

SUPREME COURT OF NIGERIA
FRIDAY 12TH DECEMBER, 2003. SC. 272/2002
CORAM:- S. M. A. BELGORE, U. A. KALGO,
A. I. KATSINA-ALU, S. O. UWAIFO, D. O. EDOZIE, JJSC

1. ABAINTA OKENDU UBANI
2. CHIJIOKE UBANI APPELLANTS
3. GABRIEL CHIKEZIE
V.
THE STATE RESPONDENT

MURDER - Ingredients - Proof - Prosecution must prove that the deceased died - And that the death was caused by accused - Whose act was intentional (H1)

MURDER - Charge - Onus of proof - The charge may be established via direct or circumstantial evidence - And the onus is on prosecution to prove same beyond reasonable doubt (H2)

MURDER - Proof - Medical evidence - Proof of death by such evidence is not mandatory - As cause of death can be proved by other satisfactory evidence (H3)

EVIDENCE - Inconsistency rule - Where witness makes extrajudicial statement inconsistent with his testimony at trial - Such testimony is to be treated as unreliable (H4)

FACTS

Accused/appellants were arraigned before the High Court of Abia State, Isiala Ngwa on two counts charge to wit - conspiracy and kidnapping contrary to sections 516 (A)(a) and (364)(b) respectively of the Criminal Code Cap 30 Vol. 11 Laws of Eastern Nigeria 1953 applicable in Abia State. Appellants pleaded not guilty to the charge and thereafter prosecution/respondent called five witnesses in proof of the offences. The learned trial Judge pursuant to section 163 of the Criminal Procedure Law, ordered that the charge be amended to read murder contrary to section 319 of the said Criminal Code.

At the trial, respondent's witnesses testified that the deceased

died in consequence of the assault on him by appellants. In their defence, appellants denied any involvement in the murder of the deceased. At the end of trial, the court convicted appellants of the offence and accordingly sentenced each of them to death. Aggrieved, appellants appealed to the Court of Appeal, Port Harcourt Division. The court dismissed the appeals of appellants. Aggrieved further, appellants filed appeal in Supreme Court.

ISSUES FOR DETERMINATION

“Was the charge of murder proved whether by direct or circumstantial evidence”

“Whether the Court of Appeal was right in confirming the conviction of the 3rd appellant for murder on the basis of the evidence led at the trial.”

HELD (Unanimously allowing appeal of 3rd appellant

and dismissing those of 1st & 2nd appellants per **EDOZIE JSC**)

MURDER - Ingredients - Proof

1. From a long line of decided cases, it is settled beyond controversy that to secure a conviction on a charge of murder, the prosecution must prove

(a) that the deceased had died

(b) that the death of the deceased was caused by the accused and

(c) that the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence.

(p. 2932 E)

MURDER - Charge - Onus of proof

2. The evidence relied upon to establish a charge of murder may be direct or circumstantial. Whether the evidence is direct or circumstantial, it must establish the guilt of the accused beyond reasonable doubt. The onus in this connection on the prosecution as a general rule never shifts and a misdirection on the question of onus of proof is fatal unless it can be shown that on a proper direction the result would be the

same. (p. 2932 H)

MURDER - Proof - Medical evidence

3. To establish cause of death, the position of the law is that much as medical evidence is desirable, it is clearly not a sine qua non as cause of death may be established by sufficient, satisfactory and conclusive evidence other than medical evidence showing beyond reasonable doubt that the death in question resulted from the particular act of the accused person.
(p. 2933 C)

EVIDENCE - Inconsistency rule

4. Secondly, the judgments of the two lower courts are attacked on the ground that the evidence of P.W.1 and P.W.2 in court was at variance with the earlier statements they had made to the police, which ought to have made their evidence unreliable. That is the inconsistency rule which is to the effect that where a witness makes an extrajudicial statement which is inconsistent with the testimony at the trial, such testimony is to be treated as unreliable while the statement is not evidence on which the court can act. (p. 2937 G)

