

**SUPREME COURT OF NIGERIA**

17TH JUNE, 2005. SC. 184/2004

**CORAM:- I. L. KUTIGI, A. O. EJIWUNMI, D. MUSDAPHER,  
I. C. PATS-ACHOLONU, S. A. AKINTAN, JJSC**

MBANENGEN SHANDE ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Confessional Statement - Is admissible -  
Where appellant admits making it - And where it establishes the guilt of  
the appellant (H1)

CRIMINAL LAW - Provocation - As a defence - Is available to offender  
- Where the act of the offender - Was done - When deprived of the  
power of self control (H2)

CRIMINAL PROCEDURE - Provocation - Confessional statement - Ver-  
dict - Duty of court - Is to consider whether a reasonable person in such  
circumstances - Might be so rendered to loss of self control - Which  
will lead to use of violence - In order to give a correct verdict (H3)

APPEALS - Culpable homicide - Retrial - Is not appropriate - Where  
lower courts did not approach question raised - As they should have  
done (H4)

**FACTS**

Before the High Court of Benue State holden at Makurdi, the ac-  
cused/appellant was arraigned for the offence of culpable homicide. The  
appellant was accused of causing the death of another woman at Achia  
village in Kwade L.G.A of Benue State by pouring kerosine on her and  
setting her ablaze. The deceased who was the mistress of the appellant's  
husband came to Achia to visit them. The appellant who had prepared  
dinner for the family offered the deceased who declined the offer as she  
had also brought along some food which she served to the people she

met at the table. The appellant also joined on the table as she was invited by her husband.

After about two hours, the deceased told the appellant's husband that she was feeling cold and wanted to sleep. He therefore ordered the appellant to prepare the room for her. While the deceased was sleeping, the appellant poured kerosine on her and set her ablaze. According to the appellant's confessional statement, she wanted to cause the deceased some bodily injuries, in order to make her keep away from her husband. The trial court convicted her of the offence charged, rejecting her defence of provocation. The Court of Appeal affirmed the conviction. The appellant has further appealed to the Supreme Court.

**ISSUES FOR DETERMINATION**

*“(a) Whether the learned Justices of the Court of Appeal were right in law in holding that the appellant committed culpable homicide punishable with death even though the prosecution has failed to discharge the onus placed upon it to prove the guilt of the appellant beyond reasonable doubt.*

*(b) Whether the defence of provocation can avail the appellant to reduce the offence from murder to manslaughter considering the circumstances of this case”.*

**HELD** (Unanimously allowing the appeal per **EJIWUNMI JSC**)

***Confessional Statement - Is admissible***

1. Having regard to the provisions of Section 27(1) and of the Evidence Act, I think that the court below cannot be faulted with their approach with regard to the extra-judicial statement made by the appellant. In this appeal, it is not the case of the appellant that Exhibit 5 was not made voluntarily. Indeed, at the trial, the appellant readily admitted it as her statement, which she made to the police. It is also not the case for the appellant that the court below failed to take cognisance of it. Rather the court below accepted it and apparently convicted the appellant on the facts disclosed in the statement, Exhibits 5. It is manifest that without the evidence that emanated from Exhibit 5, the prosecution would not have had any evidence

to establish the guilt of the appellant. Having regard to the evidence disclosed in the said Exhibit 5, the courts below were right to have held that the appellant clearly knew or ought to have known that the pouring of kerosine on the body of the deceased and setting it alight would result in the death of the deceased. (pp. 1601 F & 1602 C)

***Provocation - As a defence***

2. Now, before deciding whether the courts below were right in their resolution of this question as to whether the defence of provocation was available to the appellant, it is necessary to advert to the provisions of Section 222(1) of the Penal Code quoted above. It is I think patent that a careful reading of its provisions reveal that what is paramount in the consideration of this section is whether the act of the offender was done whilst the offender was deprived of the power of self control by grave and sudden provocation.

It is clear from the evidence adduced and accepted by the court that the deceased had been the lady friend of P.W.1, the husband of the appellant. It is also clear that P.W.1 wished to have as established that the appellant accepted that relationship. But it is manifest from Exhibit 5 that the appellant totally rejected that relationship of the deceased with her husband. (p. 1604 G)

***Confessional statement - Verdict - Duty of court***

3. It must be noted that neither the court below nor the trial court considered whether having regard to the peculiar circumstances, the appellant was in full control of herself and/or was not deprived of the power of self control. I do not think that it was right not to have considered the entire statement of the appellant as per Exhibit 5, before determining the guilt of the appellant. Indeed, in so far as the trial court had decided that Exhibit 5 is what would be accepted as the defence of the appellant, then the court has a duty to examine fully the statement in the context of her defence. I have before now set out the relevant portion of the statement of the appellant, Exhibit 5. This statement clearly sets out what happened before the 9th of May 1997 and which culminated with the outward

conduct of the deceased and the P.W.1, who directed the appellant to prepare where the deceased would sleep when he knew that the only place available is the hut where the deceased sleeps with her children.

