

SUPREME COURT OF NIGERIA
14TH DECEMBER, 2001. SC.27/2001
CORAM:- A. B. WALLI, I. L. KUTIGI, A. I. IGUH,
A. I. KATSINA-ALU, E. O. AYOOLA, JJSC.

SULE AHMED (ALIAS EZA) APPELLANT

V.

STATE RESPONDENT

CRIMINAL PROCEDURE - Conviction for lesser offence – Homicide-Though not established - Appellant is guilty of causing hurt by dangerous means s.248 (1) PC

CRIMINAL PROCEDURE - Homicide - Conviction – Proof beyond reasonable doubt - Where not established - Mere speculation or suspicion - Cannot ground conviction

HOMICIDE – Proof - Cause of death - Is a fact in issue - Which may be proved by direct or circumstantial evidence

MURDER – Medical evidence – Absence of – Nature of injury and instantaneous death – Absence of the corpus delict – Are circumstances that may lead to the inference of murder – Without medical evidence

MURDER - Proof - Injury - Reliance on without medical evidence – Depends on surrounding circumstances – And clear description of the injury

FACTS

Before the Okene division of Kogi State High Court, appellant was charged with the offence of culpable homicide punishable with death under S. 221 of the Penal Code. On or about the 31st day of March, 1996, appellant was alleged to have fired a gun at the deceased which hit him on the head. The squabble arose during a festival in which the parties were playing masquerades. Deceased was taken to the hospital where he died after 3 days. Six witnesses testified for the prosecution 5 of whom were eye witnesses. But there was no medical evidence as to cause of death nor was there any proper description of the nature of injury inflicted. The doctor who treated the deceased gave no evidence. Medical reports tendered by the prosecution were rejected by the trial court for discrepancies.

Nevertheless, the accused was convicted as charged and sentenced to death by hanging. His appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court raising 3 questions. But the matter was determined based on one main issue.

ISSUE FOR DETERMINATION

The main question in this appeal is whether after rejecting the medical report of the autopsy on the deceased and by not calling medical evidence of the cause of death the conclusion that the act of the appellant caused the death of the deceased can be sustained.

HELD (Allowing the appeal per lead judgment of AYOOLA JSC, IGUH JSC dissenting)

Homicide - Cause of death - How proved

1. Cause of death is always a fact in issue in a case of homicide and that fact in issue may be proved by direct evidence or by circumstantial evidence. Contrasted with circumstantial evidence, direct evidence is evidence of fact in issue. When it is testimonial evidence it is evidence of the witness who claims personal knowledge of the fact he testifies about. Circumstantial evidence on the other hand is evidence of relevant fact from which the existence or non-existence of facts in issue may be inferred. (p. 3331 A)

Medical evidence - Where not available

2. In relation to cause of death medical evidence is direct evidence of the cause of death, a fact in issue, when given by the doctor who carried out the autopsy or by a doctor who treated the deceased. There may be other direct evidence such, as for instance, that of a witness who saw a deceased person beheaded by another. Circumstantial evidence of cause of death may be relied on where direct evidence is absent. It is in such situation that cause of death may be proved other than by medical evidence. There is now no peradventure about it but that where medical evidence is not available cause of death can be proved by circumstantial evidence. (p. 3331 C)

Murder - Medical evidence - Absence of

3. It is easy to fall into error of merely citing and relying on cases in which the accused has been found guilty of murder, notwithstanding the absent of medical evidence, without adequate regard to the circumstances of each case. Often circumstances are not alike. In almost all the cases in which medical evidence has been dispensed with there has been evidence of the nature of the injury or wound inflicted on the deceased by the accused. In quite a number of such cases death of the deceased had been instantaneous or had occurred shortly after the attack. The circumstances that may justify an inference that an accused caused the death of another when the body is not found are not the same as would justify an inference that the act of the accused caused the death of the deceased whose body is found. To rely on cases of absences of the *corpus delicti* for a general principle that medical evidence can be dispensed with without, distinction as to the circumstances is clearly erroneous and misconceived. Any reliance on such cases for the determination of this appeal cannot be right as the circumstances are far apart. (p.3333 B/3335A)

Murder - Proof - Injury

4. It is not unknown that an apparently healthy person may collapse and die. Where death follows injury inflicted on the deceased and the fact of the

injury is relied on without medical evidence as circumstantial evidence of cause of death, the injury suffered must be so well described and be of such a nature, from such description, that the injury itself must speak clearly and unmistakably for itself taken together with the surrounding circumstances to amount to prima facie proof of cause of death.

The truth of the matter, it appears to me, is that reliance by the prosecution of the medical report (exhibits 2 and 3), which the trial Judge had described as worthless, accounted for the absence of any other evidence as to the nature of injury suffered by the deceased or evidence from which the essential inference can be drawn. Absence of such evidence leads to mere suspicion that the act of the appellant may have caused the death of the deceased. It is now trite that suspicion, however strong, will not amount to proof. (p. 3336 A)

D

Criminal procedure - Homicide - Conviction

5. Our criminal justice system loses its essential requirement of proof by evidence beyond reasonable doubt if persons accused of crime are convicted on mere suspicion or on mere speculation, however intelligent that may be, notwithstanding the inadequacy of evidence. Whatever the reason for the inadequacy of evidence or absence of essential evidence may be is immaterial to the duty of the court not to convict an accused of an offence not proved by evidence.

In my view the trial court, on the evidence before it, should have found that the cause of death had not been proved and, consequently, he should have held that the charge of homicide had not been established. (p. 3336 H)

Conviction for lesser offence

G

6. Although the appellant had been wrongly convicted of homicide, it is evident that the evidence disclosed a lesser offence for which he should have been convicted. On the facts as found by the trial court, I hold that the appellant committed the offence of voluntarily causing hurt by dangerous means contrary to section 248(1) of the Penal Code and should have been convicted of that offence. (p. 3337 D)

H

NOTABLE POINTS OF INTEREST

IGUH JSC (DISSENTING)

1. Cause of death is clear without medical evidence

Where a person uses such a murderous and lethal weapon such as a gun to shoot another on the head and that person dies within only a few hours thereafter, in the present case in under 72 hours of being shot, the court is entitled to draw the inference that the deceased had died from the gun shot. See Igbo v. The State (1975) 9-11 S.C. 129. I think having regard to the entire evidence adduced in this case by the prosecution and accepted by both courts below, the circumstances surrounding the cause or manner of death of the deceased seem to me clear and did not strictly require medical evidence in proof thereof. (p. 3353 D)

2. Proof beyond reasonable doubt - What it means

D

In this regard the point ought to be made that although the burden of proof on the prosecution in criminal cases is to establish its case beyond “reasonable doubt”, it must be recognized, all the same, that not all doubts are reasonable and “reasonable doubt” necessarily excuse unreasonable or speculative doubt or a doubt that is not borne out by the particular circumstances of a given case. It is equally now firmly established that proof beyond reasonable doubt means no more than what it says and needs not attain the degree of absolute certainty although it must attain a high degree of probability. That is what proof beyond reasonable doubt is all about in our criminal jurisprudence. (p. 3353 H)

3. Law lacks protection - If it admits fanciful possibilities

G

Perhaps I ought to restate that the law would be failing to protect the community if, without cause, it admitted plausible, speculative and fanciful possibilities, a procedure which is clearly capable of deflecting the course of justice. I think that in the present case, the evidence led against the appellant seems to me so strong and overwhelming in respect of the appellant of death of the deceased that only a remote possibility is left in his favour which in the words of Denning, J. can be dismissed with the sentence “of course it is

possible, but not in the

least probable” (p. 3355 F)

B 4. Failure to describe injury is not fatal

All I need say in this regard is that in as much as the description of the injuries sustained by the deceased in homicide cases may be desirable, it cannot be submitted with any degree of seriousness that failure to give such evidence

C is fatal to all the cases for the prosecution so long as it is established that the deceased was unlawfully killed by the accused and that it was the act the accused that caused his death. Where for instance, all accused unlawfully and intentionally attacks another person by kicking unlawfully and intentionally attacks another person by kicking him violent on the groin and the victim slumps and instantly dies or shortly afterwards, a case of homicide may still be established notwithstanding the fact that no visible or open wound or injury was caused to such a victim and that no apparent external wound or injury on him was noticeable or described to the court, (p. 3356 A)

E

5. Homicide - Cause of death is to be viewed legally

At all events, what is of paramount importance for decision in homicide cases is whether from the legal point of view the death of the deceased was caused by the injuries or wound he sustained through the act of the accused and not whether from the medical point of view the death of the deceased was caused by such injuries. See Archibong Effanga v. The State (1969) N.S.C.C. 321. (1969) 1 All N.L.R. 339. (p. 3356 H)

G REPRESENTATION

Chief A. A. Aribisala with him Miss T. E. Asuquo for the Appellant. A. N. Awulu (D.P.P. Kogi State) for the Respondent.