REPRESENTATION

E.T.O. Njoku, Esq., for the 1st and 2nd Appellants

H.E. Wabara, Esq. with G.N. Okonkwo, Esq., for the 3rd Appellant

Chief S.U. Akume with him, Nwabueze Nwankwo, Esq., for the Respondent

CASES REFERRED TO

Boy Muka & 2 Ors. v. The State (1976) 9-10 SC 305 at 325

The Queen v. Joshua (1964) 1 All NLR 1

Alor v. The State (1996) 4 NWLR (Pt.445) 726

Uguru v. The State (2002) 9 NWLR (Pt.771) 90

Abogede v. The State (1996) 5 NWLR (Pt.448) 270

The State v. Musa Danjuma (1997) 5 NWLR (Pt.506) 512

Rapheal Ariche v. State (1993) 6 NWLR (Pt.302) 752

Peter Igbo v. The State (1973) 3 SC 87

Oko Agwu Azu v. The State (1993) 6 NWLR (Pt.291) 303

Akpuenya v. The State (1976) 11 SC 269 and 278

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

Edim v. The State (1972) 4 SC 160

Essien v. The State (1984) 3 SC 14

Adekunle v. The State (1989) 5 NWLR (Pt.123) 505

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STATUTES REFERRED TO

Criminal Code Cap 30 Vol. 11 Laws of Eastern Nigeria 1953, ss. 364)(b), 516(A)(a)

Criminal Procedure Law, s. 163

C

Evidence Act, s. 9

LEAD JUDGMENT BY EDOZIE JSC

By an information dated 13th day of September, 1991 the
D three appellants on record were arraigned with three others before
Isaiah Ngwa High Court jointly charged on two counts of offences, to
wit, conspiracy and kidnapping contrary to sections 516 (A)(a) and
(364)(b) respectively of the Criminal Code Cap., 30, Vol. 11, Laws
of Eastern Nigeria, 1953 applicable in Abia State. The particulars of
E the offences alleged that the three appellants and the three others at
large on the 26th of March, 1991 at Amuzu Umurasi in Isiala Ngwa
Judicial Division conspired to commit a felony, to wit, kidnapping
and on the aforesaid date at Umuikeogale Oruokwu imprisoned Allison
F in such a manner as to prevent Felicia Abajua his wife from discover-
ing the place where he was imprisoned. Each accused person pleaded
not guilty to the charge and the thereafter the prosecution called five
witnesses at the conclusion of which the learned trial Judge, Isuama
J, pursuant to section 163 of the Criminal Procedure Law ordered
G that the charge be amended to read murder contrary to section 319
of the said Criminal Code.

The star witnesses for the prosecution who gave eyewitness
accounts of the events that led to the charge against the appellants
were Ugboaku Abajua (P.W.1) and Felicia Abajua (PW2) who were
H the daughter and wife respectively of Allison Abajua hereinafter re-
ferred to as the deceased. Their evidence was to the effect that on
26th March, 1991 at about 6 a.m., one Hilary Chukwuemeka, a
legal practitioner came to the house of the deceased, met him where
he was weaving a mat and threatened that if the deceased did not

vacate his premises, he would see what would happen to him. Apparently, the deceased did not heed the warning. Subsequently, at about 10 a.m. the same day, the six accused persons standing trial including the three appellants in company with others at large who are from Amuzu village and were relations of Hilary Chukwumemeka the legal practitioner and had come to harvest palm fruit near the house of the deceased, pounced on the deceased and asked him if he did not hear what their lawyer told him. They, armed with guns, machete and clubs started beating the deceased until he fell down. He was dragged to the house of one of the accused person at Amuzu. It is the case for the prosecution that the deceased died in consequence of the assault on him by the accused persons with whom he had a land dispute. A report was lodged at the police at Umuoba and on investigation, some arrests were made. On 15/11/91, Inspector Silas Onuoha (P.W.4) took Dr. Chima Nwafor (P.W.3) to Umuorasi in the house of one of the accused persons where from a disused latrine pit a human forearm and a human leg were exhumed. The P.W.3 in his evidence stated that from the specimen provided, the sex of the victim could not be determined but that the extent of the decomposition did suggest that the body of the victim must have been there for about six months. In their defence, the accused persons denied any involvement in the murder of the deceased. They elected not to go into the witness box after the relevant provision of the Criminal Procedure Law was explained to them.

