recalled, the conviction of the respondents was predicated on circumstantial evidence. The summary of which is that on 25th September, 1988 the deceased was visited at her house by PW1, including 1st, 2nd, 3rd accused persons and one other accused person named Harrison. On the other hand, PW2 testified that on the 25th September, 1988 he called on the deceased at her house and saw 1st, 2nd, 4th accused and the aforesaid Harrison and thereafter he never saw the deceased again. On further inquiry as regards the whereabouts of the deceased one Francisca told him that the deceased stayed back because she (the deceased) was assisting 1st accused/respondent in preparing palm oil, it being common knowledge that 1st accused/respondent was friendly with the deceased. Inter alia, PW2 also testified that on the night of 25/9/88 he heard a female's voice from the house of the 4th accused saying:

"Umuahia, chineke, do you want to kill me? Please allow me to say some prayers."

PW4 in his testimony saw that he was informed by telephone that the deceased was killed by Harrison. PW3 stated in his evidence that Harrison informed him that he (Harrison) killed the deceased.

After a review of the evidence placed before him, the learned trial Judge came to the conclusion that the two respondents were guilty of murder as charged. His Lordship said:

"There is no doubt in my that following the logic of the analysis made and the sequence of facts as adumbrated above, the 1st and 4th accused were responsible in particular for the death of the deceased. The evidence adduced points irresistibly to them in particular being responsible."

In my view the prosecution has proved its case beyond all reasonable doubt in proving that the 1st and 4th accused killed or took part in the death of the deceased."

It may be noted that when the appeal was heard at the lower court, Katsina-Alu, J.C.A., who presided and delivered the leading judgment made use of the extra judicial statements of PW2 and PW6 to the Police but which were not tendered in evidence at the trial, to discredit them. Learned Appellants' counsel has submitted that the extra judicial statements relied upon by the lower court were inadmissible. To this submission

Respondents' counsel conceded but strongly denied that the appeal ought not to be allowed solely on ground of that error. The points under consideration is the basis on which Issue No.1 is premised. Undoubtedly, the complaint by the learned counsel for the Appellant is well-taken. The B victory is however partial and indeed pyrrhic.

A decision which is otherwise sound cannot be set aside by reason only of wrongful admission of evidence where such erroneously admitted evidence cannot reasonably be said, on appeal, to have affected the C decision and the said decision would have remained the same had such evidence not been admitted. See section 227(1) of the Evidence Act. In effect, an erroneous admission of evidence will not automatically undermine an otherwise sound decision of the court. Thus where the circumstances warrant, an erroneously admitted evidence will be expunged on appeal and D if the decision of the lower court, shorn of the inadmissible evidence, remains the same it would be allowed to stand. See Umeojiako v Ezenamno (1990) 1 NWLR (Pt. 126) 253 and Queen v Haske (1961) 2 SC NLR 90. In the appeal on hand, I am satisfied that the judgment of the trial Judge, E shorn of the inadmissible evidence erroneously introduced by the Court of Appeal, there would still remain enough evidence to sustain and uphold the decision of the lower court. Furthermore, it has not been shown that any miscarriage of justice has been occasioned by relying on the inadmissible F evidence.

This takes us to Issue No.2. After a review and evaluation of evidence before him, the learned trial Judge concluded his judgment as follows:

G *"I have carefully shown how the only persons who tell and who could be accountable for the facts of whatever kind that befell on the deceased could be no other than 1st and 4th accused in particular. They were linked to her missing and I must add too to the eventual finding at the place of burial, up to their neck. There is no doubt in my mind that following the H logic of the analysis made and the sequence of facts as adumbrated above, the 1st and 4th accused were responsible in particular for the death of the deceased. The evidence adduced point irresistibly to them in particular being responsible."*

The complaint of the Respondents is that the Appellant failed to establish the case against them beyond a reasonable doubt when the testimonies of the prosecution' witnesses were unreliable and of doubtful credibility. It is important to reiterate that there was no eye-witness evidence leading to the death of the deceased. It is against this background B that learned Respondents' counsel, after a through analysis of the testimonies of the witnesses for the prosecution - PW1, PW2, PW3, PW4 and PW6 - then submitted that the circumstantial evidence relied upon by the trial Judge was neither cogent nor unequivocal as to lead to the irresistible conclusion that the Respondents and no other persons were C responsible for the death of the deceased.

