

SUPREME COURT OF NIGERIA
16TH JANUARY, 2004, SC. 294/2002
CORAM:- S. U. ONU, S. O. UWAIFO, N. TOBI, D. O. EDOZIE,
I. C. PATS-ACHOLONU, JJSC

1. FRIDAY AIGUOREGHIAN 1ST APPELLANT
2. ANTHONY OKUNBOR 2ND APPELLANT
V.
THE STATE RESPONDENT

COURTS - Murder - Misapprehension - Of accused persons' extra judicial statements - And wrongful reliance on seeming denial of the statements - By Court of Appeal in affirming conviction - Is erroneous (H6)

CRIMINAL PROCEDURE - Alibi - Investigation of - Is necessary - Failure of prosecution to investigate it - Is fatal to its case here - Though it may not be fatal in some other cases (H5)

CRIMINAL PROCEDURE - Confessional statement - Non est factum defence by accused - Is not a retraction - But a denial of making of the statement (H10)

CRIMINAL PROCEDURE - Courts - Confessional statements - Fact as to whether made - Not founded upon by the two lower courts - Reliance on overruled cases - And on a victim's evidence - Will ground quashing of appellants' conviction (H11)

CRIMINAL PROCEDURE - Manslaughter - Cause of death - Evidence of - Ambiguity in the medical reports evidence - As to cause of death - Will be resolved in favour of accused (H1)

CRIMINAL PROCEDURE - Murder - Cause of death - Burden of proof - Was wrongfully shifted to the accused - It rests squarely on the prosecution (H3)

CRIMINAL PROCEDURE - Murder - Cause of death - Medical certificate - May not be required in all cases - But it is a necessity in this case - Where death occurred 3 months later (H2)

EVIDENCE - Admissibility - Confessional statements - Non est factum⁴ plea by accused persons - Cannot stop admissibility of the statements - As that plea is to be determined by court - At conclusion of trial (H7)

EVIDENCE - Criminal procedure - Murder - Withholding of evidence - By the prosecution as to cause of death - Doubt created thereby - Is resolved in accused person's favour (H4)

EVIDENCE - Documents - Admissibility - Confessional statement - Challenge thereof on grounds of non est factum - Is appropriately made when accused as witness - Denies making the statement (H8)

WORDS & PHRASES - "Retraction" and "resile from" - Interchangeably used in decisions on plea of non est factum - Is misleading (H9)

FACTS

Before the Benin City High Court, the Appellants were arraigned on an information of murder together with one other person. It was alleged that in March, 1989, refusal of the appellants to open the gate of a piggery farm belonging to the deceased person's late brother, led to a sudden mob attack that brought about the death of the deceased in June, 1989. The deceased who lay in a pool of blood was rushed to the police station and later to the hospital. He was treated and discharged but later developed a swollen body and died subsequently. 2nd Appellant raised an alibi which was not investigated by the police.

There was ambiguity in medical reports tendered by the prosecution as to the actual cause of death. And evidence of an autopsy conducted at the UBTH that would have plainly stated cause of death was withheld by the prosecution. The trial court found the appellants guilty of

the lesser offence of manslaughter and sentenced them to 7 years imprisonment. Their appeal to the Court of Appeal was dismissed. They have further appealed to the Supreme Court raising two issues.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was correct in holding that the acts of the 1st Appellant caused the death of the deceased.

On behalf of the 2nd Appellant, the issue which calls for determination is

2. Whether the learned Justices of the Court of Appeal were right in affirming the conviction of the 2nd Appellant in view of the evidence led at the trial court and the defence of alibi raised by the 2nd Appellant.

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

Manslaughter - Cause of death - Evidence of

1. I am therefore inclined to the view expressed by the learned counsel for the 1st Appellant that there is no certainty as to the actual cause of the death of the deceased. This is because the deceased was admitted, treated and died at the U.B.T.H and medical certificate as to the cause of death was issued. This fact was admitted by both pw1 and pw4. According to pw1 UBTH put the cause of death as "*LIVER CYRRHOSIS*". In his (pw1's) testimony there was no "liver cyrrhosis" but that the cause of death was "*liver abscess of faulty change.*"

In the light of the foregoing, I agree with the submission of learned counsel for the 1st Appellant that the divergence of opinion between the Death Certificate issued by UBTH and the testimony of pw1, (Dr. Abu) leads me to arrive at the firm view that this Court is duty bound to resolve the ambiguity thus created in favour of 1st Appellant. This Court has held in appeals to it that where there is ambiguity, it ought to be resolved in favour of the accused. See Onotaire v. Onokpasa (1984) 12 SC.19 at 88 (p. 143 H)

Murder -Cause of death - Medical certificate

2. I agree with learned counsel for the 1st Appellant when he conceded

that a medical certificate as to cause of death is not always required in cases where death occurred instantly. Put in another way, it is an acceptable principle of law in homicide cases that where the cause of death is obvious, medical evidence ceases to be of practical necessity. See Enewoh v. State (1989) 4 NWLR (Part 119) 98. Ditto where the deceased died almost immediately from the voluntary act of the accused. However, where as in the instant case death occurred three (3) months later and the medical evidence as to cause of death and responsibility of the 1st Appellant is uncertain and doubtful, then a medical certificate as to the actual cause of death becomes a necessity and failure to produce same would be fatal to the prosecution's case. See (1) Band v. State (1972) ANLR 811. (p.144 D)

Cause of death - Burden of proof

3. The learned counsel to the 1st Appellant has respectfully submitted that the court below erred in affirming the decision of the trial court which shifted the burden of proving the cause of the cysts on his client. I am in complete agreement with this submission since at pages 53, line 1-5 of the Record the trial court held as follows:

"As to the cause of death itself, this was given as the cyst of the liver.....The cyst is another matter. The cyst and their cause have been quietly passed over by the defence."

For this reason, I agree with learned counsel for the 1st Appellant's submission that the court below was duty bound to uphold the well-established principle that the onus of proving the cause of death rests squarely on the prosecution not the defence. See the following decided cases by this Court of: 1. Iko v. State⁵ (2001)35 WRN 1 (p. 145 B)

Murder - Withholding of evidence

4. I agree with the submission of the learned counsel to 1st Appellant that the evidence as to the treatment and ultimate death of the deceased as well as the medical certificate of death issued by UBTH was withheld by the prosecution. This withheld evidence from UBTH would have pro-

vided crucial clues and answer on the issue of whether the injuries lingered on until the deceased's death whether or not new ailments intervened. This evidence was available to the prosecution but it withheld it leaving the court below to speculate and reach conclusion on the issue without supportive conclusive evidence. I am therefore in agreement with 1st Appellant's submission that the absence of the crucial medical evidence from UBTH and failure to tender the medical certificate of death raise serious doubt as to the cause of death, which ought to be resolved in favour of the 1st Appellant. See Section 149 (d) of the Evidence Act, Cap.112, Laws of the Federation of Nigeria, 1990.

In the light of the foregoing, my answer to this issue is rendered in the negative. Hence, I resolve it in favour of the 1st Appellant. A fortiori, I have no hesitation in resolving the issue in 1st Appellant's favour and the conviction and sentence passed on him be and are hereby quashed. The 1st Appellant is accordingly discharged and acquitted. (p. 145 F)

Alibi - Investigation of

5. As the alibi was not investigated it cannot, in my view, be asserted that from the totality of the evidence adduced by the prosecution at the trial that it is clear that there is a strong, positive and direct evidence linking the 2nd Appellant with the commission of the offence. In law, where there is direct evidence linking an accused with the commission of the offence he can safely be convicted for the commission of the said offence. Not so in the instant case where the defence of alibi raised was not investigated. It is settled law that where an accused raised defence that his alibi was not investigated, he can still be convicted if there is stronger and credible evidence before the Court which falsified the alibi. See Ortese Yanor & Anor v. The State (1965) NMLR 337 at 347; It is a well-established principle that an alibi means that the accused was somewhere other than where the prosecution alleges he was at the time of the commission of the offence. Indeed, it is not for an accused person to prove his alibi; rather the onus is on the prosecution to disprove the alibi. See Nwabueze v. The State (1988) 4 NWLR (part 86)16.

Once there is the slightest defence of alibi the plea must be inves-

tigated. Failure of the prosecution therefore to investigate the alibi raised in this case is fatal to the prosecution's case. (p. 148 C)

Murder - Misapprehension

B 6. The court below relied on this misapprehension of 2nd Appellant's extra-judicial statement in coming to the conclusion that he participated in the crime. Clearly, this conclusion was based on a misapprehension, which in turn has led to an obvious miscarriage of justice.

C The lower court found support for the affirmation of the conviction of the 2nd Appellant by alluding to the denial of the Appellants of the making of their extra-judicial statements Exhibits A and C as a result of which both statements and *evidence given in their defence* were held unreliable thereby paving the way for sole reliance on the evidence of D PW.2 to convict the Appellants.

It is for this reason that I agree with the 2nd Appellant's submission that the court below in doing this fell into grave error. What had been raised by the Appellants in relation to the statement is non-est factum.
E tum.
(p. 149 H)

Admissibility - Confessional statements

F 7. Although it is conceded that the issue of non-est factum⁴ was not raised by counsel when the statements were sought to be tendered, the pleas of non-est factum was nonetheless validly raised. Had objections been raised to the admissibility of the statements on the basis of non-est factum, they would still have been admitted in evidence as non-est factum.
G tum does not affect admissibility.

Therefore raising the objection that the statements were not made by the Appellants at the stage of tendering same would have been superfluous as the statements would all the same have been admitted. This H Court has held in Nwangbomu v. State⁶ (1994)2 NWLR (Part 327) 380 at 399-400 F-A that the plea of non-est factum in relation to a confessional statement is a matter of fact to be determined by the Judge at the conclusion of the trial. (p. 150 E)

Documents - Admissibility

8. Be it noted that it is trite that when a document is sought to be tendered and is objected to by counsel, what counsel objecting does at that stage is no more than a submission on the admissibility of the statement. Thus, as the issue of non-est factum is a matter of fact, the challenge of such a statement is more properly done when the accused or any other witness of his impugns the statement as not being that of the accused from the witness box. I agree with learned counsel for 2nd Appellant therefore that as counsel is not competent to give evidence from the bar and the challenge of a confessional statement on grounds of non-est factum is a matter of fact, the challenge is appropriately made when the accused as witness denies the making of such a statement. (p. 151 A)

"Retraction" and "resile from"

9. It is noteworthy to stress that the term "retraction" and "resile from" have been used interchangeably in most decisions with the pleas of non-est factum. This is misleading since a statement must first be shown to have been made before it can be said to have been retracted by its maker for, where the very making of the statement is in issue, the retraction cannot arise at that stage. (p. 151 G)

Confessional statement - Non est factum defence

10. It is in this wise that I agree that where an accused person sets up a defence of non-est factum in relation to a confessional statement what he has done is not a retraction but a denial of the making of the statement. (p. 152 A)

Courts - Confessional statements - Fact as to whether made

11. No finding was made by the two courts below on the issue of fact as to whether the Appellants made the statements. The application therefore of the rule in Oladeje v. The State (1987)3 NWLR (Part 61) 419 and Asanya v. The State (1991) 3 NWLR (Part 180) 422, two cases that have been overruled, was therefore prejudicial to the Appellants whose con-

viction ought not to be allowed to stand. See Egboghonome v. The State⁷ (1993)7 NWLR (Part 306) 383. What it boils down to is that had the testimony of the 2nd Appellant and his extra-judicial statement (Exhibit C) not been treated as unreliable, the 2nd Appellant would have been absolved of the offence of murder of the deceased based on his defence of alibi which was not investigated. Furthermore, the evidence of PW.2 who himself was a victim of the same attack, ought not to have been viewed with as much confidence as the trial court and the court below did, it being the evidence of a victim. (p. 152 B)