The learned trial Judge after a careful review of the evidence convicted the six accused persons for the offence of murder and accordingly sentenced each to death. Each of three appellants on record lodged an appeal to the Court of Appeal Port Harcourt Division and in its judgment on 12th July, 2001 it dismissed the appeal of the 1st appellant and in another judgment delivered on 30th May 2002 similarly dismissed the appeal of each of the 2nd and 3rd appellants. These are further appeals by each of the three appellants against their convictions and sentences for the offence of murder. Briefs of arguments were filed and exchanged between their counsel and the counsel for the respondent. These were adopted and relied upon by counsel when the appeal was heard. In the brief of argument filed on behalf of the 1st and 2nd appellants on record the issue for determination was formulated thus:

“Was the charge of murder proved whether by direct or circumstantial evidence.”

In the 3rd appellant’s brief the sole issue was couched in the following terms:-

B *“Whether the Court of Appeal was right in confirming the conviction of the 3rd appellant for murder on the basis of the evidence led at the trial.”*

The issue formulated for the respondent is identical with that of the 3rd appellant.

C In the brief of argument filed on behalf of the 1st and 2nd appellants, learned counsel referred to the evidence of the five witnesses called by the prosecution and submitted that as none of the witnesses was treated as a hostile witness, it was not open to the trial Court of Appeal to accept the testimony of one witness and reject D that of another. The court must evaluate the totality of the evidence called by the prosecution in order to determine whether the prosecution had proved its case beyond reasonable doubt. For this proposition, learned counsel called in aid the cases of *Boy Muka & 2 Ors. v. The State* (1976) 9-10 SC 305 at 325; *Onungwa v. The State* (1976) E 2 SC 169.

It was contended that the trial court and the court of Appeal properly evaluated the evidence of all the five witnesses for the prosecution and taken all of them into account particularly the evidence of (PW3) the medical evidence which the court below observed was F of no assistance on the identity of the deceased, reasonable doubts would have risen which would have been resolved in favour of the appellants. Furthermore, learned counsel contended that there were contradictions and discrepancies between the testimonies of P.W.1 G and PW2 and their extra judicial statements to the police exhibits A, A1 and exhibit B. It was pointed out that while P.W.1 testified on 22/2/94 that the deceased Allisson Abajua died on the spot on 26/3/91, her statement to the police exhibits A and A1 suggests that the deceased did not die on the spot and that his where about was unknown or that she suspected that he must have been killed. With H respect to P.W.2, it was pointed out that while in her testimony before the court she stated that as the accused persons were dragging the deceased towards their place, they killed him on the way but in her extra-judicial statement to the police exh. B she stated that when the

police came searching for the deceased and his assailants, they could not be found. It was therefore, submitted that there were sufficient doubts raised in the testimonies of the PW.1 and PW.2 and that such doubts ought to be resolved in favour of the appellants. The following cases were cited and relied upon:- Onubogu v. The State (1974) 9 SC 1 at 17; The Queen v. Joshua (1964) 1 All NLR 1 at 3; Alor v. The State (1996) 4 NWLR (Pt.445) 726 at 741. B

In respect of the brief filed on behalf of the 3rd appellant, it was contended that contrary to the findings by inference of the two lower courts that the deceased must have died as a result of the act of the accused persons who attacked him with lethal weapons, the prosecution did not establish the cause of the death of the deceased which is an essential ingredient of the offence of murder since the evidence of PW. 3 in that regard was of no evidential value. The case of Uguru v. The State (2002) 9 NWLR (Pt.771) 90, (2002) 4 SCNJ 282 at p.295 was called in aid. It was pointed out that there were contradictions between the extra-judicial statements of PW1 and PW2, which initially implied that the deceased was kidnapped and must have died much later and outside his hut and their viva voce evidence in court suggesting that the deceased had died in the hut or at the spot where the accused persons attacked him. These contradictions or discrepancies render the evidence of PW1 and PW.2 unreliable and cast doubt on the guilt of the 3rd appellant which ought to enure to his benefit vide the cases of Abogede v. The State (1996) 5 NWLR (Pt.448) 270; (1996) 4 SCNJ 223 at p. 228-229 and The State v. Musa Danjuma (1997) 5 NWLR (Pt.506) 512; (1997) 5 SCNJ 178 at 185. C
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Referring to the case of Sule Ahmed v. The State (2001) 18 NWLR (Pt.746) 622; (2001) 12 SCNJ 1 p.14 on the failure of the prosecution to prove the cause of death, learned counsel contended that there was no description of the nature of the injuries inflicted on the deceased nor was there any iota of evidence from which it could be inferred with certainty rather than suspicion that the deceased died as a result of the injuries inflicted on him. G
H

