

SUPREME COURT OF NIGERIA
FRIDAY 7TH JUNE, 2002. SC. 327/2001
CORAM:- A. B. WALI, M. E. OGUNDARE,
E. O. OGWUEGBU, S. U. ONU, U. A. KALGO, JJSC

1. BENSON OBIAKOR
2. NGOZIKA OBIAKOR APPELLANTS
V.
THE STATE RESPONDENT

APPEALS - Fresh issue - Need for leave - Leave is required to file and argue fresh issues in Supreme Court - Save issue of jurisdiction - Which can be raised with or without leave - Even for the first time (H1)

APPEALS - Fresh issue - Leave - Since Criminal Code s.34 does not affect jurisdiction of court - The issue raised by appellant is a new one - Which requires leave of court (H2)

CONVICTION - Conspiracy - Sustainability - Conviction for conspiracy charge does not fail - Merely because conviction on substantive charge had failed (H3)

CRIMINAL PROCEDURE - Crime - Suspicion - Effect - Suspicion however strong it may be - Cannot constitute a crime or ground a conviction (H4)

MURDER - Conspiracy - Proof - There was no evidence of surrounding circumstances - From which appellants can irresistibly be linked - With conspiracy to murder the deceased (H5)

FACTS

The deceased - Kingsley Ilesanmi and his mother - Mrs. Henrietta Ilesanmi were visitors to PW2 who was a tenant of 1st and 2nd appellants in Asaba-Delta State. On that fateful day, 7 year old daughter (Kelechi) of appellants took the deceased out for a play within the compound. Thereafter, a daughter of PW2 brought a rubber shoe worn by the deceased as at when the said Kelechi took him

out for play. Thereupon, a search party was organized for the deceased. Kelechi could not give satisfactory details about the whereabouts of the deceased. Appellants were uncooperative towards the search of the deceased.

However, the body of the deceased was later discovered from water well in the neighbourhood. An autopsy was conducted on the body which disclosed that the deceased died of acute respiratory failure as a result of suffocation. Appellants were subsequently arrested by the police and were charged to the High Court of Delta State, Asaba for murder and conspiracy to murder the deceased. In its judgment, the learned trial judge found appellants guilty of conspiracy and not guilty of murder. They were thus sentenced to 7 years imprisonment for conspiracy. Being aggrieved, appellants filed appeal at the Court of Appeal Benin City. The court dismissed the appeal and affirmed the conviction passed by the trial court. Dissatisfied, appellants appealed to Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the court of appeal was right in affirming the conviction and sentence of the 1st and 2nd appellants (husband and wife) of a Christian marriage for conspiracy to murder committed by themselves alone contrary to Section 34 of the Criminal Code. Laws of Bendel State 1976 Cap, 48 (applicable to Delta State of Nigeria)

2. Whether the court of appeal was right in affirming the conviction of the 1st appellant for conspiracy of murder when the prosecution failed to prove beyond reasonable doubt the substantive count of murder.

3. Whether having regard to the evidence the prosecution proved its case beyond reasonable doubt against the 1st appellant.

HELD (Unanimously allowing the appeal per lead judgment of **KALGO JSC**)

APPEALS - Fresh issue - Need for leave

1. Without necessarily citing any authority for now, the general principle is that when a party seeks to file and argue in this court any fresh issue not canvassed in the lower courts, whether that issue pertains to law or otherwise, leave to file

and argue the issue must be heard and obtained first. But where the point or issue sought to be raised pertains to issue of jurisdiction, the point or issue can properly be filed and argued with or without the leave of the court even if it is being raised for the first time. (p. 1888 C)