NOTABLE POINTS OF INTEREST

UWAIFO JSC

1. Defence of alibi avails 2nd appellant

It is well settled that it is not for an accused person to prove his alibi; it is only for him to bring it forward but it is for the prosecution to lead credible evidence to disprove it: See Nwabueze v. The State (1988) 4 NWLR (pt.86) 16. The two courts below were in grave error not to have held that the defence of alibi availed the 2nd appellant as the prosecution completely failed to disprove the alibi in the present case. (p. 159 H)

TOBI JSC

2. Break in chain of causation of death

In order to hold an accused criminally responsible, the chain of causation must not be broken. Once there is a broken link in the chain of causation, that broken link must be resolved in favour of the accused as it affects the *actus reus* of the offence. In other words, where the injury which caused the death is not the proximate, legal or direct cause of the death of the deceased, the benefit of doubt must be given to the accused. I can still go further. Where there is more than one possible cause of death, the benefit of doubt must be given to the accused because the available evidence in such a situation does not pin the accused down to the death of the deceased. This is because there is an intervening or supervening cause, which equivalents in Rome's Latin home, are *novus*

actus interveniens and nova interveniens respectively. (p. 163 E)

3. Cause of death determination - Duration is not important

In determining the cause of death, the duration between the suspected act of the death (i.e. the *actus reus*) and the death is not important. Accordingly, an accused could be guilty of the offence of murder or manslaughter even if the duration is long. In so far as the court comes to the conclusion correctly that the act of the accused caused the death of the deceased, a conviction and sentence will be proper in law. Conversely, even if the period between the act and the death of the deceased are proximate, a court can still not find the accused guilty if there are more than one possible cause of death. What is essential is that there must be evidence that the act of the accused resulted in the death of the deceased. (p. 168 G)

4. Delay in criminal justice strongly condemned

The justice delivery system in this country as it relates to delay is scandalous. It is very sad that for a period of seven years, this appeal, could not be disposed of. Delay in civil matters, though bad is not as bad in criminal matters. This is because in criminal matters the liberty of the citizen is at stake. Unless a convict gets post-conviction bail, he will lavish in prison until his appeal is finally disposed of. I do not think the appellants in this appeal had the fortune of posting post conviction bail. I do not see it in the Record. The justice delivery in this matter is most wicked and cruel to the appellants and I condemn it. If I had a stronger word than condemnation, I should have used it. (p. 171 E)

REPRESENTATION

A. O. Alegeh Esq., with Marcel Eriofoloh Esq., for the 1st Appellant.
Etigwa Uwa Esq. for the 2nd Appellant.
C. U. Ozua, Principal Legal Officer, Edo State for the Respondent.

CASES REFERRED TO

State v. Ogbubunjo (2001) 13 WRN 1, (2001) 1 KLR (pt 114) 221

Iko v. State (2001)35 WRN 1, (2001) 7 KLR (pt 126) 2419

Ahmed v. State (2002) 3 WRN 1 at 29

Valentine Adio v. State (1980) ANLR 39

Ikemson & Ors v. The State (1989) 3 NWLR (part 110) 455 at 459

B Ortese Yanor & Anor v. The State (1965) NMLR 337 at 347

Nwangbomu v. State (1994) 2 NWLR (Part 327)308, (1994) 4 KLR 1

Egboghonome v. The State (1993) 7 NWLR (pt.306) 383, (1993) 11 KLR 1

C **STATUTES REFERRED TO**

Criminal Code, cap 48 Vol 11 Laws of Bendel State of Nigeria, 1976 SS. 319(1), 314

Evidence Act cap 112 LFN 1990 S. 149(d)

D

LEAD JUDGMENT BY ONU JSC

The 1st and 2nd Appellants were the 1st and 2nd of three persons jointly arraigned before the High Court of the Benin Judicial Division of Edo State holden at Benin City (per Joan Aiwerioghene, J.) on an information of murder punishable under Section 319(1) of the Criminal Code, Cap. 48, Vol. 11, Laws of the defunct Bendel State of Nigeria, 1976. At the end of the case for the prosecution wherein seven witnesses in all were called, the 1st and 2nd Appellants, after their respective defences, were both convicted of the lesser offence of manslaughter and were each sentenced to seven (7) years imprisonment.

Being dissatisfied with the said decision of the High Court, the Appellants appealed to the Court of Appeal sitting in Benin City which G dismissed their appeal and affirmed the decision of the High Court. They have both further appealed to this Court upon a joint Notice of Appeal containing two grounds of appeal dated 26th day of August, 2002.

I will pause here and state the facts of the case briefly as follows:

H The 1st and 2nd Appellants were two of three persons accused of the murder of one Nathaniel Amu, second son to one Chief Alfred Amu whose first son, Augustine Amu now deceased owned a piggery where both 1st and 2nd Appellants worked.

On the 7th day of March, 1989 Chief Alfred Amu, requested Mr. Doherty Sunny Osifo (P.W.2), an agricultural expert and a Government employee, to go to his late son's farm to assess its state with a view to advising on what steps he deemed expedient for the well being of the pigs on the farm. Nathaniel Amu, deceased following the agreement reached between his father and Mr. Osifo accompanied the latter to the piggery. Upon their arrival they were subjected to a sudden attack by a mob resulting from the refusal by the 1st and 2nd Appellants to open the farm gate of the piggery. As they were being beaten up, he (i.e. P.W.2), said he ran away to seek for help. Upon his flight, from the scene and after raising an alarm to the effect that 2nd PW was a thief, a crowd which had been attracted apprehended and beat him. The beating persisted until he was able to identify himself with the aid of his complimentary card he carried on him. It was next stated that the deceased lay there in a pool of blood outside the farm gate from where he was rushed first to the police Station and later to the hospital. The deceased who was eventually said to have been discharged developed a swollen body and subsequently died.

The 2nd Appellant's account in his defence was that he was not at the scene of crime at all but was only attracted there by an alarm raised by people in the vicinity following the presence of thieves in the neighbourhood of the piggery.

A Notice of Appeal brought at the instance of the 1st Appellant by his counsel dated and filed on 18th October, 2002 containing five grounds to supersede the earlier one filed at the conclusion of the trial, was adopted and a copy thereof served on learned counsel for the 2nd appellant.

Before the hearing of the appeal, learned counsel for 2nd appellant brought a motion for leave to appeal, extension of time to appeal, leave to raise fresh issues and to regularize the Brief of Argument. The prayer not being opposed by learned counsel for the 1st appellant and C.U. Ozua Esq., of the Office of the Director of Public Prosecution, Edo State, was accordingly granted as prayed.

The 2 issues submitted as arising for our determination by the learned counsel for the 1st Appellant reads:

1. Whether the Court of Appeal was correct in holding that the

acts of the 1st Appellant caused the death of the deceased.

On behalf of the 2nd Appellant, the issue which calls for determination is :

2. Whether the learned Justices of the Court of Appeal were right in affirming the conviction of the 2nd Appellant in view of the evidence led at the trial court and the defence of alibi raised by the 2nd Appellant. The Respondent for his part, adopted these two issues formulated by both Appellants.

Arguing first issue 1, learned counsel for him submitted how the issue emanates and encompasses all the grounds of appeal-all of which it is argued, are directed against the finding of the Court of Appeal (hereinafter in the rest of this judgment referred to as the Court below):

The cases of State v. Ogunbunjo (2001) 13 WRN 1 and Omogodo v. State (1981) 5 SC 5, were called in aid. It is thereafter contended that evidence established that deceased did not die immediately after the attack but died three months later: A critical review of the medical evidence especially that given by P.W.5 and P.W.6, it is argued, becomes imperative, adding that DW6 it was who first testified that

"On examination he was found to have multiple bruises all over the body. The left eyes was swollen, there was infection of blood in the white part of the left eye. There was bleeding from the nose. Both knees had abrasion (sic) as well as the skull."

The witness went on to say that-

"When discharged the patient was in a relatively good condition. Good enough to be discharged."

Continuing, the witness said:

"When he was discharged he was not fit to go home. I discharged him into the care of the Ophanologist (sic). He was fit enough for discharging as far as my own treatment was concerned. The Ophthelologist (sic) wanted to treat the patient in his own hospital, which is why, I discharged him into his care."

PW5, Dr. Alexander Idehen, as the doctor into whose care the deceased was discharged and/or transferred, testified that

"I examined him and found the right eye was normal but the left

(L) eye was very painful, red and the cornea was oedematus and smaller. The anterior chamber was filled with blood. That particular eye had no function at all. He was taken to the theatre same day to wash out the blood in the anterior chamber. During that procedure we found out that the lens of the eye was dislocated. He stayed in the Hospital until 31st March, 1989 when he was discharged. That was all." B

The inference to be drawn from the evidence of this witness (i.e. PW5), learned counsel submitted, is that the left eye which had the remaining injury from the attack, was successfully treated by PW5. C

From the foregoing, it is submitted, this was the end of the chain of causation attributed to the 1st Appellant, adding that the evidence was given by medical experts who testified on behalf of the prosecution and who treated the deceased in his lifetime.

Our attention was next adverted to this Court's decision in Uguru v. The State (2002) 25 WRN 118 where the deceased died four days after the attack and after receiving treatment from two separate Hospitals. There, this Court held (per Uwaifo, JSC) at page 25 as follows: D

"The deceased was treated in two hospitals following his encounter with the appellant and died four days after. There was therefore an actus novus interveniens, which must be accounted for by the prosecution. To be able to do this, there must be evidence of the type of attention and treatment given by each hospital. In the absence of that, there is likely to be a break in the chain of causation." E F

It is then contended how in the case in hand, the deceased was treated and discharged by two hospital and subsequently took ill and was admitted to another hospital (UBTH) but no evidence of the nature of ailment and treatment was given of where the deceased died. It is then contended that the Court below in dealing with this issue relied heavily on the evidence of PW3 and PW4 - the father and brother of the deceased respectively. It is further argued that the evidence of PW3 and PW4 who were the principal complainants and relatives of the deceased must be treated with caution. G H

Additionally, it is maintained, PW3 and PW4 were not medical experts and their evidence cannot be preferred to the evidence of medical

experts who treated the deceased. After advertng our attention to the testimonies of PW3 and PW4 on the swollen tummy and legs of the deceased necessitating his being taken to Azua Hospital and then the UBTH for treatment respectively until he died on 29th June, 1989, it is submitted that there is no medical evidence in printed records that confirms that the swollen tummy and legs were as a result of the incident involving the 1st Appellant.

It is in addition submitted that even though the prosecution owed the duty to prove that the swollen legs and tummy were caused by the incident and were a continued manifestation of the injuries suffered by the deceased, the prosecution led absolutely no medical evidence of that condition, thus failing to discharge the onus in respect of the criminal ingredient of the offence.

The case of Ahmed v. State (2002) 3 WRN 1 at 26 was cited in support of the proposition.

Any doubt raised as to whether or not the swollen tummy and legs were occasioned by the incident, it is further urged, ought to be resolved in favour of the 1st Appellant.