In reply to the above submissions made on behalf of the three appellants, learned counsel for the respondent in his brief of argument referred to the evidence of PW1 and PW2 to the effect that it was the appellants that attacked the deceased in his house, beat him

mercilessly with clubs, butts of guns and other dangerous weapons, dragged him along the road and killed him in the process and submitted that it was proper from the circumstances to draw the inference that it was the appellants that killed him. It was further submitted that whether the deceased died at the scene of the crime or when he was being dragged along the road or later was immaterial. Learned counsel pointed out that notwithstanding the overwhelming evidence of P.W.1 and P.W.2 that the appellants among others attacked the deceased, the deceased was last seen with the appellants when they were dragging him along the road and later took him to the house of the 5th accused person. It was noted that the appellant did not give evidence or offer any explanation as to the where about of the deceased who was last seen with them. Learned counsel submitted that if a deceased person was last seen alive in the company of the accused and there is no credible explanation of the deceased's disappearance or where about by the accused as in the instant case, the accused would be properly convicted for murder on the authority of the following cases:- Esai & Others v. The State (1976) 11 SC 39; Rapheal Ariche v. State (1993) 6 NWLR (Pt.302) 752; State v. Godwin Nwakerendu & Ors. (1973) 3 ECSLR (Pt.2) 757 at 786; and Peter Igho v. The State (1973) 3 SC 87; 11 NSCC 166. We were urged to dismiss the appeal and affirm the convictions and sentence passed on the appellants.

From a long line of decided cases, it is settled beyond controversy that to secure a conviction on a charge of murder, the prosecution must prove

(a) that the deceased had died

(b) that the death of the deceased was caused by the accused and

(c) that the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence.

See Ogba v. The State (1992) 2 NWLR (Pt.222) 164; Monday Nwaeze v. The State (1996) 2 NWLR (Pt.428) 11; Fred Dapere Gira v. The State (1996) 4 NWLR (Pt.443) 375, to mention but a few. ***The evidence relied upon to establish a charge of murder may be direct or circumstantial. Whether the evidence is direct or circumstantial, it must establish the guilt of the accused beyond***

reasonable doubt. The onus in this connection on the prosecution as a general rule never shifts and a misdirection on the question of onus of proof is fatal unless it can be shown that on a proper direction the result would be the same. Aruna v. State (1990) 6 NWLR (Pt.155) 125; Ozaki v. The State (1990) 1 NWLR (Pt.124) 92. For circumstantial evidence to ground a conviction, it must lead only to one conclusion, namely, the guilt of the accused person but where there are other possibilities in the case than that it was the accused who committed the offence and that others other than the accused had the opportunity of committing the offence with which he was charged such an accused person cannot be convicted of murder; see Esai & 3 Ors. v. The State (1976) 11 SC 39. **To establish cause of death, the position of the law is that much as medical evidence is desirable, it is clearly not a sine qua non as cause of death may be established by sufficient, satisfactory and conclusive evidence other than medical evidence showing beyond reasonable doubt that the death in question resulted from the particular act of the accused person.** See Oko Agwu Azu v. The State (1993) 6 NWLR (Pt.291) 303; Akpuenya v. The State (1976) 11 SC 269 and 278; Lori v. The State (1980) 8-11 SC 81 at 97; Edim v. The State (1972) 4 SC 160; Essien v. The State (1984) 3 SC 14 at 18, Adekunle v. The State (1989) 5 NWLR (Pt.123) 505 at 516.

In the instant case, the prosecution to establish case against the appellants relied heavily on the evidence of P.W.1 and P.W.2 who gave eyewitness account of the events leading to the death of the deceased. P.W.1 in her evidence in-chief at page 24 of the record from line 14 et seq testified inter alia thus:-

"I Know the accused persons. They are from Amuzu village. I know one Allison Abajua; he was my father. They have killed him. On the 26th March, 1991, one Hilary came, he is called Hilary Chukwuemeka, (sic) came and my father was sewing mat in his hut. Hilary told my father if he did not pack away from his house, he would see with his eyes. Hilary later left. The following persons came and harvested palm fruits; Nwaeze, Chinenya Abainta, Dba, Mbuchi, Kingsley and many others who I can recognise if seen. They came to harvest the palm fruits at about 10 a.m. and met my father in his hut and they asked him if he did not hear what their barrister told him.