APPEALS - Fresh issue - Leave

2. It is my view that it is now a fresh issue which requires leave of this court to file and argue. Also I do not agree with the learned counsel for the 1st appellant that Section 34 of the Criminal Code affects the jurisdiction of the trial court or the Court of Appeal to entertain the case. Section 34 of the Criminal Code merely provides that “a husband and wife of a Christian marriage are not criminally responsible for conspiracy between themselves alone”. This provision, in my respectful view, only gives a defence to a Christian couple charged and tried for conspiracy between the two of them only. This is based on the common law presumption that a husband and wife are one, each being part of the other and since conspiracy requires the agreement of at least two persons to commit an offence such husband and wife cannot commit the offence. It is therefore not a question affecting the jurisdiction of the courts as such but creates a complete defence to the Christian husband and wife. Therefore as jurisdiction is not involved, to raise it as a fresh point as done as in this case, leave is necessary. (p. 1888 F)

CONVICTION - Conspiracy - Sustainability

3. I also agree with the submission of the learned counsel for the respondent in the brief that a conviction of conspiracy charge does not fail merely because the conviction on the substantive charge had failed. (p. 1890 D)

Crime - Suspicion - Effect

4. There is no doubt in my mind therefore that the above findings of the learned trial judge and supported by the Court of Appeal were based on mere suspicion, speculation and conjecture. And it is well settled that suspicion however strong

cannot constitute a crime or ground a conviction. (p. 1893 F)

MURDER - Conspiracy - Proof

- 5. There was no direct evidence in this case as there were no eyewitnesses. It is also my respectful view that the sum total**
 B **of the evidence of the prosecution at the trial did not prove**
any evidence of circumstances according to law, from which
the offence of conspiracy or indeed any criminal offence, can
 C **be inferred. There was no evidence of surrounding circum-**
stances in this case from which the appellants can irresistibly
be linked with the commission of the offence of conspiracy to
murder Ilesanmi. (p. 1893 G)

REPRESENTATION

- D I. E. Imadegbelo Esq., with J. O. Bamidele Esq., for the 1st Appellant
 O. M. Sagay Esq., with D.E. Ogunkeye Esq., for the 2nd Appellant
 N. D. F. Momah Esq., Assistant Chief Legal Officer, Ministry of Jus-
 tice, Delta State, for the Respondent

E **CASES REFERRED TO**

- Udza Uor v. Paul Loko (1985) 5 SCNJ 16
 Francis Durwode v. The State (2000) 15 NWLR (Pt. 691) 467
 Ogunsola v. Nikon (1996) 1 NWLR (Pt. 423) 126
 Agbachom v. The State (1970) 1 All NLR 69
 F Miller v. Minister of Pensions (1947) 1 All E.R. 373
 Lori v. The State (1980) 8-11 SC 81
 Babalola v. State (1989) 4 NWLR (Pt. 115) 264
 Bozin v. State (1985) 2 NWLR (Pt. 8) 465
 G Ona v. State (1985) 12 SC 59
 Ariche v. State (1993) 6 NWLR (Pt. 302) 752
 Popoola v. Commissioner of Police (1964) NMLR 1
 R v. Roberts (1913) 9 Cr. AR 189
 Onochie Ors. v. The Republic (1966) NMLR 307
 H Atano v. A.G. Bendel State (1988) 2 NWLR (Pt. 75) 201
 Amadi v. The State (1993) 8 NWLR (Pt. 644) 677

STATUTE REFERRED TO

Criminal Code Laws of Bendel State 1976 Cap. 48 s. 34, s. 516

RULES REFERRED TO

Supreme Court Rule 1985 O. 6 r. 5(1)

LEAD JUDGMENT BY KALGO JSC

The appellants were jointly charged with the offences of conspiracy and murder before the High Court, Asaba, Delta State. The particulars of the offences read:-

"i. Benson Obiakor and Ngozika Obiakor on the 9th of August, 1997, at Asaba in the Asaba Judicial Division conspired with each other to murder one Kingsley Ilesanmi contrary to Section 516 of the Criminal Code Cap. 48 Vol. II Laws of defunct Bendel State of Nigeria 1975 as applicable to Delta State.

ii. Benson Obiakor and Ngozika Obiakor, on the 9th of August, 1997, at Asaba in the Asaba Judicial Division murdered one Kingsley Ilesanmi contrary to Section 319 of the Criminal Code Cap. 48 Vol. 11 Laws of defunct Bendel State of Nigeria 1975 as applicable to Delta State."