H CASES REFERRED TO

Ogundipe v. Queen (1954) 14 WACA 465 Ogundiyan

v. State (1991) 3 NWLR (pt. 181) 519 Babuga v. State

(1996) 7 NWLR (pt. 460) 279

Azu v. The State (1993) 6 NWLR (pt. 299) 303

Lori v. The State (1980) 8-11 SC 81

B

Bakuri v. The State (1965) NWLR 163, 164

Akpunya v. The State (1976) 11 SC 269, 278

Adamu v. Kano v. The State (1968) NMLR 227

Ayinde v. The State (1972) 3 S.C. 160

C

The State v. Edobor (1975) 9-11 SC. 69

Essien v. The State (1984) 3 S.C. 14

STATUTE REFERRED TO

D

Penal Code ss. 221, 220, 240, 248 (1)

LEAD JUDGMENT BY AYoola JSC

The appellant, Sule Ahmed (Alias Eza) was on 1st August 1997 convicted by Ajanah, J. sitting at the Okene Division of the High Court of Kogi State of the offence of Culpable Homicide punishable with death under section 221 of the Penal Code. He was sentenced to death by hanging. His appeal to the Court of Appeal from his conviction was dismissed by that court on 26th October, 1999. He has now appealed to this court from the decision of the Court of Appeal.

The charge against the appellant was that on or about 31st day of March 1996 at Idogido Area, Okene, in Okene Local Government Area he committed culpable homicide punishable with death in that he caused the death of Momoh Jimoh Isiaka by “firing a gun at his head with the intention of causing his death”. By section 220 of the Penal Code the offence of culpable homicide is committed where a person causes death.

“(a) by doing an act with the intention of causing death or such bodily injury as is likely to cause death; or

(b) by doing an act with the knowledge that he is likely by such act to cause death; or

(c) by doing a rash or negligent act,”

Where a person is charged with an offence of culpable homicide the

sequence of inquiry is whether the person alleged to be killed is dead; the cause of his death and whether any act of the accused person as described in section 220 (a) - (c) is the cause of death. This was not exactly the sequence adopted by the trial judge who proceeded on the footing that *“the sequence of the ingredients of the offence was:*

1. *That the death of a human being has occurred*
2. *That the accused Person caused the death of that human being*
3. *That the accused intentionally caused the said death or had reason*

to know that death will be the likely and not the Probable consequence of the act.”

In a charge of culpable homicide if the cause of death has not been proved it is futile and illogical to proceed to consider whether it was the accused who caused the death. The primary enquiry into the cause of death of a person is an enquiry into the biological cause of death. The question at that stage is what caused the death and not who. When what caused the death has been ascertained the question who caused the death is one of causal connection between the act of the accused and the biological cause of death.

In this case the facts as found by the trial Judge and confirmed by the Court of Appeal are clearly stated in the leading judgment of the court below, delivered by Musdapher, JCA as follows:-

“On the 31st day of March, 1996, the “Ebe” Festival was held at Okene town. The Festival involved two rival masquerades of Avokuta and Arijenu. The festivities ended at 7.30 am on that day. Both masquerades enjoyed rival supporters. At the termination of the Festival, the supporters of Avokuta masquerade were escorting them out of the Venue at Idogida quarters, when the Arijenu rival supporters pursued them and attacked them, with guns. The appellant was identified by the prosecution witnesses as the one who was leading the attackers and was seen when he shot the deceased on the head. The deceased was later taken to the hospital where he died three days later. Out of the six prosecution witnesses five of them claimed to have seen the appellant firing his gun at and hitting the deceased on his head.”

The appellant, as rightly noted in the said leading judgment, denied

shooting the deceased and claimed that he left the venue of the festival earlier and took a different route to his compound.

The Court of Appeal showed no difficulty in confirming the finding of fact made by the trial Judge that the deceased was dead.

In the leading judgment of the court Musdapher, JCA in relation to the death of Jimoh Isiaka said:

“.... there is abundant evidence that Momoh Jimoh Isiaka, was shot in the head with a gun. He fell down and was taken to the hospital where he died. From the evidence, there is no dispute whatsoever that the deceased a human being is dead.”

As to whether the act of the appellant caused his death he said:

“There is no dispute, that Momoh Jimoh Isiaka died. The people who knew him saw him fall after he was hit on the head by a gun shot fired by the appellant. He was taken to the hospital and died three days later. The graphic account given by PW 2, 3, 4, 5 and 6 conclusively in my view gives no other room other than that it was the act of the appellant that caused the death of the deceased. It is also beyond any dispute that any person who shot a person on the head with a gun intends to kill him.”

The evidence produced by the prosecution to prove the death of the deceased and the cause of death were the reports which the Judge rejected in these words:

“The learned counsel to the accused has therefore in my view, rightly joined issues on whether Momoh Jimoh Isiaka or any person for that matter died. This doubt was further compounded by the failure of the prosecution to call as a witness the doctor who treated the deceased up to the time of his death or the one who examined his corpse after his death. The need to call a doctor seems to be warranted by the material discrepancies between the medical report on the corpse of the deceased Exhibit 3 and the evidence of the witness PW1 who produced the report and the other discrepancies pertaining to date and identification as pointed out. Because of the issue of uncertainty about the occurrence of the information contained in Exhibits 2 & 3 and its (sic) authenticity, I agree with the learned counsel to the accused that the said exhibits cannot be relied upon to establish the death of a

human being. Therefore I disregard the two documents.” (emphasis

mine)

The main question in this appeal is whether after rejecting the medical report of the autopsy on the deceased and by not calling medical evidence of the cause of death the conclusion that the act of the appellant caused the death of the deceased can be sustained. It was argued in the court below, as well as on this appeal, by counsel for the appellant that since the deceased was in the hospital for three days after the alleged shooting, a medical doctor should have been called to give direct evidence of the cause of death. It was argued that with the rejection of the medical reports, Exhibits 2 and 3, which was the mainstay of the prosecution's case, the case collapsed.

For the respondent it was argued that while proof of death is usually established by medical evidence, where the cause of death is obvious medical evidence of the same is no longer necessary. Counsel for the respondent illustrated this proposition by a situation in which a person is attacked with a lethal weapon and dies immediately or soon thereafter. He placed reliance on the cases of Azu v. The State (1993) 6 NWLR (Pt. 299) 303; Lori v. State (1980) 8 - 11 SC 81 and Bakuri v. The State (1965) NMLR 163,164.

In directing himself on this aspect of the appeal in the court below Musdapher, JCA, was of the opinion that medical evidence, though desirable to prove the cause of death in homicide cases, is not a sine qua non as death may be proved or established by sufficient satisfactory and conclusive evidence showing beyond reasonable doubt that the death in question resulted from the particular act of the accused. He went on to say:

"So where the circumstances of the attack on the deceased are clear, the injuries inflicted upon him as a result of the attack are described to lead to no other conclusion than that the deceased died as the result of the attack and the injuries, the court can convict even if there is no medical evidence and even if the body of the deceased is not recovered. See Ogundipe v. Queen (1954) 14 WACA 465; Ogundiyan v. State (1991) 3 NWLR (Pt 181)

519; Babuga v. State (1996) 7 NWLR (Pt. 460) 279."

Cause of death is always a fact in issue in a case of homi-

cide and that fact in issue may be proved by direct evidence or by circumstantial evidence. Contrasted with circumstantial evidence, direct evidence is evidence of fact in issue. When it is testimonial evidence it is evidence of the witness who claims personal knowledge of the fact he testifies about. Circumstantial evidence on the other hand is evidence of relevant fact from which the existence or non-existence of facts in issue may be inferred.