In my view, it is the duty of the trial court to have considered whether a reasonable person in such circumstances in consequence of such conduct and the history of the existing relationship between the appellant and the deceased might be so rendered subject to passion or loss of control as to be led to use violence with fatal results, and secondly, that the appellant was in fact under the stress of such provocation. It is after a careful evaluation of such facts that the view can be formed as to whether manslaughter or murder is the appropriate verdict. (p. 1605 H)

***Culpable homicide - Retrial***

4. Now, though the courts below did not approach the question raised, as they should have done, the question then is, whether the case be sent back for retrial. But having regard to the principles laid down in the case of Abodundu v. Queen (1959) SCNLR 62, I do not think that the justice of the case demands that a re-trial be ordered. In the result, the appellant is discharged and acquitted. The judgments of the courts below are hereby set aside. (p. 1606 F)

**NOTABLE POINT OF INTEREST**  
**PATS-ACHOLONU**

*1. Proof beyond reasonable doubt - meaning of*

It is essential to stress times without number that the expression, proof beyond all reasonable doubt - a phrase coined centuries ago and even ably applied by the Romans in their well developed jurisprudence and now verily applicable in our legal system, is proof that excludes every reasonable or possible hypothesis except that which is wholly consistent with the guilt of the accused and inconsistent with any other rational conclusion. Therefore, it is safe to assume that for evidence to warrant conviction, it must surely exclude beyond reasonable doubt all other conceivable hypothesis than the accused's guilt. The accused should be acquitted if the set of facts elicited in the evidence is susceptible to either guilt or innocence

in which case doubt has been created.

I find it difficult to pigeon-hole this case on the plain of guilt considering the special circumstances, to wit, the agony of a woman whose husband openly brought to the house his paramour to sleep in their matrimonial home, to be fed as well when the husband did not intend or make up his mind to marry her. (p. 1607 G)

### **REPRESENTATION**

Mr. M. K. Aondoakaa, for the Appellant.

Mrs. M. Sule, P.S.C., (with her, E. C. A. Hundu S.C., Benue State Ministry of Justice), for the Respondent.

### **CASES REFERRED TO**

Queen v. Itule (1961) All NLR 481 at 484

Oladipupo v. The State (1993) 6 SCNJ 233 where at p. 239

Nwaebonyi v. The State (1994) 5 SCNJ 88

Osakwe v. The State (1992) 2 SCNJ 57 at 66

### **LEAD JUDGMENT BY EJIWUNMI JSC**

This appeal may be rightly described as the fury or rage into which a jealous wife could be driven. Before the appellant in this appeal was arraigned before the High Court of Benue State in the Benue State Judicial Division, holden at Makurdi upon the application of the prosecution to prefer a charge brought pursuant to Section 185(b) of the Criminal Procedure Code. The said application was supported by proof of evidence, the statement of the appellant and the medical report of the deceased. As the learned trial Judge, having read the said application with the documents attached thereto, granted leave for the preferment of the charge against the appellant, the court also ordered that the appellant be served with the proof of evidence and the charge.

After the orders of the court were duly effected on the appellant, the plea of the appellant was taken. Before the plea was taken the charge was read out to the appellant by the court clerk in the English Language and was read out in the Tiv language to the accused who admitted that she

understood the charge. The appellant, who was then asked for her plea, said “the allegation is not true” and the learned trial Judge then entered a plea of not guilty for the appellant.