The appellants pleaded not guilty to the two charges separately when read and explained to them. The prosecution called 7 witnesses to prove their case. The appellants testified in their defence but called no witnesses. Counsel for both sides addressed the court and in a considered judgment, the learned trial judge Umukoro J. found the appellants guilty of conspiracy and not guilty of murder. He passed a sentence of 7 years imprisonment to each of the appellants for conspiracy and discharged and acquitted them of the offence of murder.

Both appellants appealed to the Court of Appeal against this decision but the Court of Appeal after hearing the appeal found no merit in it. It dismissed the appeal and affirmed the decision of the trial court. The appellants further appealed to this court.

Written briefs were filed and exchanged between the parties. In the 1st appellant's brief, the following issues were formulated for the determination of this court:-

"1. Whether the court of appeal was right in affirming the conviction and sentence of the 1st and 2nd appellants (husband and wife) of a Christian marriage for conspiracy to murder committed by themselves alone contrary to Section 34 of the Criminal Code, Laws

of Bendel State 1976, Cap. 48, (applicable to Delta State of Nigeria)

2. *Whether the Court of Appeal was right in affirming the conviction of the 1st appellant for conspiracy to murder when the prosecution failed to prove beyond reasonable doubt the substantive count of murder.*

B 3. *Whether having regard to the evidence the prosecution proved its case beyond reasonable doubt against the 1st appellant."*

For the 2nd appellant, two issues were raised and they read:-

C "1. *Whether the prosecution proved its case beyond reasonable doubt against the 2nd appellant to warrant the Court of Appeal to uphold the conviction of the 2nd appellant.*

2. *Whether from the evidence before the court, and all the circumstances, a case of conspiracy was proved by the prosecution against the 2nd appellant."*

D And the respondent in its brief set out 3 issues to wit:-

I. Whether ground 1 of the 1st appellant's ground of appeal was competent.

II. Assuming but not conceding that the 1st appellant can raise the fresh issue, whether Section 34 of the Criminal Code Cap. 48

E Vol. II Laws of defunct Bendel State of Nigeria 1976 applicable to Delta State avails the 1st and 2nd appellants.

III. Whether the prosecution successfully proved its case beyond reasonable doubt against the 1st and 2nd appellants.

F I have carefully examined the issues formulated by the parties counsel set out above and having regard to the grounds of appeal filed by the 1st and 2nd appellants from which the issues are distilled, I am satisfied that the 1st appellant's issues are more germane for consideration in this appeal. The 2 issues of the 2nd appellant are
G identical to issues (2) and (3) of the 1st appellant.

Before considering the issues, it might be useful to set out briefly the gist of what happened in this case. On the 4th of August 1997, Mrs. Henrietta Ilesanmi together with her son Kingsley Ilesanmi (3 years old boy) came to Asaba on a visit to her elder brother Sylvester
H Okolie (P.W.2) who is a tenant of the 1st appellant at No. 20, Omeogo Street, Asaba. The 1st appellant, his wife and the rest of his family also live in the same compound with his tenants.

On the 9th of August, 1997 after lunch, the daughter of the 1st and 2nd appellants, (who was about 7 years old) called Miss.

Kelechi went and carried Kingsley Ilesanmi on her back and went to play with him within the compound. After sometime the daughter of PW.2, brought the rubber shoes worn by Kingsley Ilesanmi when Kelechi took him out, which was found at the gate of the compound. Mrs. Ilesanmi then started to look for the whereabouts of her young son Kingsley and soon became apprehensive that the young boy was missing. She immediately raised an alarm and was joined in the search by her brother and his wife all over the compound. In course of the search PW.2, asked Kelechi the girl who earlier took Kingsley Ilesanmi out on her back, but Kelechi said that she dropped Kingsley Ilesanmi by the door step of the compound and left him there. Mrs. Ilesanmi tried to get more detail information of Kingsley's whereabouts from Kelechi but Kelechi's mother, the 2nd appellant refused to cooperate.