The other critical evidence to which our attention was adverted is that emanating from PW1, Dr. Suleman Abu who conducted a postmortem examination on the deceased. This witness testifying when led in examination-in-chief said, inter alia:

"Dissection revealed fractures of right side 5,6 and 7 and both lungs were crushed by dense adhesions. Detailed examination revealed the fractures ends of right rib 6 were inside a cavity of cysts of the liver and this contained chocolate coloured materials. Histological examination of these sections revealed chronic and active inflammatory cells in the cyst cavity."

Continuing, the witness further deposed:

"In my opinion, I gave the case (sic) of death as a cyst in the liver and faulty change in the liver.

.....A long duration of injury to the ribs and penetrating into the liver could induced (sic) the formation of the cyst cavity. The injuries to the liver and the ribs could have been caused by a heavy blow from a

blunt object to the right side of the chest ."

Under cross-examination he stated thus:

"UBTH suggestion was a provisional diagnosis of liver cyrrhosis.....They were querying liver cyrrhosis of the liver. Cyrrhosis is scarification of the liver cells..... cyrrhosis does not lead to faulty liver, faulty liver leads to cyrrhosisAbression (sic) of the head has nothing to do with faulty liver. A catarrh nose bridge cannot cause any bruise of the liver. The man died of liver abscess of faulty change. No cyrrhosis."

It is further contended on behalf of 1st Appellant as follows:

1. That the evidence of pw1 does not confirm and/or support the evidence of pw3 and pw4. Nor, it is further argued, does the evidence of pw1 make any reference to swollen tummy and legs, thus no nexus can be inferred therefrom.

2. That it is his submission that neither pw5 nor pw6 testified that the incident had occasioned any liver abscess and/or faulty or fatty change of liver.

3. That the inference that can reasonably be drawn from the medical evidence in the printed records is that pw6 treated the deceased satisfactorily and handed him over to pw5 to treat the injury to the eye. That pw5 treated him satisfactorily and discharged him and that the deceased subsequently developed and died of liver problems.

From the foregoing, learned counsel for the 1st Appellant submitted, the prosecution had failed to show by medical evidence any casual link between the injuries treated by pw5 and pw6 and the ultimate cause of death to wit: liver problems vis a vis the broken ribs both culminating in contradictory evidence.

In the absence of such evidence in the printed records, it is argued, the court below erred when it held that:

"The effect of Appellant's attack on Nathaniel of 7/3/89 lingered on continuously until he died on 26/6/89"

I am therefore inclined to the view expressed by the learned counsel for the 1st Appellant that there is no certainly as to the actual cause of the death of the deceased. This is because the de-

ceased was admitted, treated and died at the U.B.T.H and medical certificate as to the cause of death was issued. This fact was admitted by both pw1 and pw4. According to pw1 UBTH put the cause of death as "*LIVER CYRRHOSIS*". In his (pw1's) testimony there was no "*liver cyrrhosis*" but that the cause of death was "*liver abscess of faulty change*."

In the light of the foregoing, I agree with the submission of learned counsel for the 1st Appellant that the divergence of opinion between the Death Certificate issued by UBTH and the testimony of pw1, (Dr. Abu) leads me to arrive at the firm view that this Court is duty bound to resolve the ambiguity thus created in favour of 1st Appellant. See Valentine Adie v. State (1980) ANLR 39; see also Adio v. State (1979) 12 NSCC 51. This Court has held in appeals to it that where there is ambiguity, it ought to be resolved in favour of the accused. See Onotaire v. Onokpasa (1984) 12 SC.19 at 88 and Ebba v. Ogodo (1984) 4 SC 84 at 93 - 103.

I agree with learned counsel for the 1st Appellant when he conceded that a medical certificate as to cause of death is not always required in cases where death occurred instantly. Put in another way, it is an acceptable principle of law in homicide cases that where the cause of death is obvious, medical evidence ceases to be of practical necessity. See Enewoh v. State (1989) 4 NWLR (Part 119) 98. Ditto where the deceased died almost immediately from the voluntary act of the accused. However, where as in the instant case death occurred three (3) months later and the medical evidence as to cause of death and responsibility of the 1st Appellant is uncertain and doubtful, then a medical certificate as to the actual cause of death becomes a necessity and failure to produce same would be fatal to the prosecution's case. See (1) Band v. State (1972) ANLR 811; (2) Uguru v. State (Supra).

The doubt as to the actual cause of death as highlighted in the judgment of the trial court may be summarized hereunder as follows:

"Dr. Asuen says that an X-ray was carried out but revealed nothing. He did not say what part of the patient was X-rayed."

"Dr. Abu on the same eyebecause of fibrous growth covering the whole area. Again nobody asked the Doctor how this could have been caused whether naturally or as a result of injury."

As can be deciphered from his evidence wherein he said:

"On the issue of previous treatment of the deceased for inflammation of the liver, I am unable to find any such evidence." B

The learned counsel to the 1st Appellant has respectfully submitted that the court below erred in affirming the decision of the trial court which shifted the burden of proving the cause of the cysts on client. I am in complete agreement with this submission since at pages 53, lines 1-5 of the Record the trial court held as follows: C

"As to the cause of death itself, this was given as the cyst of the liver.....The cyst is another matter. The cyst and their cause have been quietly passed over by the defence." D

For this reason, I agree with learned counsel for the 1st Appellant's submission that the court below was duty bound to uphold the well-established principle that the onus of proving the cause of death rests squarely on the prosecution not the defence. See the following decided cases by this Court of: E

1. Iko v. State (2001)35 WRN 1 at 40
2. Lori v. State (1980) 8-11 SC. 81
3. Ameh v. State (1978) 6-7 SC.27

I agree with the submission of the learned counsel to 1st Appellant that the evidence as to the treatment and ultimate death of the deceased as well as the medical certificate of death issued by UBTH was withheld by the prosecution. This withheld evidence from UBTH would have provided crucial clues and answers on the issue of whether the injuries lingered on until the deceased's death whether or not new ailments intervened. This evidence was available to the prosecution but it withheld it leaving the court below to speculate and reach conclusion on the issue without supportive conclusive evidence. I am therefore in agreement with 1st Appellant's submission that the absence of the crucial medical evidence from F G H

UBTH and failure to tender the medical certificate of death raise serious doubt as to the cause of death, which ought to be resolved in favour of the 1st Appellant. See Section 149 (d) of the Evidence Act, Cap.112, Laws of the Federation of Nigeria, 1990.

B In the light of the foregoing, my answer to this issue is rendered in the negative. Hence, I resolve it in favour of the 1st Appellant. A fortiori, I have no hesitation in resolving the issue in 1st Appellant's favour and the conviction and sentence passed on him be and are hereby quashed. The 1st Appellant is accordingly discharged and acquitted.

C Coming to 2nd Appellant's appeal, I am satisfied that all I have said in respect of the 1st Appellant equally apply to the 2nd Appellant as they both stood trial together for the same offence of murder, later reduced to D manslaughter. Be that as it may, since the story of 2nd Appellant both in his extra-judicial statement and his testimony in court is that he was not at the scene of the crime but that he was only attracted by the alarm raised by people around as to the presence of thieves in the neighbour- E hood, I wish once more on pain of repetition, to set down the sole issue proffered and which is germane to the determination of his (2nd Appellant's) appeal as follows:

F *"Whether the learned Justices of the Court of Appeal were right in affirming the conviction of the 2nd Appellant in view of the evidence led at the trial court and the defence of alibi raised by the 2nd Appellant."*

The 2nd Appellant in his very short evidence said succinctly that he was not at the scene of crime but was attracted there after the de- G ceased had already been beaten by an alarm raised that thieves were in the neighbourhood. The evidence of the 2nd Appellant runs thus:

H *"When I returned from the farm I heard an alarm. At that time there was a lot (sic) of thieves worrying that area so every body used to come out when there was an alarm. When I ran there with many of the street people getting there it was our piggery farm. I saw Friday, 1st accused, the day guard. I asked him what happened and he said some thieves came to the piggery farm. Then I saw Lugard the 3rd accused. I gave him N2 to go and call the manager of the Farm, Gabriel Ika."*

This piece of evidence, it has been argued, is supported by the evidence of 1st Appellant himself wherein he stated:

"I remember 6th March, 1989. I was at my work at the piggery farm. Around 8.30 in the morning I saw two men came in. They told me to open the gate. I said I did not know the man before. He then jumped through the fence and untie (sic) the gate. He then started shouted (sic) "Thief. This raised an alarm in the street by an Hausa living in the street there.....2nd accused then came also and asked me about what happened. I told him a thief came into the farm. He looked for the Attendant to give him money to call the manager to come."

The story set out above, it is submitted, is consistent with the statements purportedly made by both Appellants to the Police. Relevant extracts from the statements made to the Police by the Appellants had our attention drawn to them to buttress is argument.

In concluding this statement he made to the Police at page 61-62 of the Record of appeal 2nd Appellant had this to say:

".....Before I came to the scene Nathaniel was sitting down he has (sic) injury on his face. I did not join Aigoubamege in beating Nathaniel Amu."

This statement, 2nd Appellant purportedly made to the Police, it is pertinent to point out, was made immediately he was arrested for the offence of murder and it was corroborated by the statement of the 1st Appellant. The defence of alibi raised therein was not at all investigated. A visit to the house of the 2nd Appellant and an interview with the neighbours to establish or discount the plea of alibi would have confirmed or rebutted same. Absolutely, no effort was made to locate and question the so-called Hausaman who raised the alarm with a view to ascertaining from him whether and when if at all he raised the alarm or as to whether the 2nd Appellant was already at the scene of the incident or whether he got there in response to the alarm after the deceased had already been beaten up. In her judgment at the trial court, only a brief allusion was made to the defence of alibi raised by the 2nd Appellant. The learned trial Judge went on to hold as follows:

".....the 2nd Accused said that he was not there at all and

arrived on the scene after it was all over. He was coming from his farm and heard the alarm. He had no hand in anything."

In 2nd Appellant's defence for which he called no witnesses, his statement and oral evidence to the charge of murder against him is that of
B alibi. The defence of alibi, as it were, implies that the accused person was elsewhere at the time when the offence charged was alleged to have been committed in a particular place. See Ikemson & Ors v. The State (1989) 3 NWLR (part 110) 455 at 459. In his testimony before the trial Judge he
C claimed that on 7/3/89 he went to work though not to his farm but that when he returned home he heard an alarm and he ran to the piggery where he saw 1st Appellant who intimated him that thieves came to the piggery. He gave N2 to one Lugard to go and call the Manager of the farm one Gabriel Oka but that before Lugard arrived Gabriel had come to
D the farm and they were all taken to Ugbo Police Station. **As the alibi was not investigated it cannot, in my view, be asserted that from the totality of the evidence adduced by the prosecution at the trial that it is clear that there is a strong, positive and direct evidence linking**
E **the 2nd Appellant with the commission of the offence. In law, where there is direct evidence linking an accused with the commission of the offence he can safely be convicted for the commission of the said offence. Not so in the instant case where the defence of alibi**
F **raised was not investigated. It is settled law that where an accused raised a defence that his alibi was not investigated, he can still be convicted if there is stronger and credible evidence before the Court which falsified the alibi. See Ortese Yanor & Anor v. The State (1965) NMLR 337 at 347; Nwosu v. The State (1976) 6 SC 109 and**
G **Akpuenya v. The State (1976) 11 SC 269. Where an accused raised a defence that his alibi was not investigated as in the instant case, he can still be convicted if there is strong and credible evidence before the Court which falsified the alibi vide Yanor v. The State (supra)**
H **and Joseph Okosun & 2ors v. A. G. Bendel State (1985) 3 NWLR (Part 12) 283. It is a well-established principle that an alibi means that the accused was somewhere other than where the prosecution alleges he was at the time of the commission of the offence. See**

Gachi & ors v. The State (1965) NMLR 333 and Joseph Okosun & 2ors v. The State (1985) 3 NWLR (part 12) 28. Indeed, it is not for an accused person to prove his alibi; rather the onus is on the prosecution to disprove the alibi. See Nwabueze v. The State (1988) 4 NWLR (part 86)16.