In relation to cause of death medical evidence is direct evidence of the cause of death, a fact in issue, when given, by the doctor who carried out the autopsy or by a doctor who treated the deceased. There may be other direct evidence such, as for instance, that of a witness who saw a deceased person beheaded by another. Circumstantial evidence of cause of death may be relied on where direct evidence is absent. It is in such situation that cause of death may be proved other than by medical evidence. There is now no peradventure about it but that where medical evidence is not available cause of death can be proved by circumstantial evidence. A clear statement of the law was recently made in the case of Azu v. State (supra) where at page 313 Ogundare, JSC, delivering the leading judgment of this court said:

"Be that as it may, however, it is now well settled that as much as medical evidence is desirable to prove the cause of death in homicide cases, it is not a sine qua non. It has been laid down in a long line of cases that cause of death can be established by sufficient evidence, other than medical evidence, showing beyond reasonable doubt that death resulted from the particular act of the accused. See Akpuenya v. The State (1976) 11 SC 269,278. In Lori v. The State (1980) 8 -11 SC 81 at 97, Nnamani, J.S.C. observed as follows:-

'It is conceded that medical evidence is not always essential. Where the victim in circumstances in which there is abundant evidence of the manner of death medical evidence can be dispensed with. See Adamu Kumo v. The State (1968) NMLR 227; and Tonara Bakuri v. The State (1965) NMLR 163.'

In Adamu v. Kano Native Authority (1956) 1 FSC 25; (1956) SCNLR 65 the Federal Supreme Court held that the court could infer cause of death from the circumstances surrounding the death where there is lack of medical evidence. See also Ayinde v. The State (1972)

3 SC 153; Edim v. The State (1972) 4 SC 160; and The State v. Edobor (1975) 9 - 11 SC 69. In all these three cases, the body was not even found but this court held in each one that the fact of death was provable by circumstantial evidence. See also Essien v. The State (1984) 3 SC 14, 18 Where Bello, JSC (as he then was) observed:-

B *"It is trite law that although medical evidence as to the cause of death is desirable, it is not essential in all cases of homicide. Where medical evidence is not available as to the cause of death, the court may infer the cause of death upon circumstantial evidence adduced before it."*

C It is easier to state the principles than to apply them and therein lies the critical issue in this appeal. Circumstantial evidence is proof of fact by inference from facts proved. In Udedibia & Ors. v. The State (1976) 11 SC 133 at 138-139 this court observed that: -

D *"Where ... direct testimony of eye-witnesses is not available, the court is permitted to infer from the facts proved, the existence of other fact that may be logically inferred."*

In Lori & Anor v. The State (1980) 8-11 SC 81 at 86 (1980) 12 NSCC 269, 272 this court aid, per Nnamani, JSC:-

E *"But the circumstantial evidence sufficient to support a conviction in a criminal trial especially murder, must be cogent, complete and unequivocal. It must be compelling and must lead to the irresistible conclusion that the prisoner and no one else is the murderer. The fact must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."*

In that case Nnamani, J.S.C., at p. 273, cited the opinion of Idigbe, J.S.C who, quoting with approval a passage from Emperorv. Browning 39 1.C 323, had stated:

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

reasoning as this is unsound for experience shows that crimes are often committed by persons unknown who have succeeded in wholly covering their tracks."

It is easy to fall into error of merely citing and relying on cases in which the accused has been found guilty of murder, notwithstanding the absence of medical evidence, without adequate regard to the circumstances of each case. Often circumstances are not alike. In almost all the cases in which medical evidence has been dispensed with there has been evidence of the nature of the injury or wound inflicted on the deceased by the accused. In quite a number of such cases death of the deceased had been instantaneous or had occurred shortly after the attack. In Adamu v. Kano Native Authority (1956) SCNLR 65; (1956) 1 FSC 25 there was evidence that the deceased was stabbed in the stomach and back with a knife. In that case there was oath sworn according to Islamic Law that "the stab Kato inflicted on their brother was the cause of his death." That oath was held sufficient to prove cause of death in Islamic Law.

In Bakuri v. The State (1965) NMLR 163 the deceased man was stabbed in the abdomen with a knife and he died on the spot. This court held that *"in case of this nature where a man was attacked with a lethal weapon and died all the spot it is hardly necessary to prove the cause of death; it can properly be inferred that the wound inflicted caused the death."*

In Enwenonye & Ors v. The Queen(1955) 1 FSC 1, the fact as contained in the head-note were as follows:-

"The three appellants were convicted for murder. There was no conclusive identification of the body of the deceased, but it was proved that the first and second appellants attacked the deceased and his brother, and that after the deceased was shot by

the first appellant and his brother by the second appellant both fell into a river, and the first and second appellants retrieved their bodies and took them ashore into the bush. The deceased has never been seen or heard of since. A body which could not be identified was exhumed some time later in the bush. It was found buried with another body identified as that of his brother. The trial Judge found both appellants guilty of murder and held on the evidence that it had been established

that the deceased had been killed by the first appellant actively aided by the second appellant.”

Confirming the conviction, the West African Court of Appeal was of the view that evidence in the case amounted to “direct evidence of the killing.”

In *Azu v. The State* (supra) the deceased who was attacked and hit on the head by the appellant with a kitchen stool slumped exclaiming that the appellant had killed him. He was rushed to the hospital but died on the way.

In the case of *Idirisu v. The State* (1968) NMLR 88 the fact that the deceased died on the spot consequent on being hit on the head with a pestle by the accused was held to be sufficient proof of cause of death even medical evidence was ignored. Similarly, in *Homman v. The State* (1967) NMLR 23 the deceased struck on the head by the appellant had died on the spot. There were eye witnesses who testified that they saw the appellant bludgeoned the deceased to death with an axe which he carried and the deceased died on the spot. In these circumstances the court rejected the contention that the conviction of the appellant of murder should be quashed for lack of proof of cause of death. In the recent case of *Alarape v. The State* (2001) 5 NWLR (Pt.705) 79, (2001) 2 SC 114 recently decided by the court, as recounted in the leading judgment of this court, delivered by Iguh, JSC, it was “not in dispute that the deceased died on the spot at the scene of crime as a result of gun shot injuries he sustained.” (Emphasis mine)

I have endeavoured by citation of these cases to show the circumstances in which proof of cause of death by medical evidence was dispensed with. **The circumstances that may justify all inference that an accused caused the death of another when the body is not found are not the same as would justify an inference that the act of the accused caused the death of the deceased whose body is found. To rely on cases of absence of the corpus delicti for a general principle that medical evidence can be dispensed with without, distinction as to the circumstances is clearly erroneous and misconceived. Any reliance on such cases for the determination of this appeal cannot be right as the circumstances are far apart.**

In the present case the evidence accepted by the trial Judge was to the effect that the appellant shot the deceased on the head and that the latter screamed that the appellant had shot him and fell on the ground. However, he did not die on the spot, but died about two or three days later. There was no description of the injury, if any, suffered by the deceased when he was shot or of the condition in which he was when taken to the hospital. The witnesses who could have testified to these facts were the persons who took the deceased to the hospital; or, the hospital officials who admitted him for treatment; or, the doctor who treated him on admission. None of the latter two gave evidence. Notwithstanding the absence of this vital evidence and without advertent to the inadequacy of the evidence given, the trial Judge used words such as “injuries” and “violent injuries” about which there was no evidence. The Court of Appeal came nearer a correct statement of the proper approach when Musdapher, JCA, delivering the leading judgment of that court, said:

“So where the circumstances of the attack on the deceased are clear, the injuries inflicted upon him as a result of the attack are described to lead to no other conclusion than that the deceased died as the result of the attack and the injuries, the court can convict even if there is no medical evidence and even if the body of the deceased is not recovered.”