The matter was then reported to the police when all efforts to trace the missing child proved abortive. While police investigation was going on, some soldiers from Government House Asaba were invited to assist in the matter. As a result they came to the compound where the incident happened, maltreated and intimidated the 1st appellant who then directed a search of the well in the neighbourhood for the missing child. The search was immediately carried out and the dead body of Kingsley Ilesanmi was found in the well which was earlier searched.

Post mortem examination was conducted on the body of Kingsley Ilesanmi and the cause of death was found to be due to acute respiratory failure as a result of suffocation. After police investigation the 1st and 2nd appellants were charged to court for murder and conspiracy to murder Kingsley Ilesanmi. I now take issue 1 first.

The learned counsel for the respondent submitted in his brief that the 1st ground of appeal of the 1st appellant from which issue I is distilled is incompetent because, according to him, the substance of issue I was never part of the decision of the trial court or the Court of Appeal. Further more, counsel argued, even if it is regarded as a fresh issue, then leave to file or argue it must have been obtained before it was filed. This was not done. He relied on Order 6 Rule 5 (1) of the Rules of the Supreme Court 1985 as amended and the cases of *Udza Uor v. Paul Loko* (1985) 5 SCNJ 16 at 21' - 23 and *Offlette v. The State* (2000) FW.L.R. (Pt.12) 2081 at 2091.

In his reply brief, and in answer to the objection; learned counsel for the 1st appellant submitted that application of the provisions of Section 34 of the Criminal Code was raised, because, according to him, it ousts the jurisdiction of the trial court and the Court of Appeal to punish the appellants for conspiracy. In other words, he was submitting that the ground and the issue therefrom, touched on the jurisdiction of both the lower courts and it can therefore be raised in this court without any leave. He relied on the case of Francis Durwode v. The State (2000) 15 NWLR (Pt.691) 467 at 479, Ogunsola v. Nicon (1996) 1 NWLR (pt.423) 126 at 136; Obiakoya v. Registry of Companies & Anor (1975) 4 SC 31 at 34 & 35; Resident Electoral Commissioner for Anambra State & Ors v. Chief Donatus Nwocha & Ors (1991) 2 NWLR (pt. 176) 732 at 744 & 745.

Without necessarily citing any authority for now, the general principle is that when a party seeks to file and argue in this court any fresh issue not canvassed in the lower courts, whether that issue pertains to law or otherwise, leave to file and argue the issue must be heard and obtained first. But where the point or issue sought to be raised pertains to issue of jurisdiction, the point or issue can properly be filed and argued with or without the leave of the court even if it is being raised for the first time.

In the instant case, the question whether the 1st and 2nd appellants were husband and wife could have been raised even in the trial court, but since it was not raised at that court and the Court of Appeal, and did not form part of the decisions of the courts below. ***It is my view that it is now a fresh issue which requires leave of this court to file and argue. Also I do not agree with the learned counsel for the 1st appellant that Section 34 of the Criminal Code affects the jurisdiction of the trial court or the Court of Appeal to entertain the case. Section 34 of the Criminal Code merely provides that “a husband and wife of a Christian marriage are not criminally responsible for conspiracy between themselves alone”. This provision, in my respectful view, only gives a defence to a Christian couple charged and tried for conspiracy between the two of them only. This is based on the common law presumption that a husband and wife are one, each being part of the other, and since conspiracy requires***

the agreement of at least two persons to commit an offence such husband and wife cannot commit the offence. It is therefore not a question affecting the jurisdiction of the courts as such but creates a complete defence to the Christian husband and wife. Therefore as jurisdiction is not involved, to raise it as a fresh point as done as in this case, leave is necessary. See B
Uor's case (supra) and order 6 Rule 5 (1) of Supreme Court Rules 1985 as amended.