Once there is the slightest defence of alibi the plea must be investigated. Failure of the prosecution therefore to investigate the alibi raised in this case is fatal to the prosecutions case.

From the foregoing, I am satisfied that the treatment of the defence of alibi and the value placed on 2nd Appellants' extra-judicial statement by the Court below is erroneous. Firstly, the learned justices of the court below misapprehended the purport of his (2nd Appellant's) statement to the police in Exhibit C.

What was actually stated by 2nd Appellant in clear term is:

"On the 7/3/89 when I closed from night duty, I went to (the) my farm to work. I came back from the farm at about 10.am. As I was in my house I heard alarm from an Hausa man who is security guard for one Mr. Okwuegbe. I ran out towards the piggery farm."

The lower court misapprehended the statement of the 2nd Appellant to be to the effect that he went to the piggery where he worked at about 10.00am, thirty minutes before the shout of "thief, thief's and that this implied that he was present when the deceased was beaten up and probably participated in the beating. This interpretation indeed does violence to the clear terms of the statement where the 2nd Appellant stated that he was on night duty at the piggery and that when they closed he went to his own farm to work; not the piggery from where he had already closed. Furthermore, he came back home from his farm at about 10.am and was in his house nearby when he heard the alarm.

The learned trial judge understood the purport of the 2nd Appellant's statement to the police (Exhibit C) and his testimony in court when he stated that:

"The 2nd accused said that he was not there at all and arrived on the scene after it was all over, he was coming from his farm and heard the alarm."

The court below relied on this misapprehension of 2nd Appellant's extra-judicial statement in coming to the conclusion that he participated in the crime. Clearly, this conclusion was based on a misapprehension, which in turn has led to an obvious miscarriage of justice.

The lower court found support for the affirmation of the conviction of the 2nd Appellant by alluding to the denial of the Appellants of the making of their extra-judicial statements Exhibits A and C as a result of which both statements and *evidence given in their defence* were held unreliable thereby paving the way for sole reliance on the evidence of PW.2 to convict the Appellants.

It is for this reason that I agree with the 2nd Appellant's submissions that the court below in doing this fell into grave error. What had been raised by the Appellants in relation to the statements is **non-est factum**. It is not far-fetched therefore that 1st Appellant stated that:

"I made a statement to the Police. I see Exhibit A. It is not the statement I made to the Police."

2nd Appellant for his part stated thus:

"that statement was not made by me ."

Although it is conceded that the issue of **non-est factum**⁴ was not raised by counsel when the statements were sought to be tendered, the pleas of **non-est factum** was nonetheless validly raised. Had objections been raised to the admissibility of the statements on the basis of **non-est factum**, they would still have been admitted in evidence as **non-est factum** does not affect admissibility. *The cases of R. v. Igwe* (1960) 5 CNLR 158, *Ikpasa v. Bendel State* (1981) 9 SC 7 and *Ogunye v. State* (1999) 5 NWLR (part 604) 548 at 570, 572 and 576 were called in aid.

Therefore raising the objection that the statements were not made by the Appellants at the stage of tendering same would have been superfluous as the statements would all the same have been admitted. This Court has held in *Nwangbomu v. State* (1994) 2 NWLR (Part 327) 380 at 399-400 F-A that the plea of **non-est factum** in

relation to a confessional statement is a matter of fact to be determined by the Judge at the conclusion of the trial. Be it noted that it is trite that when a document is sought to be tendered and is objected to by counsel, what counsel objecting does at that stage is no more than a submission on the admissibility of the statement. Thus, as the issue of non-est factum is a matter of fact, the challenge of such a statement is more properly done when the accused or any other witness of his impugns the statement as not being that of the accused from the witness box. I agree with learned counsel for 2nd Appellant therefore that as counsel is not competent to give evidence from the bar and the challenge of a confessional statement on grounds of non-est factum is a matter of fact, the challenge is appropriately made when the accused as witness denies the making of such a statement.

As I had cause to observe in Nwangbomu v. State (1994)2 NWLR (Part 327), a case identical to the one in hand:

".....Now the voluntary statement of the appellant which was confessional in nature was received in the proceedings giving rise to this appeal as exhibit B and B1 and these are part of the prosecution's case. See Anofi Opayemi v. The State (1985) 2 NWLR (Part 5) 101. The Appellant for his defence in rendering his testimony in court, admitted he never said what was recorded. He thereby sought to retract the statement rather than its involuntariness that was in issue."

In view of the appropriate attack of the Appellants of the statement (Exhibits 'A' and C) as not being their deeds, it was incumbent on the court below to have made a finding on whether the said statements were actually made by the Appellants before holding that the statements were retracted or before putting them into any use in convicting the Appellants.

It is noteworthy to stress that the term "retraction" and "resile from" have been used interchangeably in most decisions with the pleas of non-est factum. This is misleading since a statement must first be shown to have been made before it can be said to have been retracted by its maker for, where the very making of the

statement is in issue, the retraction cannot arise at the stage. It is
in this wise that I agree that where an accused person sets up a
defence of non-est factum in relation to a confessional statement
what he has done is not a retraction but a denial of the making of
B the statement.

No finding was made by the two courts below on the issue of
fact as to whether the Appellants made the statements. The appli-
cation therefore of the rule in Oladeje v. The State (1987) 3 NWLR
C (Part 61) 419 and Asanya v. The State (1991) 3 NWLR (Part 180)
422, two cases that have been overruled, was therefore prejudicial
to the Appellants whose conviction ought not to be allowed to stand.
See Egboghonome v. The State (1993) 7 NWLR (Part 306) 383. What
it boils down to is that had the testimony of the 2nd Appellant and
D his extra-judicial statement (Exhibit C) not been treated as unreli-
able, the 2nd Appellant would have been absolved of the offence of
murder of the deceased based on his defence of alibi which was not
investigated. Furthermore, the evidence of PW.2 who himself was
E a victim of the same attack, ought not to have been viewed with as
much confidence as the trial court and court below did, it being the
evidence of a victim.

It is for these reasons I have given above that the answer I proffer
F to issue No.2 is in the negative.

For all I have been saying, I also allow the 2nd Appellant's appeal,
set aside the decisions of the two courts below and discharge and acquit
each of the Appellants.

G

UWAIFO JSC

I had the opportunity to read in advance the judgment of
H my learned brother Onu JSC. I agree with his analysis of the
facts, his reasoning and conclusions.

It is not in dispute that the deceased was subjected to a
mob attack on 7 March, 1989. The 1st and 2nd appellants were

among those accused of inflicting injuries on him. Some three months later; on 29 June, 1989, the deceased died. The appellants and another person were charged with his murder. The learned trial judge acquitted the third accused but held that the appellants caused the death of the deceased and convicted each of them of manslaughter and sentenced him to 7 years' imprisonment. The Court of Appeal, Benin Division, affirmed the convictions and sentences of the two.

The issue is whether the attack on the deceased on 7 March, 1989 caused his death on 29 June, 1989. It is necessary to consider the evidence. On the day of the attack, two doctors examined the deceased. The first was Dr. Michael Asuen who testified for the prosecution as p.w.6. He said:

"On examination he was found to have multiple bruises all over the body. The left eye was swollen. There was infection (sic. Injection) of blood in the white part of the left eye. There was bleeding from the nose. Both knees had abrasion (sic) as well as the skull.

The witness added that when he discharged the deceased on 20 March, 1989, he was in a relatively good condition, good enough to be discharged *"as far as my own treatment was concerned."* He however discharged him into the care of an ophthalmologist to have his eye treated. The ophthalmologist, Dr., Alexander Idehen, testified as p.w.5 and said as follows:

"I examined him and found the right eye was normal but the left (L) eye was very painful, red and the cornea was oedematous and smaller. The anterior chamber was filled with blood. That particular eye had no function at all. He was taken to the theatre same day to wash out the blood in the anterior chamber. During that procedure we found out that the lens of the eye was dislocated. He stayed in the Hospital until 31st March, 1989 when he was discharged."

As already indicated, some three months later, the accused died. It was alleged that he developed swollen tummy and legs.

He was then taken to the University of Benin Teaching Hospital (UBTH) where he was allegedly treated. There is, however, no evidence as to the nature of the ailment and the treatment he was given if at all. But there was some suggestion that UBTH may have diagnosed liver cirrhosis although no doctor from that hospital testified. Dr. Suleman Abu a pathologist attached to the central Hospital, Benin City, performed the autopsy. Let me first reproduce what he said in cross-examination when counsel was trying to get him to reconcile his finding of the cause of death with what the UBTH found. He said he examined the corpse about 12 days after the man died having been brought from the UBTH along with their records which he used in carrying out the post-mortem examination. He then said inter alia:

"UBTH suggestion was a provisional diagnosis of liver cirrhosis.... They were querying cirrhosis of the liver. Cirrhosis is scarification of the liver cells. It is a chronic condition that does not go back once it starts..... Cirrhosis does not lead to faulty (sic) liver, faulty liver leads to cirrhosis. Chronic alcoholism can lead to cirrhosis. Swelling may be associated but it is not a cause. A person who drinks and smokes in a chronic manner is likely to contract cirrhosis. Abbreasion (sic) of the head has nothing to do with faulty liver. A catarrh nose bridge cannot cause any disuse of the liver. The man died of liver abscess of faulty change. No cirrhosis"

This witness in examination-in-chief talked about forehead and nasal bone injuries, and the condition of the left eye. He then went further to say:

"Dissection revealed fractures of right (R) sides 5, 6, and 7 and both lungs were crushed by dense adhesions. Detailed examination revealed the fractured ends of right (R) rib 6 were inside a cavity of cysts of the liver and this contained chocolate-coloured materials. Histological examination of these sections revealed chronic and active inflamary (sic) cells in the cyst cavity. There was no abnormality in the abdominal cavity.... In my

opinion, I gave the cause of death as cyst in the liver and faulty (sic: fatty?) Change of the liver.... A long duration of injury to the ribs and penetration into the liver could induce the formation of this cyst cavity. The injuries to the liver and the ribs could been caused by a heavy blow from a blunt object to the right side of the chest." B

In the present case it cannot be said with any measure of certainty that it was the act of the appellants which caused the death of the deceased having regard to the nature of the evidence and the obvious lack of nexus between what happened on 7th March, 1989 and what resulted in the deceased being taken to the UBTH three months later. The learned trial judge, with due respect, dealt with cause of death and whose act was responsible for it in a most unsatisfactory manner, even to the point of tending to shift the burden of proof to the defence. She said: C D

"As to the cause of death itself, this was given as the cyst in the liver and fatty change of the liver. The fatty change could be caused by chronic alcoholism, but there is no evidence that the deceased was an alcoholic. The cyst is another matter. The cysts and their cause has (sic) been quietly passed over by the defence. Dr. Abu again, 'Detailed examination revealed the fractured ends of the right rib 6 were inside the cavity or cyst of the liver and this contained chocolate coloured material A long duration of injury to the ribs and penetration into the liver could induce the formation of this cystic cavity' The deceased sustained injuries during the incident of 7th March, 1989 from which, according to the evidence, he never really recovered, and subsequently died three months later as a result of undetected injury to his liver caused by undetected fracture of three ribs on the right side, the ends of one of which had penetrated into the liver. Death was not from natural causes. [Emphasis mine]" E F G H

The learned trial judge was no doubt aware of the lapses in the evidence when she talked about "undetected injury to his liver caused by undetected fracture of three ribs on the right side" which

caused the cyst. Yet she said the defence "*quietly passed*" the cysts and their cause. How could she rely on probability and shift the burden to the defence of disproving that the presence of the cysts was caused by the appellants? How could she be sure of referring to the injury to the liver and fracture of the ribs as "*undetected*" as if they existed at the time the first doctor (Dr. Asuen) examined and treated the deceased?