(Emphasis mine)

The conclusion by the court below that the cause of death of the deceased “was crystal clear” is flawed in that that court did not apply the principle it had itself stated, in that there was no description of the injuries inflicted on the deceased, nor was there evidence from which it could be inferred as a matter of certainty, rather than suspicion, that the deceased died as a result of injuries. **It is not unknown that an apparently healthy person may collapse and die. Where death follows injury inflicted on the deceased and the fact of the injury is relied on without medical evidence as circumstantial evidence of cause of death, the injury suffered must be so well described and be of such a nature, from such description, that the injury itself must speak clearly and unmistakably for itself taken together with the surrounding circumstances to amount to prima facie proof of cause of death.**

The truth of the matter, it appears to me, is that reliance by the prosecution on the medical reports (Exhibits 2 and 3), which the trial Judge had described as worthless, accounted for the absence of any other evidence as to the nature of injury suffered by the deceased or evidence from which the essential inference can be drawn. Absence of such evidence leads to mere suspicion that the act of the appellant may have caused the death of the deceased. It is now trite that suspicion, however strong, will not amount to proof. In Onyenakeya v. The State (1964) 1NMLR 34, this court cited with approval the case of R. v. Oledinma 6 WACA 202 where it was held that:

“..... to establish a charge of murder or manslaughter it must be proved not merely that the act of the accused person could have caused the death of the deceased, but that it did.”

and went further to add:

“The fact that the defence did not suggest that death arose from other causes is no confirmation of evidence which falls short of showing that death did arise as a result of the appellant’s act. The onus to establish this is not on the defence, it is on the prosecution.”

The principle of these two cases applies to the present case. **Our criminal justice system loses its essential requirement of proof by evidence beyond reasonable doubt if persons accused of crime are convicted on mere suspicion or on mere speculation, however intelligent that may be, notwithstanding the inadequacy of evidence. Whatever the reason for the inadequacy of evidence or absence of essential evidence may be is immaterial to the duty of the court not to convict an accused of an offence not proved by evidence.**

In my view the trial court, on the evidence before it, should have found that the cause of death had not been proved and consequently, he should have held that the charge of homicide had not been established. However, it is clear that there were concurrent findings of the trial court and the court below which show that the appellant did shoot and hit the deceased. There is no merit in the contention advanced by counsel for the appellant on this appeal in regard to alleged contradictions in the prosecution case and in regard to the defence of alibi set up by the appellant and rightly rejected by the trial

Judge.

Although the appellant had been wrongly convicted of homicide, it is evident that the evidence disclosed a lesser offence for which he should have been convicted. There is no doubt that the appellant had caused hurt which in section 240 of the Penal Code is defined as “bodily pain, disease or infirmity.” The evidence is insufficient to find that the hurt was grievous hurt in terms of section 241 of the Penal Code, there being no description of the injury caused by the appellant’s act. However, there is section 248(1) of the Penal Code which provides as follows:

“Whoever, except in the case provided for by section 244, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting or any instrument, which used as a weapon of offence is likely to cause death, or by means of fire or any heated substance or by means of electricity or by means of any corrosive or explosive substance or by the administration of any poisonous or deleterious substance or by means of any animal, shall be punished with imprisonment for a term which may extend to three years or with fine or with both.”

On the facts as found by the trial court, I hold that the appellant committed the offence of voluntarily causing hurt by dangerous means contrary to section 248(1) of the Penal Code and should have been convicted of that offence.

For the reasons I have stated the appeal of the appellant is allowed. The judgment of the Court of Appeal is set aside. The conviction of the appellant by the trial Judge of homicide is quashed. The appellant is found guilty of the offence of causing hurt by dangerous means contrary to section 248(1) of the Penal Code and he is convicted accordingly and sentenced to a term of 3 years imprisonment with effect from the date of his conviction by the trial High Court, that is to say, 1st August, 1997.

WALI JSC

I have had the privilege of reading in advance a copy of the lead judgment of my learned brother Ayoola JSC and I entirely agree with

his reasoning and conclusion for allowing the appeal on the conviction of murder under section 221 of the Penal Code substituting it with a conviction for a lesser offence under s. 248(1) of the same Code and imposing a sentence of a term of 3 years imprisonment.

B Having nothing more useful to add I adopt the reasoning conclusion in the lead judgment as mine. I hereby allow the appeal, set aside the conviction and sentence under section 221 (a) of the Penal Code and in place thereof! substitute it with a conviction for a lesser offence under section 248(1) of the same Code and a sentence of 3 C years imprisonment. The sentence shall run from the date of conviction by the trial court.

KUTIGI JSC

D I read in advance the judgment just delivered by my learned brother Ayoola, J.S.C. I agree with him that there is merit in the appeal. The evidence clearly shows that the deceased allegedly shot by the appellant, died three days later in the hospital. The doctor and or E nurses who treated him in the hospital were never called to testify. The so called Medical Reports (Exhibits 2 & 3) were rightly rejected by the learned trial Judge. The doctor who performed the post mortem examination on the deceased was again not called. None of the prosecution witnesses who witnessed the shooting described the nature F of any injury or wound suffered by the deceased as a result of the shooting. None of them could even say on which part of the head he was shot! These omissions are all fatal to the case of the prosecution. In these circumstances I am firmly of the view that one cannot safely come to the conclusion that the deceased died as a result of any gun G shot wounds or injuries. And the benefit of that doubt must go to the appellant. It is settled law that in a charge of murder or manslaughter it is not enough to show that the act of the accused person could have caused the death of the deceased. The prosecution has the onus to prove that it did in fact cause the death, and if the evidence does not prove H that he did, then the failure of the defence to suggest some other cause does not confirm the case for the prosecution (see Frank Onyenankyea v. The State (1964) All NLR 151; R. v. Oledinma 6 WACA 202). The

cause of death of the deceased was therefore not proved in this case. Consequently, the offence of culpable homicide was not proved. Both the trial High Court and the Court of Appeal were therefore wrong when they found otherwise. I hereby set aside their convictions and sentences on the appellant. The appellant is discharged and acquitted B of the charge against him.

The evidence before the trial court however clearly established that the appellant could have been properly convicted by the trial court of the lesser offence of voluntarily causing hurt by shooting contrary to section 248(1) of the Penal Code in exercise of the powers conferred C upon the trial court under section 218(2) of the Criminal Procedure Code even though he was not charged with it. The appellant is therefore found guilty of voluntarily causing hurt by shooting contrary to section 248(1) of the Penal Code. He is convicted and hereby sentenced to three (3) years imprisonment with effect from 1st August 1997 the date D of his conviction for culpable homicide (now set aside) by the High Court.

IGUH JSC (DISSENTING)

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother Ayoola, J.S.C. but deeply regret that after a F most careful consideration of the facts of the case as found by the trial court and affirmed by the Court of Appeal, I find myself, if I may say with the greatest respect, unable to subscribe to the conclusion herein reached.

G The appellant, Sule Ahmed (Alias Eza), was on the 13th day of January, 1997 arraigned before the High Court of Justice of Kogi State, holden at Okene, charged with the offence of Culpable Homicide punishable with death. He was charged with causing the death of one Momoh Jimoh Isiaka by firing a gun at the head of the said Momoh H Jimoh Isiaka with the intention to cause his death punishable under section 221 of the Penal Code. The particulars of the offence charged are as follows:

'That you, SULE AHMED (Alias Eza) on or about 31st day of March,

1996 at Idogido Area Okene, in Okene Local Government Area within the Kogi State Judicial Division did commit culpable homicide punishable with death in that you caused the death of Momoh Jimoh Isiaka by doing an act to wit: firing a gun at his head with the intention of causing his death and you thereby committed an offence punishable under section 221(a) of the Penal Code”.

The appellant pleaded not guilty to the charge and the prosecution called a total of six witnesses at the trial. The appellant also testified in his own defence and called two witnesses. He denied shooting the deceased and set up the defence of alibi.

The substance of the case as presented by the prosecution and accepted by the trial court is clear and straight forward. This is that on the 31st day of March, 1996, the “Ebe” masquerade festival was held at Okene town. This festival which involved two rival masquerades known as Avokuta and Arijenu ended at between 7.00a.m and 7.30 a.m. of the said 31st March, 1996. Thereafter, the supporters of Avokuta Masquerade were escorting it out of the carnival arena at Idogido quarters when the Arijenu supporters who were armed with guns pursued and attacked them. In the process, the appellant who led the Arijenu supporters took an aim at the deceased, the late Momoh Jimoh Isiaka and shot him with his gun. The gunshot hit the deceased. It hit him right on his head. The appellant shot the deceased from a distance of about 12 metres. The deceased immediately screamed that the appellant had shot him and instantly slumped and fell on the ground. The colleagues of the deceased rushed to his aid and rushed him to the hospital where he died on the third day of his admission. PW2, Abdul rahman Ohiani, who along with several other witnesses saw the attack, knew both the appellant and the deceased before the date of the incident. The case was reported to the Police on the same day that the deceased was shot by the appellant. PW6, Sadiku Ahmed Onumoh, identified the dead body of the deceased to the Doctor at his post mortem examination.