In this case there is nothing on the record to show that the required leave was obtained by the appellant before ground of appeal 1 was filed in this court. I therefore sustain the objection of the learned counsel for the respondent on ground 1 of appeal and issue 1, and I accordingly strike out ground of appeal I, and the issue 1 raised therefrom. C

I now come to issues 2 and 3 of the 1st appellant. These are D identical in substance to the two issues of the 2nd appellant. I therefore intend to take them together as they affect each appellant according to the evidence. The issues are challenging the conviction of the appellants for conspiracy to murder on the ground that the prosecution have failed to prove its case beyond reasonable doubt. E

It is common ground that in all criminal prosecution, it is the duty of the prosecution to prove its case beyond reasonable doubt. It is not essential to prove the case with absolute certainty but the ingredients of the offence charged must be proved as required by law and to the satisfaction of the court. See *Agbachom v. The State* (1970) 1 F All NLR 69 at 76; *Miller v. Minister of Pensions* (1947) 2 All E.R. 373; *Okpolor v. The State* (1990) 7 NWLR (pt. 164) 581 at 593.

The learned counsel for the 1st appellant submitted in his brief that the conviction of the 1st appellant for conspiracy cannot stand G when he has been discharged and acquitted for the offence of murder because, according to him, the 1st appellant cannot conspire to do what he had been discharged and acquitted of. He cited many decided case in support of his proposition such as *R. v. Cooper & Compton* (1947) 2 AER 701 at 705; *Ikem v. The State* (1985) 1 H NWLR (pt. 2) 378 at 388; *Abioye v. The State* (1987) 2 NWLR (pt. 58) 645 at 653; *Arinze v. The State* (1990) 6 NWLR (pt. 155) 158; *Amadi v. The State* (1993) 8 NWLR (Pt. 644) at 677.

The trial court and the Court of Appeal both dealt with this

point. The trial court found that even though the substantive offence of murder did not succeed against the appellants, they can still be found guilty of the offence of conspiracy once there is evidence to that effect. This is because the ingredients of the offence of murder are different from those of conspiracy. The Court of Appeal agreed with the trial court when it said:-

“...the actual commission of the offence is not necessary to ground a conviction for conspiracy. All that is needed is the meeting of the minds to commit an offence and this meeting of the minds needs not be physical. Once the court arrives at a conclusion that the prosecution has established some community effort on the part of the accused persons aimed at committing a crime, it will be safe to convict them of conspiracy. Conspiracy is a matter of inference from certain acts of the parties.”

I entirely agree with the definition ascribed to conspiracy given by the Court of Appeal in the text quoted above. ***I also agree with the submission of the learned counsel for the respondent in the brief that a conviction of conspiracy charge does not fail merely because the conviction on the substantive charge had failed.*** See *Atano v. A.G. Bendel State* (1988) 2 NWLR (pt. 75) 201 at 226-7 also cited by the respondent’s counsel.

Conspiracy as an offence is the agreement by two or more persons to do or cause to be done an illegal act or legal act by illegal means. The actual agreement alone constitutes the offence and it is not necessary to prove that the act has in fact been committed. Because of the nature of the offence of conspiracy, it is rarely or seldom proved by direct evidence but by circumstantial evidence and inference from certain proved acts. But where persons are charged with conspiracy and with offence committed in pursuance of it as in the instant case, care must be taken in considering the evidence relevant to conspiracy and keep the several issues clear. See *Onochie Ors v. The Republic* (1966) NMLR 307.