The charge to which the appellant pleaded read thus:-

B *“That you Mbanengen Shande, on or about the 9th day of May, 1997, at Achia village, Kwande Local Government Area within the Benue State Judicial Division did commit culpable homicide punishable with death in that you caused the death of MRUMUN DERA by pouring kerosine on her body while she was asleep and setting her ablaze with the knowledge that her death would be the probable consequence of your act and thereby committed an offence punishable under Section 221 of the Penal Code.”*

At the trial of the appellant, four witnesses gave evidence for the D State and only the appellant gave evidence in defence of the charge. The evidence led by the respondent may be summarized briefly as follows: P.W. 1, whose names are Benjamin Iorumun Shande is a civil servant and the husband of the appellant. They apparently lived together at Achia, E where they have their matrimonial home. The witness said that on account of his work, he stays more regularly at Adagi but he does go home regularly. On the 8th May, 1997, while at Adikpo, he learnt that Mrumum Dera, the deceased, had enquired after him. He therefore went over to see her at Jato-Aka where she lived. The next day which was the 9th of May, F he agreed with the deceased that she should come to his home at Achia. There, according to the witness, she would join his own wife, the appellant, to plant groundnuts. P.W. 1 said that he arrived at Achia on that day before the deceased. He also did not meet his wife who had gone to G the school where she was a teacher. He then went to the farm. By the time he came back, the appellant had returned home and prepared dinner for the family. It was soon after that the deceased arrived. When she arrived, she joined the witness where he was sitting with his father and junior brother. H Though she was offered food, the deceased declined the offer as she had also brought some food along with her and which she served to the people she met at the table under the ‘Ate’. The appellant also joined them there, as she was invited so to do by P.W. 1. Some two hours after they had

eaten, P.W.1 stated that as the deceased told him that she was feeling cold and would like to sleep, he instructed the appellant to prepare the room for her. The room, a thatched round hut, belonged to the witness within the compound of P.W.1 's father. And it is the room according to the witness, where the deceased and the appellant slept when the deceased visits them. B

He claimed that sometime after the appellant had gone into the room, he heard a cry from the room. He and his brother then ran to the room/hut. As they could not easily gain entrance into the room, his brother, P.W.2 had to kick the door open. Inside it they found the deceased with fire on her body. She was then quickly rushed out of the room to a clinic. In the room, the two children of P.W.1 were found sleeping. The appellant was also in the room when they entered. The deceased was later rushed to the hospital where she died. P.W.1 admitted that the deceased had been his friend between 1995-1997, and that the deceased and the appellant had been friends and did exchange visits in the period. He was not aware of any trouble between them. D

The appellant as I have stated above gave evidence on her own behalf. Also tendered and admitted is the extra-judicial statement Exhibit E 5 made to the police by the appellant after she was arrested. Also admitted in evidence are Exhibits 1-4 which are (1) 4L gallon, Exhibit 1; (2) kerosine inside the 4L gallon, Exhibit 1A; (3) some burnt pieces of cloth, Exhibit 2; some grass, Exhibit 3; Medical Report on the post mortem on the deceased, Exhibit 4. The appellant in her oral evidence admitted that she made Exhibit 5. But she went on to give oral evidence of what happened in the room before and after the fire incident that led to the death of the deceased. She also gave evidence about the relationship between P.W.1 and the deceased. It is manifest from her oral statement and the extra-judicial statement, Exhibit 5, that the appellant had not clearly accepted the 'lovers' relationship between the deceased and her husband, P.W.1. G Indeed from what she gave in evidence, it is, I think, manifest that she greatly resented the relationship as she was convinced that it was because of it that her husband has on many occasions abandoned her and the responsibilities of the appellant for the upkeep of the family. H I will later in this judgment have cause to dwell further on this aspect of the case.

In the meantime, let me say that the trial court rejected her oral testimony with regard to how the deceased met her death. Exhibit 5, her extra-judicial statement, formed the pivot of the judgment of the trial court for reaching its conclusion about the guilt of the appellant. Before arriving  
B at this conclusion, the trial court duly considered whether the defences of provocation and of accident were open to the appellant but the trial court held that those defences were not available to her. She was accordingly found guilty of the offence of culpable homicide punishable with death  
C contrary to Section 221 of the Penal Code. As the appellant was very dissatisfied with the judgment and orders of the trial court, she appealed to the court below. As that court affirmed her conviction by the trial court, she has filed a further appeal to this court.

Pursuant thereto, four grounds of appeal were filed against the  
D judgment of the court below. And in consonance with the rules of this court, Briefs of Argument were filed and exchanged by the parties. After a perusal of the two briefs filed by counsel on behalf of the parties, it is clear that they are agreed that there are only two issues for the determination of  
E this appeal. They read thus:-

*“(a) Whether the learned Justices of the Court of Appeal were right in law in holding that the appellant committed culpable homicide punishable with death even though the prosecution has failed to discharge  
F the onus placed upon it to prove the guilt of the appellant beyond reasonable doubt.*

*(b) Whether the defence of provocation can avail the appellant to reduce the offence from murder to manslaughter considering the circumstances of this  
G case”.*

On the first issue, which is, whether the court below was right to have upheld the conviction of the appellant, learned counsel submits that apart from the extra-judicial statement made by the appellant, there is no  
H other evidence before the court to prove that it was the appellant who killed the deceased. It is his further submission that the court cannot convict the appellant on Exhibit 5, the extra-judicial confession of the appellant. And he further submitted that as the court failed to consider whether there was



any other evidence that corroborated the facts disclosed in the said confessional statement, where, submits counsel, as in this case, no such evidence was disclosed nor considered by the trial court, then the court should have refused to convict the appellant on Exhibit 5.