I should, perhaps, state that of the six witnesses who testified for the prosecution against the appellant five were eye witnesses to the event that occurred at the scene of crime on the date of the incident. These are PW2, PW3, PW4, PW5 and PW6 and whose testimony the trial court unequivocally accepted as true. Said he: -

“I find the PW2, PW3, PW4, PW5 and PW6 from their com-

portment when giving evidence, the veracity of their evidence and the consistency of their story to be credible witnesses and I believe them.”

The sixth witness was PW1, an Inspector of Police to whom the case was referred on the 3rd April, 1996 for investigation. This witness tendered the post mortem reports on the cause of death of the deceased, Exhibits 2 and 3. The prosecution inter alia relied on these medical reports in proof of the deceased’s cause of death. As a result, they failed to call the medical doctor who treated the deceased at the hospital on admission and/or performed the post mortem examination on his body after he gave up the ghost to testify at the B trial. However, because of what the learned trial Judge described as discrepancies pertaining to the dates on the medical reports and the consequent uncertainty surrounding their authenticity, he was prepared to and did discountenance both medical reports. But he went on:

“However, there are other facts from the evidence before the court from which inference could be drawn that the death of a human being had occurred. Since these facts could be ascertained independently of the medical report, I do not consider the failure of the prosecution to lead evidence directly on the point to be fatal. While the general rule as earlier espoused is that proof of death of a person is usually established by a medical examination, this rule is not sacrosanct and there are exceptions. This exception is said to occur where a person is attacked brutally in the process of which he sustained injuries and dies either immediately or shortly afterwards”,

The learned trial Judge next examined the evidence of PW2, PW3, PW4, PW5 and PW6 on the issue most meticulously and concluded as follows:

“The other prosecution witnesses also gave evidence to the same effect as the PW4. PW6 in addition to the above said he identified the body of Momoh Jimoh Isiaka to the doctor that examined him. Against this background, I find cogent and compelling evidence of the PW2, PW3, PW4, PW5 and PW6 that Momoh Jimoh Isiaka, the subject of the charge of Culpable Homicide, died at the General Hospital on the third day after he was shot on the head. It has been held that where a person dies from the violent injuries inflicted by another within a short interval from the time of the injuries, it can properly be inferred that the death was caused by the injuries.”

On the defence of alibi raised by the appellant, the learned trial Judge fully considered the matter and dismissed the same holding as follows:-

"I do not believe the evidence of the accused on his defence of alibi and I am inclined to agree with the prosecution that the said defence was an afterthought. I believe the evidence of the PW2, PW3, PW4, PW5 and PW6 who established firmly that the accused was at Idogido, the scene of the incidence on the 31st March, 1996 and that he fired his gun at the deceased. These are eye-witnesses who saw the accused at the scene of incidence leading others to attack the supporters of the other Masquerade. I am therefore satisfied that there is enough evidence before me in proof of the second ingredient of the offence beyond reasonable doubt i.e. that the accused caused the death of the deceased."

He concluded:-

"I hereby hold that the prosecution has discharged the onus of proof placed on her in an offence of this nature. The prosecution has proved that the accused has committed the offence of Culpable Homicide punishable with death under section 221 of the Penal Code. Accordingly I find the accused guilty as charged and I therefore hereby convict him of the offence of Culpable Homicide punishable with death under section 221 of the Penal Code."

Dissatisfied with this decision of the trial court, the appellant lodged an appeal against his conviction and sentence to the Court of Appeal, Abuja Division. The Court of Appeal in a unanimous judgment dismissed the appeal of the appellant and affirmed the conviction and sentence passed on him on the 26th day of October, 1999 by the trial court. It is against this decision of the Court of Appeal that the appellant has now appealed to this court.

Both the appellant and, the respondent filed and exchanged their written briefs of argument. Each submitted three issues for the determination of this court. These three issues are substantially the same but are better framed in the respondent's brief of argument as follows:

(i) Whether any material contradictions existed in the testimonies of the prosecution witnesses to fault the decision of the trial court as affirmed by the court below;

(ii) Whether the court below was right in upholding the finding of the trial court that the defence of ALIBI put up by the appellant was

not established;

(iii) Whether the Court of Appeal was right by holding that the prosecution proved its case against the appellant beyond reasonable doubt.

It was argued by Chief A. Aribisala, learned counsel for the appellant under issue I that there were material contradictions in the testimonies of the prosecution witnesses at the trial and that these vitiated the conviction and sentence passed on the appellant. For the respondent, it was submitted by Mr. A. N. Awulu learned Director of Public Prosecution, Kogi State, that there were no discrepancies whatsoever in the evidence of the prosecution witnesses and that the appellant was merely picking bones where none existed in the testimony of the prosecution witnesses. He contended that the crux of the appellant's argument revolved on the position the said appellant was at the time he fired the deadly shot that killed the deceased. He stressed that the

position the appellant was is immaterial in these proceedings so long as it is proved that he was the person who took an aim at and shot the deceased in his head.

There can be no doubt that it is not in all cases where there are discrepancies or contradictions in the case of the prosecution that an accused person will be entitled to an acquittal. It is only when such discrepancies or contradictions are on a material point or points in the prosecution's case that they create some doubt in its case that the accused is entitled to benefit therefrom. See *Okonji v. The State* (1987) 1 NWLR (pt. 52) 659, *The State v. Aibangbee* (1988) 3 NWLR (Pt. 84) 548; *Onubogu v. The State* (1974) 9 S.C. 1. Where the contradictions in the evidence of the prosecution raise no doubt as to the guilt of the accused, the only duty of the learned trial Judge is to observe and comment on them as such. See *Inyere Akpuenya v. The State* (1976) 11 S.C. 269 at 276; *Sunday Emiator v. The State* (1975) 9-11 S.C. 107 at 111.

Both the trial court and the court below carefully considered all the evidence led on behalf of the prosecution against the appellant in the present case and held that the alleged contradictions were entirely immaterial and in no way amounted to any disparagement of the witnesses for the prosecution or any of them. The trial court after

adverting its mind to the alleged contradictions as submitted on behalf of the appellant concluded:

"I therefore do not find any material contradiction when one witness says the accused ran into their midst and the other says the accused ran after them. The most material and consistent evidence is that the accused was seen by all these witnesses running at them and that he fired a shot at the deceased. I find the PW2, PW3, PW4, PW5 and PW6 from their comportsment when giving evidence, the veracity of their evidence and the consistency of their story to be credible witnesses and I believe them. The alleged contradictions pointed out by the defence counsel are not material to the facts in the charge against the accused person."

In the same vein, the Court of Appeal gave due consideration to the issue of the alleged contradictions and commented:

"In considering conflict in the testimony of witnesses in criminal proceedings, it is not the minor discrepancies as to detail but material conflicts that affect the proof of the facts that are crucial. See Bozin v. The State (1985) 2 NWLR (Part 8) 465, Kalu v. The State (1988) 4 NWLR. (Part 90) 503. The conflict must raise reasonable doubts as to existence of the state of affairs. All the five witnesses in the present case are one in that the appellant in company of others pursued the deceased and others with guns and indeed they all saw when the appellant fired his gun at the deceased on his head. They heard him shout and fall down. See Ibeh vs. The State (1997) 1 NWLR (Pt.484) 632. In my view the contradictions in the testimony of the prosecution witnesses are not material and they do not affect or cause any miscarriage of justice. The discrepancies do not amount to any disparagement of the witnesses: In the case at hand, the learned trial judge had carefully adverted his mind to these conflicts and came to the right conclusion that they were of no importance."