I think the Respondents' submission is well-founded. It is firmly established that the burden of proof of guilt of the accused in every criminal trial remains on the prosecution; see Patrick Njoven & ors v The State D (1973) 1 NMLR 331. There is very little difference if the guilt is being substantiated by the prosecution in reliance on eye-witness evidence or circumstantial evidence. Generally and ideally, the offence preferred against the accused is proved by eye-witness evidence or such other direct E evidence (e.g. documentary evidence.) But circumstantial evidence can be equally potent and often more telling and devastating than direct or eye-witness evidence (e.g. in trials on conspiracy) if the circumstantial evidence is so cogent, complete and unequivocal, and point or lead to the F irresistible conclusion that the accused and no one else is the perpetrator of the offence under reference. See The State v Macauley Uzor (1972) 1 NMLR 208 at 212.

I am at one with the submission by learned Respondents' counsel that the evidence led at the trial in this case could not be said to have passed the acid test or being sufficiently cogent, unequivocal and irresistible as to hold G inferentially that the Respondents were the perpetrators of the offence leading to the death of the deceased.

The unconvincing quality of the circumstantial evidence relied upon H by the prosecution was also under fire in the leading judgment of Katsina-Alu, JCA (as he then was) when he stated pointedly:

"As I have already stated, the case of the appellants was closely

interwoven with and inseparable from that against the 2nd, 3rd and 5th accused who were acquitted by the learned trial judge. It is now settled law that where the appellant was tried jointly with another and their case was interwoven, and inseparable, the conviction of the appellant cannot stand where the 2nd accused was acquitted. See Abudu v The State (1985 1 NWLR (pt. 1) 55. In law, an accused person is under no obligation to prove his innocence. The burden of establishing to prove his innocence. The burden of establishing his guilt beyond reasonable doubt rests throughout on the prosecution. See Patrick Njoven & Ors v The State (1973) 1 NMLR 331. Failure to do so will lead to the discharge of the accused person - Onubogu v The State (1974) 9 SC 1, Ikemson v The State (1989) 3 NWLR (Pt.110) 455."

The weak circumstantial evidence elicited by the prosecution through PW1, PW2, PW3, PW4, PW6, comprising mainly that the deceased was last seen in the company of 1st, 2nd and 3rd accused and the corpse of the deceased was discovered in a shallow grave in 2nd and 4th accused's farm,) was even severely rendered insignificant by the medical evidence of PW5. It will be remembered that there was evidence of absence of human blood stain around the house of 4th accused or elsewhere nor was any blood-stained lethal weapons found in the houses of the Respondents who were alleged to have cut off the hands of the deceased. Against this poor state of the evidence of the prosecution's witnesses, one is obliged to also observe the report of the autopsy carried out on the deceased, which, inter alia, states that:

"The most significant finding was that the hands were cut off from the wrist. All other structures were intact. There was no sign of strangulation. The deceased must have died of severe haemorrhage. One of the arteries over the hand was cut. She would be expected to die within 10 minutes - a slow and painful death."

Despite this revelation of the sordid acts that were meted out to the deceased there is no strong compelling evidence unequivocally linking the Respondents with the commission of the offence alleged even though the evidence of suspicion heaped up against the Respondents were undoubtedly overwhelming. But suspicion no matter how grave can never be a

substitute for proof of evidence; see Igboji Abieke v The State (1975) 9-11 SC 97.

It is manifestly clear that the circumstantial evidence relied upon by the prosecution, in the absence of any eye-witness account leading to the death of the deceased, was not cogent and unequivocal enough to lead to B irresistible conclusion that the Respondents were responsible for the death of the deceased. It was, for this reason that I summarily on 26th October, 1000 dismissed the appeal for the reasons I have today set out in this judgment. For completeness, I would add that I also had the privilege of C reading the judgment of my learned brother Onu, JSC, and I entirely agree with the reasons for his judgment delivered on 26th October, 2000.

UWAIFO JSC

On 26th October, 2000, I dismissed this appeal and indicated I would D give my reasons for so doing today. I have since read in advance the reasons given by my learned brother Onu JSC.

The respondents and three others were charged with the murder of E one Celestina Amucha on or about 25 September, 1988 in Obollo Mbano, Imo State. There was no eye-witness account of the murder.