They started to beat him while some of the men were armed with guns, machetes, clubs. Nwaeze used the butt of his gun and hit him and he fell. Excreta passed through his anus and they dragged him to the house of one Erundu of Amauzu village. As the men were dragging my father along, my mother and I followed them, but later
 B *I turned back and ran to the police station to report. The police followed me to the scene and no body was there again. The police did not recover the body of my father. I recognise all the accused persons. The first accused Abinta beat my father. Chinenye the second*
 C *accused beat my father too. Nwogwugwu, the third accused also beat my father. The fourth accused Andrew Anaba also beat my father. The fourth accused Chijioke Ubani also beat my father. That is all..."*

That evidence was corroborated by the testimony of PW.2 who at page 21 from line 5 et seq testified in-chief inter alia as follows:-

D *"I know the accused persons; they killed my husband. I know the accused also as people disputing over a land with my husband. My husband's name was Allison Abajua. They have killed him. On 26th March, 1991 at about 10 o'clock in the morning, Hilary a barrister, met my husband in his house and asked Allison are you still*
 E *there? I served you a paper to pack away from the land. If you did not know that I am a barrister and the Government (sic). If you did not pack away will die today? He then left.*

At about 10 o'clock in the morning the relations of Hilary came to harvest palm fruits on that land. The relations of Hilary:- Nwarundu
 F *Ogbuji the 5th accused. Chinenye Abianta the 6th accused, Chijioke the 4th accused; Nwogwugwu the 3rd accused; Chinenye the 2nd accused; Abainta the 1st accused ...*

When they came to harvest the palm fruits they came to our compound and surrounded us. They surrounded Allison, myself, Ugboaku
 G *Abajua P.W.1. One Nwaeze blew his whistle and all the people came to our compound. They started to beat my husband, some using clubs, some machetes, some gun butts in hitting my husband. As they were beating him he fell down and passed excreta from his*
 H *anus. They dragged him towards their own place and I raised alarm. As they were dragging him towards their place they killed him on the way. They carried his corpse to the house of one Nwerundu who is the 5th accused ... When they took my husband to the house of Nwerundu, the 1st accused used his machete to cut his deceased's*

mouth saying he used his mouth in suing them The police followed P.W.1 to the scene and on arrival the accused persons had run away. The bones of my husband were found in the toilet or latrine in the house of Nwerondu. I identified him through his finger and it was smelling... ”

It is manifest from the excerpts quote above that the 1st and 2nd appellants were among a hostile crowd that attacked the deceased beating him mercilessly with lethal weapons and eventually dragged him to an unknown destination. The incident occurred on 24th March 1991 and as at 8th March, 1994 when the P.W.2 testified, that is about three years after the incident, the deceased has not been seen alive. The attack on the deceased was premeditated having regard to the threats and warnings by Hilary the barrister and relation of the appellants a despicable conduct most undeserving of a lawyer. Again although proof of motive on the part of the accused on a charge of murder is not a sine qua non to his conviction for the offence, yet if evidence of motive is available it is not only a relevant fact but also admissible under section 9 of the Evidence Act: see Jimoh Ishola v. The State (1978) 9 - 10 SC 81 at 104-105. The motive for the murder of the deceased was his refusal to vacate the land in dispute between him and his assailants.