The question is, if the man suffered broken ribs which could have penetrated into the liver to induce the formation of the cyst cavity, causing death, who caused the broken ribs? The first two doctors who examined and treated him talked of skull, nose and general body injuries (p.w.6); and eye injury (p.w.5). If the ribs were broken then that was the time to find out through examination. Were the doctors careless or they could not detect that the ribs were broken? The learned trial judge decided to speculate that the broken ribs were undetected then. A court of law is not permitted to speculate whether in civil or criminal proceedings: See *Oledele v. The State* (1993) 1 NWLR (pt.269) 294; *Ogunzee v. The State* (1998) 5 NWLR (pt.551) 521; *Amed v. The State* (1999) 7 NWLR (pt.612) 641; *Ivienagbor v. Bazuaye* (1999) 9 NWLR (pt.620) 552. Was liver cirrhosis the cause of death as the provisional diagnosis at UBTH showed? It remains uncertain, in my view, whether it was the act of the appellants that caused the death of the deceased. The nearest that can be said is, who knows, it could well be. This does not take the matter any further in view of the requirement of the law.

It is a cardinal requirement of our criminal justice system that the prosecution must prove its case beyond all reasonable doubt: see *Muka v. The State* (1976) 9-10 SC 305; *Anekwe v. The State* (1976) 9-10 SC 225. This means that every ingredient of an offence must be established to that standard of proof so as to leave no reasonable doubt of the guilt of an accused. This certainly applies to the cause of death in homicide cases where the prosecution must prove with certainty the cause of death and

that it is due to the act of the accused. It is not a matter of probability but of certainty. In *R v. Oledima* (1940)6 WACA 202, the court said:

"Now 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" B

In *Omogodo v. The State* (1981) 5 SC 5 at 26-27, Nnamani JSC observed thus:

"In a murder case..... The prosecution cannot succeed in establishing the guilt of the accused unless it not only established the cause of death but established in addition that the act of the accused caused the death of the deceased." C

I think the learned trial judge was in error to attribute the cause of death of the deceased to the act of the appellants. The court below fell into the same error when it said per the leading judgment of Ibiyeye JCA: D

"I agree with the submission of the learned counsel for the respondent that there was no intervening fact which snapped the continuous claim of causation between what the p.w.6 and p.w.7 (sic:p.w.5) respectively observed on 7/3/89 and 11/7/89. In other words, the effect of the attack on the deceased by the appellants which the p.w.6 observed on 7/3/89 were visibly present on 11/7/89 when the p.w.1 carried out autopsy on Nathaniel' corpse. In view of all these, the arguments of the appellant's counsel on failure to call some vital witnesses, contradiction in medical opinions and want of medical reports as far as the identity of who caused the death of Nathaniel is concerned are academic. The naked truth is that the effect of the appellants' attack on Nathaniel on 7/3/89 lingered on continuously until he died on 29/6/89" E F G

With due respect to the learned Justice of Appeal, he seems to me to have completely overlooked the submission of counsel on the consequences of the available evidence. The reliance placed on the evidence of p.w.5 and p.w 6 as the cause of death is an utter misdirection; and to have concluded that the appellants' act on 7 H

March, 1989 lingered on until the deceased died on 29 June, 1989 is not a proper inference based on the evidence which fell far short of providing a safe connecting link.

The 2nd appellant made a statement to the police (exh.C) in B which he raised alibi. He said:

" On the 7/3/89 when I closed from night duty, I went to my farm to work. I came back at about 10 am. As I was in my house I heard alarm from an Hausa man who is a security guard for one C Mr. Okwuegbe. I ran out towards the piggery farm, when I got to the farm I saw many people all gathered outside the gate..... Before I came to the scene Nathaniel was sitting down he has injury on his face. I did not join Mr. Friday Aiguobawangie in beating Nathaniel Amu"

D The 1st appellant virtually confirmed that the 2nd appellant did not take part in the fracas in his own statement to the police (exh.A), claiming that he alone fought with the deceased. He confirmed this in his testimony in court. The police did not investigate the alibi. The learned trial judge did not even consider the evidence of alibi. All she said was:

"If he (deceased) were not beaten up by the two accused persons then how did he come to be in such a sorry state when F he arrived at the police Station and at Dr. Asuen's hospital? The 2nd p.w. Is certain that the two accused persons attacked the deceased and beat him. He was so certain that he even said that he did not see the erstwhile 3rd accused involved in the attack."

G With due respect to the learned trial judge, this is a very weak and unsatisfactory analysis of the question of the alibi raised by the 2nd appellant. She did not consider whether enough facts which would enable the police to check on the alibi were given at the first opportunity in the statement of the 2nd appellant. Of H course there were. One Hausa man, a security guard for one Mr. Okwuegbe, was mentioned. He was not contacted by the police nor was there any attempt to find out if the 2nd appellant went to his farm, returned at the time he said he did and remained in his

house before the alarm he said the Hausa man raised. But the learned trial judge relied on the evidence of p.w.2, Doherty Sunny Osifo, when he said he saw the 2nd appellant take part in attacking the deceased and that *"he was so certain that he even said he did not see the erstwhile 3rd accused involved in the attack."* B
 Could that be a measure of ascertaining if a witness saw a particular person attack another simply because he said he did not see one other do the same. I should have thought perhaps the evidence of p.w.2 in cross-examination would have rendered him C
 unreliable when he said:

*"It is not correct that when I saw 1st accused they did not have anything with them. They both had cutlasses and I said so in my report.... I did see the 1st and 2nd accused attack Nathaniel D
 Amu with cutlasses. I said so in my statement."*

There was absolutely no evidence either from the p.w.6, Dr. Michael Asuen, who was the first doctor to examine and treat the deceased, or from p.w.5, Dr. Alexander Idehen, who treated him later; or from p.w.1, Dr. Suleman Abu, who did the postmortem examination of any machete injury on the deceased. The learned trial judge herself said:

*"There was no evidence that they continued to hit him with cutlasses and indeed the medical evidence does not support this. F
 So the implements used would be fists or feet, or possibly the sticks that the 1st accused mentioned in his statement that he later denied."*

How then could the same judge rely positively on the evidence of a witness of the type of p.w.2 to come to the conclusion G
 that the 2nd appellant took part in attacking the deceased? I am satisfied that the alibi raised by the 2nd appellant was not controverted by any credible evidence which would falsify that defence: See Yanor v. The State (1965) NWLR 337; Nwosu v. The State H
 (1976) 6 SC 109; Okosun v. A.G. Bendel State (1985) 3 NWLR (p.t 12) 283. It is well settled that it is not for an accused person to prove his alibi; it is only for him to bring it forward but it is for

the prosecution to lead credible evidence to disprove it: See Nwabueze v. The State (1988) 4 NWLR (pt.86) 16. The two courts below were in grave error not to have held that the defence of alibi availed the 2nd appellant as the prosecution completely failed B to disprove the alibi in the present case.

For the above reasons and those more fuller stated by my learned brother Onu JSC, I will allow each of the appeals of the 1st and 2nd appellants. Accordingly, I set aside the conviction and sentence passed on each of the appellants by the two courts C below and make an order of discharge and acquittal of each of them.

D **TOBI JSC**

The appellants were charged along with a third man with the murder of Nathaniel Amu on or about the 29th day of June 1989. The appellants were security men in a piggery farm in Benin City at the material E time. The piggery farm was owned by Augustine Amu who died on 10th February, 1989.

The case of the prosecution is that after the death of Augustine Amu, the father, PW3, requested PW2 to have a look at the farm and advise him on the animals that had been received in the farm a few weeks F before the son died. PW2 was the Director of Agricultural Services in Edo State Government and an expert on agricultural matters.

The deceased, who knew the farm took him there. Efforts to get into the farm proved abortive. The deceased sounded the horn of the car G but to no avail. On further sounding of the horn, the appellants came out from a house nearby, outside the piggery gate. The deceased recognized the 2nd appellant as one of the security men. 2nd appellant introduced the 1st appellant to the deceased as another security man who has been re- H cently employed by the farm manager.

The deceased made inquiries as to the whereabouts of the farm manager. 2nd appellant told him that he left for the town. The deceased then introduced PW2 to the appellants as one who was mandated by

PW3 to inspect the piggery. 2nd appellant was therefore asked to open the gate to enable PW2 carry out the inspection. 2nd appellant refused. He told the deceased that the farm manager gave them instruction not to allow any member of the family into the farm.

The deceased insisted. 2nd appellant refused to open the gate. B The deceased put his hand on the fastener of the gate to see if it was really locked. 1st appellant hit the deceased with a cutlass that he was carrying. 2nd appellant joined him. As they continued beating the deceased, PW2 shouted for assistance. He started running away to the town. The appellant left the deceased and chased PW2. He was mistakenly beaten by a mob in the neighbourhood as a thief. C

The evidence of the appellants is different. 1st appellant said that two men came to the farm in the morning of 6th March, 1989. They told him to open the gate but he refused. One of them jumped through the fence and united the gate. He shouted “thief”. This raised an alarm in the street. 2nd appellant, who heard the shout, came and the 1st appellant told him that a thief came to the farm. D

The 2nd appellant said in his evidence-in-chief at page 36 of the Record. E

“I saw Friday, 1st Accused, the day guard. I asked him what happened and he said that some thieves came to the piggery farm. Then I saw Lugard, the 3rd accused, I gave him N2 to go and call the Manager of the farm, Gabriel Oka. Before Lugard came back, Gabriel had come to the farm. They took all of us to Ugbowo Police Station” F

The deceased was first admitted at the Aseun Hospital and was treated by PW6. PW6 referred him to PW5 for eye treatment. The deceased was later admitted at the University of Benin Teaching Hospital where he died on the 29th June, 1989. G

The learned trial Judge did not see his way clear in convicting the appellants on the charge of murder. He convicted them for the lesser offence of manslaughter. He said at page 56 of the Record: H

“From the evidence, therefore, it cannot be reasonable (sic) concluded that the Accused intended to do grievous harm to the deceased. The necessary intent, therefore is not established for the offence to amount

to murder. A person who unlawfully kills another in such circumstances as not to constitute murder is guilty of man slaughter. Section 317 Criminal Code. From the above, it had been established that Nathaniel Amu died as a result of the actions of the Accused persons but in circumstances that do not amount to murder. It is not clear from the evidence whose hand inflicted the blow that caused the injury that brought about the death but the two accused persons joined together in fighting the deceased. The two Accused persons carried out the offence together and each was therefore aiding the other. Both are therefore principals or parties to the offence. For the reasons stated above, I find each of the accused persons guilty of manslaughter and each is convicted accordingly.”