The prosecution relied on the evidence of six witnesses. The evidence of Mrs. Juliana Amucha (p.w.1) who claimed that she and the F deceased were married within the same family is that on 25 September, 1988, she met the 1st respondent and two others originally charged with the offence with the deceased in her house. After a while all three and the deceased left. That was the last time she saw the deceased alive. This was G followed by the evidence of Bernard Iwuji (p.w.2) that on that same 25 September he saw the 1st respondent and the other accused persons and two women in the 2nd respondent's house. He left them and went to H entertain his guests. He said when he got up in the night that same day he heard a voice of a woman pleading to be allowed to pray before being killed. The voice came from the house of one of the accused persons. When this witness went to that house the following morning he saw no human blood. This was a woman who was said to have died from blood loss as a result

of her hands having been cut off from the wrist. Again, there was nothing to identify that voice with that of the deceased. The third witness, Alexander Amucha (P. W. 3) who claimed that the deceased was his elder brother's wife, said one Harrison admitted to him that he and the accused persons killed the deceased. The fourth witness, Francis Maduwuba, said that when he learnt that the deceased could not be found, he went to the police station. He then said: "There at the police station, one young man telephoned me and told me that the woman we were looking for is now dead and is killed by 1st accused." The medical doctor who performed the autopsy was p.w.5, Dr. Benjamin Ibezim. He said the corpse was completely decomposed when it was exhumed from a swallow grave after about a month of her death. He found that the hands were cut off from the wrist otherwise the other parts were intact. He concluded that the cause of death was haemorrhage as a result of the cutting off of the hands. There was no sign of strangulation. The evidence of p.w.6, Godwin Ohaji, tended to implicate the respondents and the other accused persons. He gave evidence as to how he got some of the accused persons to confess to him and following that he took them before the police. It would have been expected that the police would confirm this. But p.w.7, Sgt. Godwin Metuka, was not forthcoming. He was cross-examined and the following was recorded:

F "Q. In your statement of report of 4th November, 1988, you indicated that there is nothing to link the accused persons with the death of the deceased. Are you still sticking to that report or are you denying it?

A. Still maintain that the statement is correct

G Q. Who told you of the murder or that the deed took place?

A. My informants.

Q. What further investigations did you do to convince you that the accused were the people who did it?

H A. The investigation was concluded by the State Division of Investigation and Intelligence.

The prosecution asks for a new date to conclude that (sic) case.

Court: The case is adjourned to 1st June, 1990 for continuation. (Sgd) Hon. I.C.K. Pats Acholonu Judge 7.5.90"

What looked like a very vital evidence of p.w.6 was thus undermined by p.w.7, the sergeant.

There is nothing in the record of proceedings to show that the case was called on June 1, 1990. The case was called on 12 June, 1990 and adjourned to 4 July, 1990 without any proceeding. On 4 July the prosecution suddenly closed its case and defence opened without a ruling whether a prima facie case had been made out. The first accused to testify was the 5th accused, Janet Amaechi (recorded as Janet Ameshi). She claimed not to have known the deceased. The next was the 4th accused (now 2nd respondent), Njoku Amaechi. He also denied knowing the deceased. The 3rd accused, Francisca Amucha next testified. She admitted that the deceased and herself were married into the same family but that she knew nothing about her disappearance. Samuel Njoku, 4th accused, and John Ogbubunjo, 1st accused (now 1st respondent) testified in that order. Each denied ever knowing the deceased.

The learned trial judge was now left to do with the haphazard circumstantial evidence which was weak and doubtful. In a rather sweeping manner, he gave credence to evidence of suspicion. He adverted to the defence of the 2nd accused and observed that his alibi was not investigated. He then reached the conclusion that: The issue as to whether this accused knew the deceased did not arise as he was obviously not there on the date of the death and the prosecution has not shown that there was an act of conspiracy in which the 2nd accused took part in the planning and eventual execution of the planned act.” But, curiously, later in the judgment the learned trial judge said: “There was no singular challenge to the avalanche of evidence tending to link the 3rd and 2nd accused persons with the death of the deceased.” I must note here that throughout the judgment the learned trial judge did not make it clear whether he believed the evidence of the prosecution witnesses and/or disbelieved that of the accused persons. There was nothing directly said in that direction except in the case of the 5th accused (whom he did not in any event convict) when he observed:

“With respect to the 5th accused I believe that she knew the deceased, for the evidence given as to the fact of her being seen in the company of

the deceased was not challenged in the court when she had the opportunity to do so.”

I cannot help saying that this case was poorly investigated, badly prosecuted and, with due respect, unsatisfactorily resolved at the trial.

B The lower court was right to come to the conclusion that the convictions of the respondents were unsafe and to have set them aside. The present appeal by the State was ill-advised. The appeal thoroughly lacks merit and for that reason I did not hesitate to dismiss it peremptorily on 26th October, C 2000.

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