Having regard to the circumstances of this case particularly the fact that three years after the incident, the deceased has not been found and there was no explanation from his assailants as to his where about other than a bare denial of complicity in the crime, the inference is irresistible that he is dead; that it was the act of his assailants that caused his death and judging from the nature of the attack and the lethal weapons used, the attackers had the intention to kill or at least cause grievous bodily harm on the deceased. All the three ingredients of murder earlier enumerated having been established, the judgment of the trial court convicting the 1st and 2nd appellants and the court below affirming the conviction remain unassailable. As the respondents counsel observed, the deceased was last seen alive with the 1st and 2nd appellants. In the case of Peter Igho v. The State (1978) 11 NSCC 166, the appellant was charged with the murder of the deceased. The deceased left her house for a religious service and never returned. The appellant was the last person with whom she had been seen alive as three witnesses testified that she was last seen

riding at the back of the appellant's bicycle. The appellant denied ever carrying her at the back of his bicycle. The appellant was convicted of murder and he appealed contending that the circumstantial evidence did not point irresistibly to his guilt. Eso, J.S.C. while dismissing the appeal of the appellant in the lead judgment, had this to say at p. 168 of the report:-

"We can find no other reasonable inference from the circumstance of the case. The facts, which were accepted by the learned trial Judge, amply supported by evidence before him, called for an explanation and beyond the untrue denials of the appellants (as found by the leading Judge) none was forthcoming. Though this constitutes circumstantial evidence, it is proof beyond every reasonable doubt of the guilt of the appellant."

The case on hand in which the appellants were seen savagely attacking the deceased with lethal weapons appears to me stronger than the case of Peter Igho in which the deceased was merely seen riding at the back of the appellant's bicycle. See also Esai & Others v. The State *supra* and Raphael Ariche v. State *supra*.

The main plank of the appellants' appeal is firstly, that there was no proper evaluation of the evidence of all the witnesses for the prosecution particularly the evidence P.W.3 the medical doctor. It was submitted that it is not open to a Judge where none of the prosecution's witnesses has been treated as a hostile witness to accept the testimony of one witness and reject that of another. With due respect to learned counsel, the principle of law referred to is in relation to material contradiction in the evidence of witnesses for the prosecution. The principle was well stated by this court in the case of Onubogu v. The State (1974) 9 SC at p.361 where Fatayi Williams, J.S.C. (as he then was) stated:-

"We are also of the view that where one witness called by the prosecution in a criminal case contradicts another prosecution witness on a material point, the prosecution ought to lay some foundation such as showing that the witness is hostile before they can ask the court to reject the testimony of one witness and accept that of another witness in preference for the evidence of the discredited witness. It is not competent for the prosecution which called them to pick and choose between them. They cannot without showing clearly that one is hostile witness discredit one and accredit the other see

Summer and Laivenslay v. Brown & Co. (1990), 25 T.L.R. 745). We also think that even if the inconsistency in the testimony of the two witnesses can be explained, it is not the function of the trial Judge, as was the case here, to provide the explanation. One of the witnesses should furnish the explanation and thus give the defence the opportunity of testing by cross-examination the validity of the proffered explanation." B

The principle enunciated above comes into play only where there are material contradictions in the evidence of witnesses for the prosecution. No such contradictions have been identified in this case. The evidence of PW.3 the medical doctor which appear to be the fulcrum of the complaint under consideration did not contradict the evidence of any other witness for the prosecution. In his evidence in-chief, PW.3 the medical testified at p.34 et seq, as follows:- C

"I conducted an external exhumation based on the request of the police on the 15/11/91 at 3 p.m..... On the surface of the burial ground about a foot deep a human forearm from elbow to fingers with (sic) decomposed and dried flesh. The fingers were hanging on partly to the bones ... my impression was that the bones seen consisted (sic) with those of a middle-aged human being. The sex could not determined with available specimen and resources. The extent of the decomposition did suggest that the specimen must have there about six months. These were my findings." D E

The above statement has not been shown to be contrary to the evidence given by any other witness. All that the court below said of the evidence and, rightly too, was that it did not disclose the identity of the victim and therefore not helpful in ascertaining the cause of the death of the deceased. The question of discrediting any of the prosecution witnesses did not therefore arise to justify the invocation of the principle under consideration. F G