The appeal to the Court of Appeal was dismissed. Relying particularly on section 314 of the Criminal Code, Ibiyeye, JCA said in the penultimate paragraph of page 141 of the Record:

“The appellants in the instant case are, by virtue of the above provision (referring to section 314 of the Criminal Code) deemed to have caused the death of Nathaniel since his death occurred within four months which came within the ambit of the operation of section 314 of the Criminal Code.”

Dissatisfied, the appellants have come to this court. Briefs were filed and duly exchanged. The main thrust of the argument of learned counsel for the 1st appellant, Mr. A.O. Alegeh, is that the act of the appellant did not cause the death of the deceased. He relied on the evidence of PW3, PW4, PW5, PW6 and the following cases: State v. Ogunbunjo (2001) 13 WRN 1; Omogodo v. State (1981) 5SC.5; Uguru v. State (2002) 25 WRN 118; Ahmed v. State (2002) 2WRN 1 at 26; Adie v. State (1980) All NLR 39; Adio v. State (1979-81) 12 NSCC 51; Bande v. State (1972) All NLR 811; Iko v. State (2001) 35 WRN 1 at 40; Lori v. State (1980) 8-11 SC 81 and Ameh v. State (1978 6-7 SC 27. Counsel urged the Court to quash the conviction and sentence passed on the 1st appellant and discharge and acquit him.

Learned counsel for the 2nd appellant, Mr. Etigwe Uwa, dealt with the defence of alibi raised by the 2nd appellant. He submitted that the treatment of the defence of alibi and the value placed on his extra judicial

statement by the Court of Appeal is erroneous. He referred to the evidence of the 2nd appellant and Exhibit C, the appellant's statement to the police. He submitted that any defence raised by an accused person should be investigated. He cited R.v. Igwe (1960) 5 CNLR 158; Ikpassa v. Bendel State (1981) 9 SC. 7; Ogunye v. State (1999) 5 NWLR (Pt. 604) 548 at 570, 572, 567; Nwangbomu v. State (1994) 2 NWNLR (Pt.327) 380 at 399-400; Oladejo v. State (1987) 3 NWLR (Pt.61) 419; Asanya v. State (1991) 3 NWLR (Pt.180) 422; and Egboghonome v. State (1993) 7 NWLR (Pt. 306) 383. He urged the Court to uphold the appeal of the 2nd appellant and discharge and acquit him and quash his conviction and sentence for manslaughter.

Let me take first the appeal of the 1st appellant. It zeros on the law of causation in our criminal jurisprudence. Around the terminology of causation is proximate cause, legal cause and direct cause, terms which are used synonymously. The expressions "*immediate cause*", "*effective cause*" and *causa causans* are used to denote the last link in the chain of causation. There could be an intervening or supervening cause. An intervening or supervening cause denotes a cause that comes into active operation arising from negligence, even if that cause does not break the chain of causation.

In order to hold an accused criminally responsible, the chain of causation must not be broken. Once there is a broken link in the chain of causation, that broken link must be resolved in favour of the accused as it affects the *actus reus* of the offence. In other words, where the injury which caused the death is not the proximate, legal or direct cause of the death of the deceased, the benefit of doubt must be given to the accused. I can still go further. Where there is more than one possible cause of death, the benefit of doubt must be given to the accused because the available evidence in such a situation does not pin the accused down to the death of the deceased. This is because there is an intervening or supervening cause, which equivalents in Rome's Latin home, are *novus actus interveniens* and *nova interveniens* respectively.

In Uyo v. Attorney-General, Bendel State (1986) 1 NWLR (PT. 17) 418, the court held that (i) the principle of causation dictates that an

event is caused by the act proximate to it and in the absence of which the event would not have happened; (ii) to establish a charge of murder or, manslaughter it must be proved not merely that the act of the accused could have caused the death of the deceased but that it did; and (iii) the important consideration for determining responsibility is whether death of the deceased was caused by injuries he sustained through the act of the accused and not whether from the medical point of view death was caused by such injuries, see also R. V. Effanga (1969)1 All NLR 339.

In Oguntolu v. The State (1996) 2 NWLR (Pt. 432) 503; this court held that in a charge of murder, the death of the victim must be caused by the act of the accused. See also Ononuju v. State (1976) 5 SC 1; Onyenankeya v. State (1964) NMLR 34; Idowu v. State (2000) 7 SC (Pt. II)50; Ahmed v. State (2001) 12 SC (Pt.1) 135.

The cause of the death of the deceased should be established with certainty because the act which caused the death is in most cases a certain act. See Adekunle v. State (1989) 12 SC 203; Oforlete v. State (2000) 7 SC (Pt. 1) 80. There are however instances where cause of death could be inferred from the circumstances of the case. See Adekunle v. State (supra); Oguonzee v. State (1998) 4 SC 110.

I have talked enough Law for now. Let me now go to the facts of the case. PW6 was the first medical doctor to examine and treat the deceased. He said in examination in chief at pages 20 and 21 of the Record:

“On 7th March, 1989, Mr. Nathaniel Amu was brought to my hospital in a semiconscious state. The history on admission was a mob attack, in Nathaniel’s brother’s piggery farm. On examination he was found to have multiple bruises all over the body. The left eye was swollen, there was infection of blood in the white part of the left eye. There was bleeding from the nose. Both knees had abrasion (sic) as well as the skull. He was admitted... The patient was in my hospital until 20th when he was discharged for observatory case. I gave a medical report. When discharged, the patient was in a relatively good condition. Good enough to be discharged. The impression I got from the injuries was that the attack on the patient was severe enough to create the semi-conscious condition”

Under cross – examination, witness said at page 21 of the Record:

“The injuries was (SIC) sustained, in my opinion by physical attack. There were bruises and abression (SIC) on the patient’s body but laceration, I could not say for sure. When he was discharged he was not fit to go home. I discharged him with the care of the opathalnologist B (SIC). He was fit enough for discharge as far as my own treatment was concerned... I did an X – ray. It did not reveal anything. If I was not discharging the patient to the care of another physician, I would not have discharged him when I did. X-ray does not tell the whole story. The fact C that X-ray did not reveal anything did not mean the patient was 100% perfect.”

PW6 materially contradicted himself. In one breath he said in evidence that the deceased was good enough to be discharged and in another breath he said that but for the fact that he was discharging him to PW5, he D would not have discharged him at the time he did. What he said in examination in-chief is quite different from what he said under cross examination.

PW5, the specialist in eyes said at page 19 of the Record: E

“On March, 1989 one Nathaniel Amu was referred to me by my colleague, Dr. Asuen, as a result of injury to the (L) eye. I examined him and found the Right eye was normal but the (L) eye was very painful, red and the cornea was oedematus and smaller. The anterior chamber was F filled with blood. That particular eye had no function at all. “He was taken to the theatre the same day to wash out the blood in, the anterior chamber. During the procedure we found out that the lense (SIC) of the eye was dislocated. He stayed in the hospital until 31st March, 1989 G when he was discharged.”

There is no complication in the evidence of PW5. He treated the deceased on the left eye and discharged him on 31st March, 1989.

PW1, a Consultant and former Pathologist attached to the Central Hospital, Benin-City, performed the post-mortem on the body of the de- H ceased. He said at page 5 of the Record under examination in-chief:

“On examination there was leaking abrasions on the left (L) side of the forehead. There was deformity of the nasal bone, the

nasal septum. The left (L) eye was smaller than the right (R) eye. The corner of the left (L) eye was hazy and opaque. The lens of the eye had already started forming contract. The fudas of the eye could not be visualized because of fibrous growth covering the whole area. Dissection
 B revealed fractures of right (R) side 5,6 and 7 and both lungs were crushed by dense adhesive. Detailed examination revealed the fractures ends of right (R) rib 6 were inside a cavity of cyst of the liver and this contained chocolate coloured materials. Histological examination of these sec-
 C tions revealed chronic and active inflamary cells in the cyst cavity. There was no abnormality in the abdominal cavity..... The microscopic appearance of the specimens of tissue taken from the area out of the cyst showed an advanced stage of faulty charge, but these were not cyrorhotic in appearance.... A long duration of injury to the ribs and penetrating
 D into the liver could induce the formation of this cyst cavity. The injuries to the liver and the ribs could have been caused by a heavy blow from a blunt object to the right side of the chest. On other occasions, if a person falls from a height and lands on the right side of the chest on a blunt
 E object, it can cause fracture, especially where there is crowd pushing."

Under cross-examination, witness said at page 6 of the Record:

"Cyrrhois is scarification of the liver cells. It is a chronic condi-
 F tion that does not go back once it starts. The faulty charge that I said about can lead to cyrrhosis. An abress (sic) cannot be reduced by cyrrhosis. Cyrrhosis does not lead to faulty liver, faulty liver leads to cyrrhosis. Chronic alcoholism can lead to cyrrhosis. Swooling (sic) may be associ-
 G ated but it is not a cause. A person who drinks and smokes in a chronic manner is like (sic) to contact cyrrhosis. Abbression (sic) of the head has nothing to do with faulty liver. A catarrh nose bridge cannot cause any disuse of the liver. The man died of liver abscess of faulty charge. No cyrrhosis."

Pw1 said clearly in his evidence that the deceased died of liver
 H abscess; not cyrrhosis. Witness gave possible medical situations which could give rise to injuries to the liver and the rib. This first is a heavy blow from a blunt object to the right side of the chest. The second one is if a person falls from a height and lands on the right side of the chest on

a blunt object. It appears to me that the first situation is closer to the facts of this case, although there is no such direct evidence. PW2, the Director of Agriculture Services said at page 7 of the Record:

"Nathaniel did not believe the statement. He insisted the gate should be opened for us because he know(sic) the security man normally keeps the key to the gate. When the secuity (sic) was unwilling to open the gate he tried his hand on the key to see if it was actually locked. Almost immediately the 1st \accused hit him with the cutlass he had in his hand. As Nathaniel tried to hold him back, but 2nd Accused joined 1st AC-CUSED. While they were fighting Nathaniel, I started shouting for people in the neighbourhood for help."

Witness did not tell the court the result of the cutlass beating the deceased received from the 1st appellant. He did not also say what role the 2nd appellant played in the whole affair. All he said was that the 2nd appellant joined the 1st appellant. Did he join him in beating of the deceased? If so, what specific role did 2nd appellant play in the fight? These are some unanswered questions.

That is not all. I can still beg the matter to favour the prosecution, a position I normally ought not to take. PW6 said in his evidence in-chief that the skull of the deceased had abrasion. This means in my layman's language and understanding that the surface of the skin around the skull was rubbed or worn away. The word "skull" stripped off its technical medical meaning, means the bone of the head which closes the brain. There is therefore so much proximity naturally between the head and the skull. I am not a medical doctor but I have the feeling that the Almighty God in his full and final wisdom had put them contiguously or in some contiguity.

PW1 said under cross-examination that abrasion of the head has nothing to do with faulty liver. Taking this evidence in the context of the further evidence given by witness that "the man died of liver abscess of faulty charge", the point I have been struggling to make should be clearer now.

It is all the line of causation that I have been trying to draw, but it does not appear to flow. There are bricks here and there. Let me return to

law. In Onyenakeya v. The State (1964) NMLR 34, it was held that to establish a charge of murder or manslaughter the evidence must be such as to show that the death of the deceased was caused by the act of the accused. The fact that the defence did not suggest that death arose from other causes is not confirmation of evidence which falls short of showing that death did arise as a result of the appellant's acts, the onus to establish this being not on the defence but on the prosecution.