I have myself given a most careful consideration to the submissions of learned counsel on the same point and cannot fault the view of the learned trial Judge as affirmed by the Court of Appeal on this issue of contradictions. Issue 1, is accordingly resolved against the appellant.

Turning to issue 2, I have earlier on in this judgment set out the decision of the learned trial Judge on the alibi raised by the appellant at

the trial. In the opinion of the trial court, the defence of alibi could not avail the appellant as he was positively fixed at the scene of crime by all five prosecution witnesses who were eye witnesses to the incident.

It is long settled that where the prosecution adduces sufficient and accepted evidence to fix the accused at the scene of crime at all times material to the commission of a crime, any alibi raised by him is thereby physically and logically demolished. See Michael Hausa v. The State (1994) 6 NWLR (Pt.350) 281 S.C.; Njovens v. The State (1973) 5 S.C. 17, Peter v. The State (1997) 3 NWLR (Pt. 496) 625, Ntam v. The State (1968) NMLR 86. In the present case, there was overwhelming evidence accepted by the trial court and affirmed by the court below which fixed the appellant at the scene of crime at all material times. In this regard, the Court of Appeal observed:

"The learned trial Judge considered the plea of alibi raised by the appellant even though after his trial commenced and preferred the evidence of the prosecution witnesses who placed the appellant squarely at the crime scene. See Peter vs. The State (1997) 3 NWLR. (Pt. 496) 625. The learned trial Judge, as mentioned before, had carefully looked into the evidence before him and came to the conclusion that the prosecution had demolished the plea of alibi, when he accepted the evidence of the prosecution witnesses rather than that of the appellant. I have myself examined the evidence and I have come to the same conclusion that the defence of alibi set up by the appellant was an afterthought. I accordingly reject the complaint under this issue."

I think both courts below are entirely right in their decision on the appellant's plea of alibi and issue 2 must accordingly be resolved against the appellant.

Issue 3 poses the question whether the Court of Appeal was right by holding that the prosecution proved its case against the appellant beyond reasonable doubt. The main contention of the appellant in this regard is that the prosecution failed to establish by medical evidence that the appellant caused the death of the deceased. The respondent, for its own part, submitted that the general rule that the proof or cause of death of a person in homicide cases is usually established by medical evidence is not without exception. He described it as trite law that where the cause of death is obvious, medical evidence of the same may no longer be necessary. He argued that this situation will

arise where, for instance, a person is attacked with a lethal weapon and he dies immediately or soon thereafter. In such situation, medical evidence will be superfluous.

I have earlier on in this judgment set out the facts of this case as found by the learned trial Judge and no useful purpose will be served by my recounting them all over again. I need only add that the entire findings of fact of the learned trial Judge were carefully examined by the Court of Appeal which, in no mistaken terms, did not hesitate to affirm them. Said the court below per the leading judgment of Musdapher, J.C.A. with which Bulkachuwa and Oduyemi JJ.C.A. concurred:

“The evidence accepted by the learned trial judge is that the prosecution witnesses saw when the appellant aimed his gun, fired and hit the deceased Momoh Jimoh Isiaka on the head. He shouted and fell on the ground. He was taken to the hospital by some people including some of the witnesses. He died at the hospital three days after the shooting and his body was retrieved from the hospital and was buried. The learned trial judge having believed the evidence of these five witnesses, the cause of death and the death of Momoh Jimoh Isiaka in these circumstances were crystal clear in his mind that it will be idle to seek for any medical evidence to establish that the death of Momoh resulted from the direct shooting on his head by the appellant.”

It went on:- *“.....I am of the opinion that despite the lack of the medical evidence as to the death and cause of death of the deceased, there are other independent credible evidence from which the learned trial judge could infer the death and the cause of the death of deceased.”*

On the question of the death of the deceased, the Court of Appeal stated:-

“.....there is abundant evidence that Momoh Jimoh Isiaka, was shot on the head with a gun. He fell down and was taken to the hospital where he died. From the evidence, there is no dispute whatever that the deceased, a human being is dead.”

The court went on:-

“There is no dispute that Momoh Jimoh Isiaka died. The people who knew him, saw him fall after he was hit on the head by a gun shot fired by the appellant. He was taken to the hospital and died three days later. The graphic account given by P’W’s 2,3,4,5 and 6 conclusively, in my view, gives no other room other than that it was the act of the appellant that caused the death of the deceased. It is also beyond any

dispute that a person who shot a Person on the head with a gun intends to kill him.”

I think I ought to point out that the vital question in this appeal, as rightly alluded to in the leading judgment of my learned brother, Ayoola, J.S.C. is whether or not after rejecting the autopsy reports on the deceased, Exhibits 2 and 3, the conclusion that the act of the appel

lant from the rest of the evidence before the court caused the death of the said deceased can be sustained. In other words, was the cause of death of the deceased by other evidence other than the medical reports, Exhibits 2 and 3, established beyond reasonable doubt in the proceedings? That is the cardinal question, the answer to which, regrettably and with the utmost respect, I have found myself in the unenviable position of parting ways with my learned brethren. My considered view, having regard to the totality of the evidence before the court, is that there is abundant accepted evidence from which both courts below arrived at the irresistible conclusion that it was the act of the appellant that caused the death of the deceased.

I think I ought to start by stating that it is well settled that much as medical evidence is desirable to prove the cause of death in homicide cases, it is not a sine qua non and death can be established by sufficient satisfactory evidence, other than medical evidence, showing beyond reasonable doubt that such death resulted from the particular act of the accused person alleged by the prosecution. Where, therefore, medical evidence as to the cause of death is either not produced or is not available, the court may infer such cause of death upon the circumstantial evidence adduced before it provided that the circumstantial evidence is positively and irresistibly consistent with no other natural conclusion than that the deceased is dead and that his death was caused by the act of the accused person. See *Azu v. The State* (1993) 6 NWLR (Part 299) 303, *Ayinde v. The State* (1972) 3 S.C. 147, 153, *Essien v. The State* (1984) 3 S. C. 14 at 18, *Adamu Kumo v The State* (1968) N.M.L.R. 227, *Adekunle v. The State* (1989) 5 NWLR (Pt. 123) 505, *Adamu v. Kano Native Authority* (1956) 1 FS.C. 25; (1956) SCNLR 65, *R. v. Mortimer* (1936) 25 Cr.App. Rep. 150, C.C.A., *Noor Mohammed A v. R* (1949) A.C. 182 P.C. etc.

So in *Lori v. The State* (1980) 8 - 11 S.C. 81 at 97, this court

per Nnamani, J.S.C. expressed the position as follows:

"It is conceded that medical evidence is not always essential. Where the victim dies in circumstances in which there is abundant evidence of the manner of death, medical evidence can be dispensed with."

Similarly, in *Essien v. The State* (1984) 3 S.C. 14 at 18, Bello, J.S.C., as he then was, delivering the judgment of this court explained this principle of law in the following terms:

"It is trite law that although medical evidence as to the cause of death is desirable, it is not essential in all cases of homicide. Where medical evidence is not available as to the cause of death, the court may infer the cause of death upon circumstantial evidence adduced before it."

In a charge of homicide, therefore, the cause of death of the deceased must be established, admittedly beyond reasonable doubt, and the onus lies on the prosecution to discharge this burden of proof. See *R. v. Samuel Abengowe* (1936) 3 WACA 85, *R. v. William Oledinma* (1940) 6 WACA 202. It must also be established that it was the act of the accused person that caused such death of the deceased. See *Frank Onyenankya v. The State* (1964) N.M.L.R. 34, *Sunday Ononuju v. The State* (1976) 5 S.C. 1, *Philip Omogodo v. The State* (1981) 5 S.C. 5. Where, however, the deceased died in circumstances which leave no doubt as to the cause or manner of death, medical evidence can be dispensed with. See *Tonara Bakuri v. The State* (1965) NMLR 163; *Adamu Kumo v. The State* (1968) NMLR 227.

So, in cases where a man was attacked with a lethal weapon and he died on the spot or shortly afterwards, it is hardly necessary to prove the cause of death since it can properly be inferred that the wound inflicted thereby caused the death. See *Edet Ukut v. The State* (1995) 9 NWLR (Pt.420) 392, *Tonara Bakuri v. The State* (1965) NMLR 163. I think it is now convenient to examine more closely the evidence of the eye witnesses to the incident with a view to determining whether, as found by both courts below, the prosecution was able establish the cause of the death of the deceased. I will start with the evidence of P.W.2, AbdulRahman Ohiani.