Secondly, the judgments of the two lower courts are attacked on the ground that the evidence of P.W.1 and P.W.2 in court was at variance with the earlier statements they had made to the police, which ought to have made their evidence unreliable. That is the inconsistency rule which is to the effect that where a witness makes an extrajudicial statement which is inconsistent with the testimony at the trial, such testimony is to be treated as unreliable while the statement is not evidence H

on which the court can act. See *R. v. Golder* (1990) 1 WLR 1198 at 1172, as approved by this court, in *Ukpong v. The Queen* (1961) SCNLR 53; *Joshua v. The State* (1964) All NLR 1; *Egboghonome v. State* (1993) 7 NWLR (Pt.306) 383. For this rule to be applicable, the inconsistency between the extra judicial statement and the testimony in court must be on a material issue. A mere discrepancy will not operate to discredit the witness. In the instant case the inconsistencies alleged border on whether the deceased died in his compound at the time of being beaten or died on the way as he was being dragged along or died wherever he was taken to. The inconsistencies in question are not material such as could cast a reasonable doubt as to the guilt of the appellants. What is material is that the deceased died and the opinion by the P.W.1 P.W.2 that he died at any particular point in time was irrelevant.

Thirdly, it was contended that the prosecution did not establish cause of death of the deceased because the medical evidence of P.W.3 in that regard was inconclusive. As noted earlier, it is settled law that although medical evidence is desirable to ascertain cause of death, it is not a sine qua non in cases of culpable homicide where the cause of death could be established by other evidence. In case where a man was attacked with a lethal weapon and he died on the spot, it is not necessary to prove cause of death by medical evidence since it can properly be inferred that the wound inflicted thereby caused the death. *Bakare v. State* (1965) NMLR 165; *Lori v. State* (1980) 8-11 SC 81; *Adamu v. Kano N.A.* (1956) SCNLR 65; *Essien v. State* (1984) SCNLR 1.

In the same vein, where as in the instant case the deceased was savagely attacked by his assailants who carried away and disposed of his body rendering medical evidence impossible, the court is at liberty to draw the necessary inference of cause of death based on the established facts. It has long been judicially recognised that conviction for murder can be sustained in the absence of corpus delicti where there is a strong direct evidence. *R v. Sati* (1938) 4 W.A.C.A. 10; *Edim v. State* (1972) 4 SC 160; *Babuga v. State* (1996) 7 NWLR (Pt.460) 279; *R. v. Onufreje* (1955) 1 Q.B. 388; 39 Cr. App. R.1. My answer to the solitary issue for determination is that there was ample evidence to justify the convictions of the 1st and 2nd appellants by the trial court and the court below was right in affirming the

convictions. The 3rd appellant was not implicated in the murder as none of the witnesses for the prosecution mentioned his name.

It needs be stressed that this appeal is based on the concurrent findings of fact of the two lower courts. The attitude of this court in that regard is well settled. It is that an appellate court will not interfere with the concurrent findings of the lower courts on issues of facts except there is established a miscarriage of justice or a violation of some principle of law or procedure: see *National Insurance Corporation of Nigeria v. Power and Industrial Engineering Co. Ltd.* (1986) 1 NWLR (Pt.14) 1 at p.36; *Enang v. Adu* (1981) 11-12 SC 25 at 42; *Nwagwu v. Okonkwo* (1987) 3 NWLR (pt.60) 314 at 325; *Igwego v. Ezeugo* (1992) 6 NWLR (Pt.249) 561 at 574. There is nothing agitated in each of the appeals to bring the concurrent findings on the guilt of the 1st and 2nd appellant within the ambit of the exception.

In the event, each appeal of 1st and 2nd appellants lacks substance and is accordingly dismissed. The conviction and sentence of each of the 1st and 2nd appellants are hereby affirmed. The appeal by the 3rd appellant is allowed. He is discharged and acquitted.

BELGORE JSC

I agree this appeal is without merit and for reasons adumbrated by my learned brother, Edozie, JSC, I also dismiss it.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Edozie, JSC. I agree entirely with it. I have nothing to add.

KALGO JSC

I have the advantage of reading in advance the judgment of my learned brother, Edozie, JSC in this appeal and I entirely agree with him that there is no merit in the appeal of the 1st and 2nd appellant, and should be dismissed. I also agree that the appeal of the 3rd appellant is meritorious and that it ought to be allowed.