In the State v. Osuagwu (1974) ECSLR 358, it was held that the courts have always viewed with seriousness the requirement that in the case of murder or manslaughter the cause of the death must be positively proved either by direct evidence or by such circumstantial evidence that leaves no room either for doubt or for speculation. In order to draw an inference of the accused person's guilt from circumstantial evidence, there must be no other co-existing circumstances which weaken or destroy that inference.

Absence of proof of cause of death as attributable to the act of an accused person is fatal to the conviction of an accused person. See Ojimah v. The State (1978) 1 NCAR 516. I have read the evidence of the witnesses twice but I cannot see either direct or circumstantial evidence joining the 1st appellant with the offence of manslaughter, in the sense that he killed the deceased. The possibility of intervening or supervening cause, that is to say, a cause that comes into active operation after the commission of the offence, may not be ruled out. I should not sound final or dogmatic on that in the absence of specific evidence. Since certainty is a vital ingredient in the apportionment of criminal responsibility, particularly in our common law concept of acts reus, I will find it extremely difficult to uphold the conviction and sentence of the 1st appellant.

In determining the cause of death, the duration between the suspected act of the death (i.e. the acts reus) and the death is not important. Accordingly, an accused could be guilty of the offence of murder or manslaughter even if the duration is long. In so far as the court comes to the conclusion correctly that the act of the accused caused the death of the deceased, a conviction and sentence will be proper in law. Conversely,

even if the period between the act and the death of the deceased are proximate, a court can still not find the accused guilty if there are more than one possible cause of death. What is essential is that there must be evidence that the act of the accused resulted in the death of the deceased.

The Court of Appeal invoked section 314 of the Criminal Code B which provides for the 12 months rule, in the determination of criminal responsibility. In my view, section 314 anticipates a situation where the accused is found guilty of the offence of murder or manslaughter. Where an accused is not found guilty, as in this appeal, the time frame in section C 314 will not apply.

And that takes me to the defence of alibi by the 2nd appellant. The word "alibi" in its original Latin context as an adverb, means "elsewhere". See Gachi v. The State (1965)NMLR 334; Nwabueze v. The State (1988) 4 NWLR (pt. 86) 16. If the defence of alibi succeeds, the accused is D completely and totally exonerated from criminal responsibility as he lacks the mens rea and the actus reus for the commission of the offence. This is because if an offence was alleged to have been committed by the accused in a particular place, which is the scene of crime, and there is E evidence that he was somewhere else at the time, and not in the scene of crime, he cannot be found guilty of committing the alleged offence.

It is a defence available to an accused person who normally raises it early either as a suspect or later as an accused person in police interro- F gation room. In Ukwunnenyi v. The State (1989) 4 NWLR (pt.114) 131, this court held that the best defence and evidence of an alibi is one pleaded at the first opportunity and not at the time of trial. When the defence is raised by the accused, the police have a duty to investigate in order to G know the veracity or authenticity of the defence.

In Ukwunnenyi v. The State (supra) this court held that when the defence of alibi is raised by an accused giving names and tangible particulars which can be cross checked at the investigation stage, it is the duty of the investigating police officer to investigate it in order to ascer- H tain its truth. (i.e that the suspect was present at a place other than the scene of the crime when the crime was committed) or its falsity (that the suspect was not where he said he was when the crime was committed)

Where the police fails to investigate the alibi raised by the accused, the trial judge is bound to give the benefit of doubt to the accused, unless there is strong and credible evidence or there is positive evidence which cancels the alibi. In other words, non-investigation of alibi will not be prejudicial to the case of the prosecution if there is strong evidence implicating the accused in the commission of the offence to the extent that the defence of the alibi is a mere charade or farce. See Okosun v. Attorney-General, Bendel State (1985) 3 NWLR (pt.12) 283; Odu v. Erhumewense (2001) 10 NWLR (pt. 722) 668; Dogo v. The State (2001) 1 SC. (pt.11) 30; Eyesi v. The State (2000) 12 SC (pt. 1) 24.

What is the content of the defence of alibi by the 2nd appellant? He said at page 36 of his evidence in-chief:

"when I returned from the farm I heard an alarm. At that time there was a lot of thieves worrying that area so everybody used to come out when there is an alarm. When I ran there with many of the street people getting there, I asked what happened, and he said that some thieves came to the piggery farm. Then I saw Lugard, the 3rd accused. I gave him #2 to go and call the Manager at the farm, Gabriel Oke, Before Lugard came back, Gabriel had come to the farm. They took all of us to Ugbowo police Station."

It appears to me from the above that the 2nd appellant returned from the farm to his residence. I expected the police to investigate by going to his residence and ask anybody whether he was there at the material time. I say this because I do not expect the appellant to live alone. By this I mean that even if he lived alone, there will be persons in the compound where he lived.

I have stated the position of the law that an accused who raised an alibi can be convicted if there are other compelling evidence that can drown or cancel the defence. Is there any such evidence? PW2 in his evidence in-chief said at page 8 and I reproduce it at expense of prolixity:

"When the security was unwilling to open the gate he tried his hand on the key to see if it was actually locked. Almost immediately the 1st Accused hit him with the cutlass he had in his hand. As Nathaniel tried to hit back but 2nd Accused joined 1st Accused."

Is this enough evidence outside the defence of alibi to rope in the 2nd appellant? All pw2 said is the 2nd accused joined 1st accused? I ask: to do what? While I may speculate (and our adjectival law does not permit me to do so) that 2nd appellant jointed 1st appellant in the fight; what was his exact role? Did he also take the cutlass in the hand of the 1st appellant to bit the deceased? If so, what part of the body was broken? This question is important in the light of the medical evidence of pw1. such a swallow and peripheral evidence cannot stand as basis for the non- investigation of the alibi presented by the 2nd appellant. In the circumstance, I hold that non-investigation of the alibi is prejudicial to the case of the prosecution.

I want to say something about the delay in this appeal. Judgment was delivered in the High court on 10th March, 1994. The respondent's brief was filed in this court on 17th October, 2003 and the appeal was heard on 23rd November, 2003. Accordingly the delay in hearing this appeal cannot be placed at the door steps of this court.

The appellants were convicted and sentenced each to seven years in prison. That was on 10th March, 1994. The prison term at worst should expire earlier than March, 2001. This is 2003 and the appeal is being heard. If the appeal was heard earlier, the appellants could have been free persons latest in the year 2001.

The justice delivery system in this country as it relates to delay is scandalous. It is very sad that for a period of seven years, this appeal, could not be disposed of. Delay in civil matters, though bad is not as bad as delay in criminal matters. This is because in criminal matters the liberty of the citizen is at stake. Unless a convict gets post-conviction bail, he will lavish in prison until his appeal is finally disposed of. I do not think the appellants in this appeal had the fortune of posting post conviction bail. I do not see it in the Record. The justice delivery in this matter is most wicked and cruel to the appellants and I condemn it. If I had a stronger word than condemnation, I should have used it. One day of H freedom means so much to the incarcerated prisoner. I say no more.

Finally, it is for the above reasons and the more detailed reasons given by my learned brother, Onu, JSC in the leading judgment that I too

allow the appeal. I quash the conviction and sentence passed on the appellants. The appellants are hereby discharged and acquitted.

EDOZIE JSC

B The two Appellants were before the Benin High Court jointly charged with the murder of one Nathaniel Amu on or about the 29th June, 1989 contrary to section 319(1) of the Criminal Code, Cap 48, Laws of Bendel State, 1976. At the end of the trial they were each convicted of the lesser offence of manslaughter and sentenced to a term of imprisonment of seven years. Their appeals to the court of Appeal were dismissed and their convictions and sentences affirmed.

D In their further appeals to this court, the main thrust of the 1st Appellant's appeal is that the prosecution did not establish that it was the act of the 1st Appellant that caused the death of the deceased. No doubt, to ground a conviction for murder, the prosecution must establish beyond reasonable doubt the following ingredients:

- (a) *the death of the deceased;*
- (b) *the act or omission of the accused which caused the death; and*

F (c) *that the act or omission of the accused which caused the death was intentional with knowledge that death or grievous bodily harm was its probable consequence, see Ogba v. State (1992) 2 N.W.L.R. (Pt .222) 164, Nwaeze v. State (1996) 2 N.W.L.R. (pt.421) 1, Fred Depere Gira v. The State (1996) 4 N.W.L.R. (pt.443) 375 at 382, Haruna v. The State (1990) 6 N.W.L.R. (pt.115) 125 at 126.*

H The burden which never shifts is on the prosecution to prove not only that the act of the accused could have caused the death of the deceased but that it certainly did. If there is the possibility that the deceased died from other causes than the act of the deceased, the accused is entitled to an acquittal: R v. Oledima (1940) 6 W.A.C.A. 202, Ononuju v. State (1964) 1 All N.L.R. 15, Frank

Onyenankeya v. The State (1964) N.M.L.R. 34; R v Owe (1961) 1 All N.L.R. 680, Rex v Abangowe (1936) 3 W.A.C.A. 85.

Cause of death can be proved by direct or circumstantial evidence. Where the prosecution relies on direct evidence, such as the medical evidence of the medical doctor who performed a post mortem examination of the deceased, such medical evidence must be satisfactory and cogent in establishing that it is the injury inflicted on the deceased by the accused that led to the death of the former. Where medical evidence is inconclusive, the court has the duty to examine the evidence before it and draw the necessary inferences: see Adekunle v. The State (1989) 5 N.W.L.R. (pt.123) 505 at 515; Essien v The State (1984) 3 S.C.14. C

In the instant case, the incident which led to the prosecution of the Appellants occurred on 7th March 1989 at a piggery farm in Benin when the Appellants were said to have attacked the deceased and thereby caused him severe bodily injuries. The evidence established that the deceased did not die immediately after the attack but died about three months later. The prosecution, to secure a conviction was expected to rely on medical evidence, as it did, to establish that the deceased died as a result of the injuries he sustained from the Appellants during his encounter with them. The evidence of Dr. Sulaiman Abu (p.w.1) who conducted post mortem-examination on the deceased and that of Dr. Michael I. Assien p.w.6 and Dr. Alexander Idehen p.w.5 who previously treated the deceased of the injuries he sustained as a result of the assault did not satisfactorily establish that the deceased died as a result of those injuries. In the circumstance, the appeal of the 1st Appellant succeeds. D E F G

For the 2nd Appellant, the main plank of his appeal is the defence of alibi. This is a defence that places the accused person at the relevant time of crime in a different place from the scene of crime and so removed therefrom as to render it impossible for him to have committed the offence. Being a matter peculiar within his knowledge, the accused has a duty to disclose it to the police H

at the earliest opportunity and before trial begins for it to be investigated: Aremu v The State (1991) 7 N.W.L.R. (pt.201) 1 at 24. In the case of Ogoola v The State (1991) 2 N.W.L.R. (pt.175) 509 the court held that it is not a proper way of raising a defence of alibi for an accused person to merely show that he was elsewhere at a time antecedent to the time the crime was proved to have been committed. He must go further to show that because he was at that place at that time it was impossible for him to have been at the scene of the crime when it was shown to have been committed. Where an accused person sets up the defence of alibi, the mere allegation that he was not at the scene of the offence is not enough. He must give some explanation of where he was and with whom he was of who could know of his presence at that other place at the material time of the commission of the offence: The State v Salami (1988) 2 N.W.L.R. (pt.85) 670. It is well settled by the decisions of this court that where an alibi is set up by an accused person, the onus of establishing his guilt is still on the prosecution but the evidential or secondary burden is on the accused to adduce some evidence of where he was at the material time. The defence of an alibi ought to be set up at the earliest possible moment and ought to include a statement where the accused was at the time the offence was committed and with whom he was; Okosi v The State (1989) 1 N.W.L.R. (pt.100) 659, Gachi v The State (1965) N.W.L.R. 333, Ozaki v The State (1984) 1 N.W.L.R. (pt.121) 92.