In this case, there is no direct evidence of any witness or any admission or confession of the offence of conspiracy by the appellants. Therefore the evidence against them must of necessity be circumstantial if their conviction is to be sustained. And for circumstantial evidence to ground conviction it must lead to one and only one conclusion i.e. the guilt of the accused. See *Popoola v. Commissioner*

of Police (1964) NMLR 1; R v. Roberts (1913) 9 Cr. A.R. 189; Raphael Ariche v. State (1993) 6 NWLR (pt. 302) 752; Atano's case (supra) at page 225. The facts to be relied upon for conviction must be consistent, cogent and must irresistibly lead to the guilt of the accused. It is also well settled that circumstantial evidence is as good and sometimes better than direct evidence. It is sometimes referred to as the best evidence capable of proving a proposition with the accuracy of mathematics. See Ona v. State (1985) 12 SC. 59 at 64; Lori v. The State (1980) 8-11 SC 81 also cited by learned counsel for respondent.

The totality of the evidence of the prosecution at the trial was aptly summarized in my view, in the respondent's brief to be:-

"1. That on 9/8/97, between 2.00pm and 3.30pm one Kelechi daughter of the appellants, took Kingsley Ilesanmi deceased to play.

ii. That at the time Kelechi came to carry Kingsley Ilesanmi, 1st D appellant was at home as could be seen from the uncontroverted evidence of 1st P.W. and 2nd P.W.

iii. That shortly afterwards, the daughter of the 2nd P.W. came in with the deceased sandals which prompted the search for him.

iv. That at the different times 1st P.W. and 2nd P.W. inquired E from the said kelechi about the deceased, the 2nd appellant prevented them from seeing Kelechi or questioning her.

v. That Kelechi was not sleeping as claimed by the 2nd appellant when 1st P.W. went to the appellants' house to ask for the deceased but Kelechi was watching television. F

vi. That the well in which the corpse of the deceased was later found had earlier been searched but nothing was found.

vii. That the 1st appellant said he went to buy cut-out but could not supply the names and the address of the person he bought it G from.

viii. That based on 1st appellant's suggestion, a well, which had earlier been searched and nothing found in it, was again searched and the corpse of the deceased was discovered in it.

ix. That Kelechi-appellant's daughter told 1st P.W. and 3rd P.W. H that she dropped the deceased Kingsley Ilesanmi by the appellants' door mouth.

x. That the medical evidence ruled out death by drowning but attributed cause of death to be due to acute respiratory failure due to

suffocation.”

All that the evidence revealed was that on the fateful day, Kelechi the daughter of the 1st and 2nd appellants carried the deceased Ilesanmi away from his mother to play outside. When his shoes were brought without him, his mother PW.1, went to 2nd appellant to ask B Kelechi about him. Kelechi was then sitting on a bench watching television but her mother 2nd appellant said she was sleeping. That the 1st appellant went out of the compound and on his return, he found soldiers in the compound who manhandled him and he suggested that a well nearby should be searched for Ilesanmi. A search C was conducted and the dead body of Ilesanmi was recovered. Earlier the same well was searched but nothing was found. Post mortem examination of the body of Ilesanmi revealed that he died as a result of acute respiratory failure due to suffocation. In the course of police D investigations, the 1st appellant was arrested and he made a statement in which he did not confess to having anything to do with the deceased Ilesanmi. He did not confess to any arrangement or agreement with his wife 2nd appellant, Kelechi his daughter who took Ilesanmi out on that day or anybody at all. There was no evidence to E connect him or his wife 2nd appellant with the dead body of Ilesanmi or the cause of death thereof. In fact, evidence revealed that the 2nd appellant was not arrested by the police or any body originally in connection with the allegation. She was also detained because of her safety and she never made any statement to the police in the course F of their investigation. There is no doubt that evidence at the trial has shown that both appellants did not show any interest in the plight of Ilesanmi's mother (PW.1) and made no efforts at all or very little indeed to assist her whilst she was anxiously looking for her late son. G The 2nd appellant was particularly uncooperative and her attitude towards P.W. 1 was disturbing as a mother herself more so as Kelechi her daughter was the one who took away Ilesanmi before he finally disappeared. But notwithstanding all these, there is no iota of evidence to link any of the appellants with the death or cause of death H of young Ilesanmi. Yet the learned trial judge before finding the appellants guilty of conspiracy to murder Ilesanmi said:-

“My opinion on the reaction of the 2nd accused to the enquiries of 1st P.W., 2nd P.W., and 3 P.W. having regard to the unchallenged evidence that Kelechi, a girl of 7-8 years came one, two and

on the third occasion to take Kingsley Ilesanmi alive and later not found alive again creates the compelling impression that a foot was design in which the said Kelechi was being managed as the human agent and Kingsley Ilesanmi the convict with 1st and 2nd accused pressing the remote control.”