The principal witnesses to the unprovoked attack on the de-

ceased by the appellants were PW1 and PW2 at the trial who were eye witnesses to the whole episode. Their evidence was direct and corroborative of each other and was unsuccessfully challenged by cross-examination. Their testimony was consistent and contained no material contradiction affecting its cogency. The learned trial Judge
 B was therefore right in my view in accepting and believing their evidence. Also from the circumstances of the case, there is no doubt that the attack on the deceased was premeditated judging from what transpired between the deceased and barrister Hilary on the day in
 C question as related by PW1 and P.W.2. it is my respectful view therefore that on the evidence of P.W.1 and P.W.2 alone the 1st and 2nd appellants can be convicted. See *State v. Ajie* (2000) 11 NWLR (Pt.678) 434 at 450; *Ali v. State* (1988) 1 NWLR (Pt.68) 1.

There is no doubt that in the instant case, there was no direct
 D proof of the cause of death of the deceased. There was no medical certificate but P.W.1 and P.W.2 testified that after the deceased was savagely attacked by the appellants, he was dragged on the ground to a house in the course of which he died and was buried soon thereafter. It is well established in cases such this, that a medical certificate
 E to prove death is not essential or sine qua non particularly where as in this case, it appears very likely from circumstantial evidence that the deceased died soon after the infliction of the injuries on him as a result of the attack. See *Adamu v. Kano N.A.* (1956) SCNLR 65; 1
 F F.C. 25; *Gabriel v. State* (1989) 5 NWLR (Pt.122) 457; *Homman v. State* (1967) NMLR 23; *Ukut v. State* (1995) 9 NWLR (Pt.420) 392. It is also well established by a plethora of authorities in this court that the offence of murder of a person can be proved without actually seeing or producing the body of the person (i.e. corpus delicti) see
 G *Princewill v. State* (1994) 6 NWLR (Pt.353) 703; *Edim v. State* (1972) 4 SC 160; *Ariche v. State* (1993) 6 NWLR (Pt.302) 752.

It is however significant to observe that P.W.1 and P.W.2 in listing the names of those who attacked and killed the deceased in their testimony did not mention the name of the 3rd appellant the 3rd
 H appellant did not confess to the attack on the deceased in his statement to the police. He did not testify in his defence. So he could not properly have been found guilty and convicted of any offence by the learned trial Judge. His conviction was therefore wrong.

From the above and the more detailed reasons given by my

learned brother, Edozie, JSC. in the leading Judgment, I also find no reason to interfere with the conviction and sentence passed by the trial court and affirmed by the Court of Appeal on the 1st and 2nd appellant. I dismiss their respective appeals and confirm their conviction and sentence. The appeal of the 3rd appellant is however allowed and I set aside his sentence and conviction and acquit and discharge him accordingly. B

UWAIFO JSC

I had the opportunity to read in advance the judgment of my learned brother, Edozie, JSC. He has thoroughly considered the appeal of each of the appellants. I entirely agree with his reasoning and the conclusion he has arrived at. I respectfully adopt them as mine. C

The appellants have not disputed the evidence led against them. By resting on the prosecution's case, each appellant is assumed to have accepted that the evidence against him is exactly truly stated. The two eye-witnesses (p.w.1 & p.w.2) narrated the part each accused played in attacking the person of the deceased. They include two of the appellants here, namely, 1st and 2nd appellants. Although it was casually said by each of the two witnesses that the accused person arraigned in court killed the deceased, when it came to naming those of them who took part in the killing, each omitted to mention the 3rd appellant. D E

The 3rd appellant in his statement to the police said inter alia: F

"I am the first son of Abainta Ubani. On 26th March 1991 I was not at home. I left our compound around 6.30 a.m. to one Friday Osuagwu's compound to work in his farm ... On the 26/3/91 I did not follow them to Uzomkpa land, to cut palm fruits." G

This alibi was in no way investigated nor was it controverted by any reliable or positive evidence by the prosecution: see Umani v. The State (1988) 1 NWLR (Pt.70) 274. I do not think it was safe to have condemned the 3rd appellant along with others on the state of the evidence by the prosecution. He rested on that evidence which was inadequate to implicate him. I think he should be given the benefit of the doubt as the prosecution failed to prove the case against him beyond reasonable doubt: see Bakare v. The State (1987) 1 NWLR (Pt.52) 579; Onafowokan v. The State (1987) 3 NWLR (Pt.61) H

538.

I will therefore allow the appeal of the 3rd appellant, set aside his conviction and sentence to death, and instead enter a verdict of discharge and acquittal for him. I dismiss the appeal of each of the 1st and 2nd appellants. Appeal dismissed.

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