It is also the law that it does not always follow that once the prosecution failed to investigate an alibi, such failure is fatal to the case of the prosecution. The trial judge has a duty even in the absence of investigation to consider the credibility of the evidence adduced by the prosecution vis-a-vis the alibi: see Umani v The State (1988) 1 N.W.L.R. (pt.70) 274. In the case in hand, the 2nd Appellant raised the defence of alibi in his statement to the police dated 26/8/89 when he stated inter alia:

"..... On the 7/3/87 when I closed from night duty, I went

to my farm to work. I came back from the farm at about 10 am. As I was in my house I heard alarm from an Hausa man who is a security guard for one Mr. Okwugbe I ran out towards the piggery farm. When I got to the farm I saw many people all gathered outside the gate B

*.....
When I asked Friday what is (sic) happening, he told me that the two men came and asked him to open the gate, he told them that the key is with piggery attendant Lugard Akhorutomwen and the man jumped the fence and entered the farm..... C*

Before I came to the scene Nathaniel was sitting down; he has (sic) injury on his face I did not join Mr. Friday Aigubawagie in beating Nathaniel Amu... D

The import of the above statement is that the 2nd Appellant was in his house at the time the offence was committed at the piggery farm. But he did not disclose the person with whom he was at the material time even though he mentioned an Hausa man whose alarm attracted him to scene nor did he indicate that from the location of his house where he was, it was not possible for him to have been at the scene of a crime at the material time. In his viva voce evidence, the 2nd Appellant reiterated that he was not at the scene of crime at the material time. Against that evidence there is the evidence of p.w.2, which the trial court accepted to the effect that both the 1st and 2nd Appellant attacked the deceased. E F

Notwithstanding the weak alibi, the 2nd Appellant is entitled to take advantage of the defence that has availed the 1st Appellant because since the injuries inflicted on the deceased have been shown not to be responsible for his death, a defence relied upon by the 1st Appellant which has succeeded, the same equally avails the 2nd Appellant. Where persons who are charged together for committing a crime have a common base for their defence, the acceptance of the offence to the benefit of one of them should G H

also result in its acceptance for the benefit of other: Okobi v State (1984) 7 S.C. 47; Ukwunnenyi v State (1989) 4 N.W.L.R (pt.114) 131 at 167; Kalu v State (1988) 4 N.W.L.R. (pt.90) 503; Akpan v State (2002) N.W.L.R.(pt.780) 189 at 204

B It is for the foregoing reasons as well as those more detailed explanations in the leading judgment of my learned brother Onu J.S.C. which I had the privilege of reading before now that I also allow the appeals of the two Appellants, set aside the decisions of the two court below, and discharge and acquit the Appellants.
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D

PATS-ACHOLONU JSC

I have read in draft the Judgment of my learned brother Onu JSC and I agree with his conclusions after detailed analysis of the fact. I would however make a few comments of my own.

E The appellants had originally been charged and tried with murder but at the judgment stage, the trial Court convicted them of the lesser offence of manslaughter. The two appellants appealed to the Court of Appeal which saw no merit in their case and confirmed the judgment of the trial Court Still piqued and discontented with the judgment of the Court below, they appealed to this Court. Both appellants are represented by different Counsel.
F

The synopsis of the story associated with the case is as follows:-
One Mr. Doherty Sunny Osifo, a Director of Agricultural services in the Ministry of Agriculture in Benin accompanied the deceased Nathaniel whose elder brother prior to his death owned the piggery farm where the appellants worked. As a livestock Officer he was detailed to inspect the farm. Obviously he was not known by the two employees i.e. the appellants but Nathaniel was known to one of them. The appellants were asked to open the gate of the farm but they refused. When the deceased and the Livestock Officer P.W. 2 insisted that the gate of the farm be opened, and the farm security resisted, Nathaniel attempted to force the gate open and
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according to P.W. 2 vicious blows were rained on Nathaniel and obviously frightened, he ran out shouting for neighbours to come and help the beleaguered man

After the fracas, the deceased and others were driven to the Police station where the Police advised that the seriously injured man should be taken to the hospital for treatment. In the first hospital he was taken to, he was examined and treated and later discharged. Some months later he was again taken to another hospital when the deceased's condition deteriorated and a report on the state of his health was made. Months after the incident he was dead.

A careful consideration of the case of the appellants would show that the main question is whether the personal injuries to the deceased could be said to have been directly or circumstantially linked or connected to with his death. The 2nd Appellant raised a defence of alibi i.e. he was not at the scene of the crime. This was not investigated as the Respondent relied on the evidence of P.W.2. I shall come to this later. In this case it must be pointed out that the seeming variables of the medical reports which appear cacophonous do not easily lead to proper understanding of the main point as to whether the acts to the appellants were responsible for the death of the deceased.

After the incident the deceased was treated by one Dr. Michael I. Asuen whose evidence runs thus;

"On examination he was found to have multiple bruises all over the body. The left eye was swollen there was infection of blood in the white part of the left eye. There was bleeding from the nose. Both knees had abrasion (sic) as well as the skull"

On cross-examination he said;

"He was fit enough for discharge as far as our treatment was concerned. The ophthodogist(sic) wanted to treat the Patient in his own hospital which is why I discharged him into his care. Blood coming from the nose and ear may be caused by fracture of the based bone of the skull. I left that to the Ophthologist(sic). I did an X-ray. It did not reveal a thing. If I was not discharging the patient to the care of another physician, I would not have discharged him when I did....."

B He went further to say that when the Patient was discharged, "he
 was in a relatively good condition. Good enough to be discharged". Now
 this Doctor had said that there was blood from the nose and ear, and"
 may be caused by fracture of the based bone of the skull". This particular
 evidence is to my mind, with the greatest respect, a surmise as the x-ray
 he had earlier made, revealed nothing. I shall come to this later. Dr. Idehen
 P.W.5 an eye specialist concerned himself with the treatment of the Pa-
 tient's i.e. the deceased's eye. The eye specialist discharged him on 31st
 C March, 1989. The testimony of the Father of the deceased was to the
 effect that he had to take the deceased to the hospital for treatment when
 he started developing swollen tummy and legs and this was on the 19th
 of June, 1989.

D What is easily discernible is that none of the earlier hospitals he
 was treated said he had life threatening injury. The evidence of P.W.6
 was difficult to understand. In one breath he said after treating the de-
 ceased, he discharged him because he was fit enough to be discharged.
 In another breath he said;

E *"If I was not discharging the Patient to the care of another physi-
 cian, I would not have discharged him when I did".*

F Such welcome and unwelcome news at once it is too hard to
 reconcile (apologies to William E. Shakespeare)". The medical reports
 seem contradictory in nature, and to conflict with the evidence of the lay
 people as to the cause of death particularly as patient died about 3 months
 after having been discharged. I believe that where a patient is discharged
 from a hospital unconditionally, it would be safe to assume that to all
 intents and purposes he was reasonably fit enough to go home.

G Now it may be necessary to re-state in full the evidence of P.W.1
 who did the post mortem examination.

H *"The microscopic appearance of the specimens of tissue taken from
 the area out of the cyst showed an advanced stage of faulty change but
 these were not cirrhotic in appearance. In my opinion, I gave the cause
 of death as a cyst in the liver and faulty change of the liver. I later issued
 a report to the police..... A long duration of injury to the ribs and
 penetrating into the liver could induce the formation of this cyst cavity.*

*The injuries to the liver and the ribs could have been caused by a heavy blow from a blunt object to the right side of the chest. On other occasions, if a person falls from a height and lands on the right side of the chest on a blunt object, it can cause fractures, especially where there is a crowd pushing. It would have been 12 days after he died that I saw him. I did not enquire where he came from. I had the records sent to me from University of Benin Teaching Hospital. I used it in carrying out the post mortem. University Teaching Hospital suggestion was a provisional diagnosis of lever cirrhosis. There was an attachment in long hand written by Dr. Abure. They were querying cirrhosis of the liver. Cirrhosis is scari-
fication of the liver cells. It is a chronic condition that does not go back
once it starts. The faulty charge(sic) that I said about can lead to cirrho-
sis. An abscess cannot be reduced by cirrhosis. Cyrrhosis does not lead to
faulty liver, faulty liver leads to cirrhosis. Chronic alcholism can lead to
cirrhosis. Swollen may be associated but it is not a cause. A person who
drinks and smokes in a chronic manner is likely to contact cirrhosis.
Abression of the head has nothing to do with faulty liver. A catarrh nose
bridge cannot cause any disuse of the liver. The man died of liver abscess
of faulty charge(sic) not cirrhosis"*

A close examination of the Medical evidence of P.W.1 makes the cause of death an open one. The nature of the evidence of the three medical Doctors who came in contact with the deceased has not really cleared the cobweb as to the cause of death as a proper evaluation of their evidence and proper analytical examination of the testimony has not shown that it is not tainted with some cloudiness and obscurity. The point I am making is that the totality of the evidence proffered is to my mind susceptible to different interpretations. There now exists a body of corpus juris to the effect that a reasonable doubt as to the guilt arises if any or more of the circumstances proved are inconsistent with guilt and at the same time may be inconsistent with innocence. Thus if two possibilities can be inferred from or are equally compatible with the evidence given, neither one can be said to have been proved. A fortiori any evidence which by its very nature is equally consistent with two or more conflicting or divergent hypothesis or proposition or opposing hypoth-

esis therein or which leads as reasonably to one hypothesis as to another tends to support or establish neither. In such a case such testimony or testimonies will definitely not support a judgment in favour of the propo-
nent. The case made by the Respondent is to my mind not water tight.

B With the diverse opinions of the Doctors who treated the Patient before his death and which markedly seem to be at variance with the evidence of P.W.1 who did the post mortem examination, it is unsafe to say that the State, nay the Respondent has satisfactorily proved the case accord-
C ing to the standard of proof required. It is now a settled law that where the existence of essential fact on which the party relies, in this case the State, that is the Respondent, is left in doubt, that party on whom the burden rests to establish the fact must fail.

I had earlier on said that the defence of alibi was not investigated.
D Even if the alibi raised by the 2nd Appellant had been investigated and he was found to be there i.e. participated in the violence to the person of the deceased it would not still erase the latent defects clearly manifest in the Respondents' case as to whether it was the beating by itself or something
E else that was responsible for the death. I believe this was a case in which it would have been necessary to get a clinical pathologist to carefully examine the body with a view to affording the prosecution, the defence and the Court the benefit of such expert advice in such a specialized area
F of morbid anatomy.

In the case before us I have no doubt that the evidence of the prosecution's witnesses hangs in the air and no tribunal of justice could possibly return a verdict of conviction. Accordingly I allow the appeal and set aside the judgment of the Court below. I agree with the conclu-
G sion and orders made in the leading judgment.

H ⁴ A plea denying execution of instrument sued on.

⁵ (2001) 7 KLR (pt 126) 2419

⁶ (1994) 4 KLR 1

⁷ (1993) 11 KLR 1