The Court of Appeal confirmed this opinion of the learned B trial judge when it said:-

“The conclusion which the learned trial judge reached on this strange behaviour displayed by the Accused/Appellant is that “a foot was a design in which the said Kelechi was being managed as the human agent and Kingsley Ilesanmi the victim, with the 1st and 2nd Accused pressing the remote control”. I cannot but agree with the conclusion”.

With due respect to the Court of Appeal, that is where they have clearly gone wrong. There was no evidence to connect the act D of Kelechi in relation to Ilesanmi with the appellants. Even in the statement she made to the police which was referred to as Exhibit B2 in the trial court, she said nothing about any of the appellants. She was also not called as a witness at the trial, even though she was at the center of the whole controversy. Therefore it could not under E any circumstances be correct to say that “*Kelechi was being managed as the human agent*”; (human agent of who? Certainly not the appellants in this case) with the appellants “*pressing the remote control*”.

There is no doubt in my mind therefore that the above findings of the learned trial judge and supported by the Court of Appeal were based on mere suspicion, speculation and conjecture. And it is well settled that suspicion however strong cannot constitute a crime or ground a conviction. See Babalola F v. State (1989) 4 NWLR (Pt.115) 264; Bozin v. State (1985) 2 NWLR (Pt.8) 465. G

There was no direct evidence in this case as there was no eyewitnesses. It is also my respectful view that the sum total of the evidence of the prosecution at the trial did not prove any evidence of circumstances according to law, from which the offence of conspiracy or indeed any criminal offence, can be inferred. There was no evidence of surrounding circumstances in this case from which the appellants can irre- H

sistibly be linked with the commission of the offence of conspiracy to murder Ilesanmi. I therefore so find and resolved all the issues in favour of the 1st and 2nd appellants.

For all what I have said above, I find that there is merit in this appeal, and I allow it. I set aside decision of the Court of Appeal and
B quash the conviction and sentence passed on the 1st and 2nd appellants. I acquit and discharge them accordingly.

WALI JSC

C I have had the privilege of reading in advance, the lead judgment of my learned brother Kalgo, JSC and entirely agree with his reasoning and conclusion for allowing the appeal.

There is no direct evidence in this case. The only evidence
D available is circumstantial which is neither complete and cogent, nor compelling as to lead to the irresistible conclusion that the appellants committed the offence they were convicted of. See the case of *LORI V. THE STATE* [1980] 8 - 11 SC. 81. The conviction was based on mere suspicion which cannot however strong, sustain the conviction.

E The appeal must therefore succeed. The appellants are acquitted and discharged.

OGUNDARE JSC

F I agree with the reasons given by my learned brother Kalgo JSC in his judgment just delivered that the Appellants be discharged and acquitted, their appeal having succeeded.

G

OGWUEGBU JSC

I agree entirely with the judgment just delivered by my learned brother Kalgo, J.S.C. And for the reasons given by him in the said judgment I also allow the appeals.

H It may well be that the appellants had hands in the unfortunate death of the three year old boy by drowning, motive for the commission of the alleged offence was not even suggested, the law is clear that suspicion no matter how strong cannot displace the heavy duty on the respondent to prove the appellants guilt to the hilt by

admissible evidence. I accordingly discharge and acquit both appellants.

ONU JSC

I had the opportunity of reading in draft before now the judgment of my learned brother Kalgo, JSC just delivered. I am in entire agreement with him that the appeal is meritorious and for the reasons therein stated, I too allow it. Accordingly, I discharge and acquit both appellants.

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