PW2 in his evidence testified thus: -

"I know the accused person. I know one Momoh Jimoh Isiaka. The said Momoh Jimoh Isiaka is dead. The said Momoh Jimoh Isiaka was shot with gun and died of gunshot wound. I know the person who shot and killed him. The accused before the court was the one that shot Momoh Jimoh Isiaka to death." (Italics supplied for emphasis)

A little later in his evidence, PM. 2 stated as follows:

"On our way going a lot of people ran to us. The people that ran to us are the members of Arijenu. Arijenu is the name of another masquerade at Idoji. When I looked back to see those that were coming I saw the accused person and some other people. The accused person was leading the others and they were all holding guns. The accused person shot his gun. When he shot his gun it hit Momoh Jimoh Isiaka. The shot hit the said Momoh Jimoh Isiaka on the head. When the Accused shot Momoh Jimoh on the head the said Momoh Jimoh screamed that the accused had shot him and fell to the ground. When he fell down I started running. I was hearing gun shots. After sometime when they had left the place I went to the Police Station and reported the case to the Police. After Momoh Jimoh was shot he was taken to the hospital by some other people and he died after three days."

The accused person was in front of all the other people coming at us and he was the one that fired his gun that hit Momoh Jimoh Isiaka before he fell down. When I reported the case to the Police I was given some policemen to go and arrest the accused person." (Italics supplied for emphasis)

It is noteworthy that this witness was never cross-examined on his testimony that the deceased died of the gun shot wounds he received from the appellant...

There was next PW. 3, Ahovi Salami. He testified thus:-

I know the accused before the court. I also know one Momoh Jimoh Isiaka. The said Momoh Jimoh Isiaka is dead. The Accused person before the court killed him. "

He went on:

"It was the accused that shot Momoh Jimoh. After we ran away and the accused person and his followers were waging their war, we came back and met that the deceased had been shot in the head. He was conveyed to the hospital. He spent three days in the hospital and

he died.” (Italics supplied for emphasis)

There was next the evidence of PW4, Mallam Raji Ohere as follows:

“I know the Accused person. I know one Momoh Jimoh Isiaka. The said Momoh Jimoh Isiaka is dead. The accused killed the said Momoh Jimoh Isiaka with a gun.

On 31-3-96 at about 7.30 a.m. I was at Idogido Quarters, Okene. I know one Ohiani AbduIRahman (PW2). I also know one Ahovi salami (PW3). The two persons mentioned above were also at Odogido on the 31st March, 1996 at 7.30 a.m.

On 31st March, 1996 at 7.30 a.m. after our masquerade had finished performing and we were escorting the masquerade home when the accused ran into our midst and shot a gun at Momoh Jimoh Isiaka and all of us started running away and the rest of the people with the accused started shooting. The accused shot his gun at Momoh Jimoh shead and the said Momoh Jimoh fell down. All of us started running away. After the people had all gone, we took Momoh Jimoh Isiaka and went to the hospital. The said Momoh Jimoh died on the third day after he was shot. The accused person had already shot his gun at Momoh Jimoh before all of us started running. It was after we started running that we were hearing other gun shots.”

(Italics supplied for emphasis)XFR

He went on:-

“Momoh Jimoh Isiaka died the third day after he was shot. When Momoh Jimoh was shot he did not die on the spot it was the third day after he got to the hospital that he died. “ (Italics supplied)

In the same vein, P.W 5, Mallam Yahaya Lawal testified thus:-

“I know the accused person before the court. I also know one Momoh Jimoh Isiaka. The said Momoh Jimoh Isiaka is dead. He was killed by the accused, Eza, who shot him with a gun. I know the P.W.2, I also know the PW3, and the PW4. On the 31st March, 1996 at 7.30 a.m. I was at Idogido. The PW2, PW3, and PW4 were also at Idogido on the said date and time. At about 7.30 a.m. on that day at Idogido quarter after our Masquerade Avokuta had performed and we were escorting him home on our way going then we heard some commotion and people were running behind us, When I turned round I saw the members of Arijenu masquerade coming and the accused was in front.

He was holding a gun and the other people following him were holding guns and other dangerous weapons. The Accused person was in front and he shot at Momoh Jimoh Isiaka. He shot the said Momoh Jimoh Isiaka on the head. The said Momoh Jimoh shouted and fell down. After the said Momoh Jimoh fell down and I was not with any weapon and was not ready to fight I started running. He (the deceased) was taken to the hospital and he died.” (Italics supplied)

There was lastly the evidence of PW6, Sadiku Ahmed Onumoh.

Said he:-

“I know one Momoh Jimoh Isiaka before his death. The said Momoh Jimoh Isiaka is dead. The deceased was killed by Sule Eza the accused before the court. On 31st March, 1996 after our masquerade called Avokuta had performed we left for home at about 7.30 a.m. On our way along Idogido road then we saw a lot of people coming. The accused was in front of the people coming and he was holding gun with some other people. The Accused person fired his gun and it hit Momoh Jimoh Isiaka. The Accused shot it at Momoh Jimoh Isiaka. He fell down and I ran away. When I ran away after sometime I came back and took Momoh Jimoh to the hospital. When I took him to the hospital he died on the third day. I know the said Momoh Jimoh Isiaka since youth and we have been coming together. When he died I went to the Doctor after the Doctor came to examine him and he saw that he was dead I went to the Police Station to report. I identified the dead body to the Doctor. I have known the Accused person for about six years now.

Cross -Examination xxx:- We were escorting our Masquerade home along Idogido road on the day of the incident. The distance from where the gun was shot to where the deceased was caught by the bullet is 12 metres approximately.” (Italics supplied)

In the face of all the above testimony, there can be no doubt that there is abundant evidence on record in support of the accepted facts of this case as found by the trial court and affirmed by the court below. What are these facts? Briefly, they are again that on the 31st March, 1996 at Idogido Area Okene the appellant intentionally attacked the deceased by taking aim with his gun at the deceased and by shooting him on the head. The appellant shot the deceased from a distance of only 12 metres and the bullet hit the deceased right on his head. The deceased who received gun shot injuries immediately shouted that the

appellant had killed him but instantly slumped and fell on the ground. He was conveyed straight to the hospital by his colleagues where he died on the third day of his admission, that is to say, in under 72 hours of his gun shot head wounds.

The argument of learned counsel for the appellant is that the deceased did not die on the spot but three days later after he was shot on the head. It was therefore his submission that the cause of death of the deceased could not be said to have been proved beyond reasonable doubt in the absence of medical evidence having regard to the interval of time after the shooting. With the greatest respect to learned counsel, I am unable to accept this submission as well founded having regard to the particular circumstances of the case. In my view, and I agree with the court below on the point, where a person uses such a murderous and lethal weapon such as a gun to shoot another on the head and that person dies within only a few hours thereafter, in the present case in under 72 hours of being shot, the court is entitled to draw the inference that the deceased had died from the gun shot. See Igbo v. The State (1975) 9 - 11 S.C. 129. I think having regard to the entire evidence adduced in this case by the prosecution and accepted by both courts below, the circumstances surrounding the cause or manner of death of the deceased seem to me clear and did not strictly require medical evidence in proof thereof. In my view medical evidence was not of any practical or legal importance in the circumstances of the case. The cause of the death of the deceased seems to me obvious despite the fact that he did not die on the spot after he was shot in the head and both courts below were right in inferring from a totality of the evidence before the court that it was the said gunshot injuries on the head of the deceased that was the cause of his death.

In this regard the point ought to be made that although the burden of proof on the prosecution in criminal cases is to establish its case beyond "reasonable doubt", it must be recognised, all the same, that not all doubts are reasonable and "reasonable doubt" necessarily excludes unreasonable or speculative doubt or a doubt that is not borne out by the particular circumstances of a given case. See Mufutau Bakare v. The State (1987) 1 NWLR (pt.52) 579, (1987) 3 S.C. 1 at 33 or (1987) 1 N.S.C.C. 267 at 272, Umeh v. The State (1995) 9 NWLR (Pt.420) 392, (1973) 2 S.C. 9 at 12 -13. It is equally now firmly estab-

lished that proof beyond reasonable doubt means no more than what it says and needs not attain the degree of absolute certainty although it must attain a high degree of probability. That is what proof beyond reasonable doubt is all about in our criminal jurisprudence.

So in Miller v. Minister of Pensions (1947) 2 All E.R. 372 Denning, J., as he then was, succinctly explained the meaning of proof beyond reasonable doubt required in criminal cases before an accused Person is found guilty as follows:-

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice."

The above observation of Denning, J has received the approval of this court in Mufutau Bakare v. The State (1987) 1 NWLR (Pt.52) 579, (1987) N.S.C.C. 267 at 272 where Oputa, J.S.C. in a similar vein put the matter as follows:

"Proof beyond reasonable doubt stems out of a compelling presumption of innocence inherent in our adversary system of criminal justice. To displace this presumption, the evidence of the prosecution must prove beyond reasonable doubt, not beyond the shadow of any doubt, that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure including the administration of criminal justice. Proof beyond reasonable doubt means just what it says. It does not admit of plausible and fanciful possibilities but it does admit of a high degree of cogency, consistent" with an equally high degree of probability.....'

In the present case, the appellant intentionally, brutally and for no justifiable cause took an aim at the deceased and shot him on the head with a lethal weapon, to wit, a gun. The deceased, on being shot screamed, slumped and instantly fell on the ground. He was rushed to

the hospital where he died in under 72 hours of admission. His body was retrieved from the hospital and was duly buried. And it is submitted to us that despite the above glaring facts, the deceased's death was still not established beyond reasonable doubt. With profound respect, I find myself unable to subscribe to this submission. To do so in all the particular circumstances of this tragedy will, in my view, tantamount to requiring proof of the deceased's death beyond the shadow of any doubt on the part of the prosecution in the present case. It will tantamount to insisting that the prosecution must prove the cause of death of the deceased with "absolute certainty" and this is not the requirement of our criminal law.

It was again submitted to us that it is not unknown that an apparently healthy person can possibly collapse suddenly and die. However, such an uncommon phenomenon has neither been suggested by either of the parties in this case nor does such occurrence fit unto the plain facts of the present case. Speaking for myself and with the greatest respect to learned counsel, the case of sudden death alluded to seems to fit into the "plausible and fanciful possibilities" referred to in the *Miller v. Minister of Pensions and Mufutau Bakare v. The State* cases (supra) when such speculation is absolutely unwarranted and not justified from the hard facts of a given case. Perhaps I ought to re-state that the law would be failing to protect the community if, without cause, it admitted plausible, speculative and fanciful possibilities, a procedure which is clearly capable of deflecting the course of justice. I think that in the present case, the evidence led against the appellant seems to me so strong and overwhelming in respect of the cause of death of the deceased that only a remote possibility is left in his favour which in the words of Denning, J. can be dismissed with the sentence "of course it is possible, but not in the least probable". On the facts of this case, I find it proved with a high degree of probability and cogency that it was the gun shot on the head of the deceased by the appellant on

the 31st July, 1976 that was the cause of his death.

There is next the contention that there was no description of the injury, if any, suffered by the deceased after he was shot by

the appellant. All I need say in this regard is that in as much as the description of the injuries sustained by the deceased in homicide cases may be desirable, it cannot be submitted with any degree of seriousness that failure to give such evidence is fatal to all the cases for the prosecution so long as it is established that the deceased was unlawfully killed by the accused and that it was the act of the accused that caused his death. Where for instance, an accused unlawfully and intentionally attacks another person by kicking him violently on the groin and the victim slumps and instantly dies or shortly afterwards, a case of homicide may still be established notwithstanding the fact that no visible or open wound or injury was caused to such a victim and that no apparent external wound or injury on him was noticeable or described to the court.

In the present case, however, it is not in dispute that the appellant shot the deceased in the head at all material time. It is also in evidence that the deceased was hit and was actually wounded as a result of this gunshot attack and that he died following the said gun shot wound. On this point PW.2 testified in clear terms as follows:

"I know one Momoh Jimoh Isiaka. The said Momoh Jimoh Isiaka is dead. The said Momoh Jimoh Isiaka was shot with a gun and he died of gun shot wound.....The accused before the court was the one that shot Momoh Jimoh Isiaka to death"

As I stated earlier on in this judgment this witness was not cross-examined on this vital point. No issue was therefore joined on the same. Under such circumstance, I find it difficult to accept that the absence of medical evidence is any matter of great moment, having regard to all the circumstances of the case.

At all events, what is of paramount importance for decision in homicide cases is whether from the legal point of view the death of the deceased was caused by the injuries or wound he sustained through the act of the accused and not whether from the medical point of view the death of the deceased was caused by such injuries. See *Archibong*

Effanga v. The State (1969) 1 All N.L.R. 339, *R. v. Smith* (1959) 2 All ER 193 at 198. In my view, there exists in the present case overwhelming circumstantial evidence of the cause of the death of the deceased

Momoh Jimoh Isiaka. Where strong circumstantial evidence, as in the present case, is led against an accused in a criminal trial and this gives rise to the drawing of a presumption or inference irresistibly warranted by such evidence, the criminal court will not hesitate to draw such a presumption or inference so long as it is so cogent and compelling as to convince a jury that on no rational hypothesis other than the inference can the facts be accounted for. See *Esai and Others v. The State* (1976) 11 S.C. 39, *Peter Eze v. The State* (1976) 1 S.C. 125. In my view, both courts below, from the particular facts of the present case were right by drawing the irresistible presumption or inference that the accused died as a result of the gun shot wound he received from the appellant to his head at all material time and place. Issue 3 is accordingly resolved against the appellant.

The offence of culpable homicide punishable with death under section 220 of the Penal Code is committed where a person causes the death of another by doing an act with the intention of causing his death or such bodily injury as is likely to cause death or by doing an act knowing that he is likely by such act to cause death or by doing a rash or negligent act. In the present case, it is not in dispute that Momoh Jimoh Isiaka is dead. It is equally clear that the cause of his death is the injuries he received from the appellant who on the 31st day of March, 1996, shot him in the head from a distance of only about 12 metres whereupon the deceased instantly slumped and fell on the ground, was immediately rushed to the hospital for treatment but died in under 72 hours of his admission. It is also beyond dispute that the appellant's act of firing his gun at the head of the deceased was a rash and negligent act. It was also intentional and for the purpose of causing the death of the deceased or such bodily injury as is likely to cause death and with the knowledge that he was likely by such act to cause his death.

Where an accused intentionally and deliberately takes an aim at another person and shoots him and that person, as in the present case dies, the necessary inference is that he intended to kill him and the onus will shift to the person that fired the shot to explain that he merely wanted to disable the deceased and no more. See *Daniel Adeoye v. The State* (1997) 4 NWLR (Part 499) 307. No such explanation was suggested in the defence of the appellant in this case and I am

satisfied that the appellant in the present case was rightly convicted and sentenced as required by law for the offence of culpable homicide punishable with death under section 221 of the Penal Code.

It is for the above reasons that I find myself, with deep respect, unable to subscribe to the leading judgment of my learned brother just delivered.

If the decision in this appeal were to rest with me, I can see no option open to me than to dismiss the same. Consequently, this appeal fails and the same is hereby dismissed by me. The conviction and death sentence passed on the appellant by the trial court as affirmed by the Court of Appeal are hereby further confirmed.

Appeal allowed.

Appearances

Chief A.A. Aribisala (with him, T.E. Asuquo (Miss» - for the Appellant For the Appellants

A.N. Awulu, Director of Public Prosecutions, Kogi State - for the Respondent For the Respondents

o

B

C

D

E

KATSINA-ALU JSC

I have read in advance the judgment of my learned brother Ayoola, JSC. I agree that there is no merit in this appeal. For the reasons he gives I too, would allow the appeal and quash the conviction of the appellant by the trial Judge of culpable homicide punishable with death. The appellant is however found guilty of the offence of causing hurt by dangerous means contrary to section 248(1) of the Penal Code and he is convicted accordingly and sentenced to a term of 3 years imprisonment.

G

H