For the respondent, its learned counsel contended that it must be noted that there is no dispute that Exhibit 5 was the voluntary confessional statement of the appellant. He further submitted that the free and voluntary confession of an accused may be the basis for his conviction for the offence for which he was being prosecuted. In support of this submission he referred to *Osakwe v. The State* (1992) 2 SCNJ 57 at 66 and also *Nwaebonyi v. The State* (1994) 5 SCNJ 88.

The argument of the appellant and the respondent thereto on this issue were canvassed before the court below. In respect of that submission, the court below held thus:-

*“From the evidence adduced in the case, it is clear that the appellant had admitted making the confession. A written confession of an accused person is relevant and should not be discarded or ignored simply because the accused had later retracted it or resiled from that voluntary statement. Once a confessional statement is proved to have been made voluntarily, as in this instant case, and it is direct, positive, unequivocal and clearly amounts to an admission of guilt, it can still ground a conviction regardless of the fact that the maker resiled therefrom or retracted the same completely at the trial, as such retraction does not make it inadmissible or that the trial court should not act on it.”*

**Having regard to the provisions of Section 27(1) and of the Evidence Act, I think that the court below cannot be faulted with their approach with regard to the extra-judicial statement made by the appellant** Section 27(1) and (2) of the Evidence Act provides:

*“27(1) Confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime.*

*(2) Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only.”*

In this respect, permit me to refer to the decision of this court in

Queen v. Itule (1961) All NLR 481 at 484 where Brett, Ag. CJF., said:

“The judge referred to Exhibit E in his judgment, and to the fact that it had been “retracted”, by which he presumably meant that the appellant had denied ever making it, but by an unfortunate omission, he failed to record any finding on the question whether the appellant had in fact made it. A confession does not become inadmissible merely because the accused person denies having made it and in this respect a confession contained in a statement made to the police by a person under arrest is not to be treated differently from any other confession R. v. Philip Kanu & Anor 14 WACA 30. (Underlining mine)

**In this appeal, it is not the case of the appellant that Exhibit 5 was not made voluntarily. Indeed, at the trial, the appellant readily admitted it as her statement, which she made to the police. It is also not the case for the appellant that the court below failed to take cognisance of it. Rather the court below accepted it and apparently convicted the appellant on the facts disclosed in the statement, Exhibits 5. It is manifest that without the evidence that emanated from Exhibit 5, the prosecution would not have had any evidence to establish the guilt of the appellant. Having regard to the evidence disclosed in the said Exhibit 5, the courts below were right to have held that the appellant clearly knew or ought to have known that the pouring of kerosine on the body of the deceased and setting it alight would result in the death of the deceased.** Issue 1 will therefore be resolved against the appellant.

I now turn to consider the second issue. This is whether the defence of provocation can avail the appellant to reduce the offence from murder to manslaughter considering the circumstances of this case. The question raised by this issue falls to be considered in the light of the provisions of Section 222(1) of the Penal Code, which provides that:

*“Culpable homicide is not punishable with death if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.”*

This question as to whether the defence of provocation was

available to the appellant was resolved against her after referring to the provisions of Section 222(1) quoted above and to her evidence in Exhibit 5. Learned trial Judge then referred quite properly to the case of *Oladipupo v. The State* (1993) 6 SCNJ 233 where at p. 239 this court held that:-

“It is settled law that to avail himself of the defence of provocation, the appellant must have done the act for which he is charged: B

(i) In the heat of passion;

(ii) The act must have been caused by sudden provocation;

(iii) The act must have been committed before there was time for passion to cool; C

(iv) The mode of resentment must be proportionate to the provocation offered.

These four requirements must co-exist before the defence can succeed.” D

The trial court then went on to hold as follows:-

*“I think the provocation which will avail the accused is that offered immediately before the act complained of while the acts of the deceased may have annoyed the accused person, they certainly do not amount to provocation as defined above. There is no evidence from the accused or in Exhibit 5 that when they got to the room, the deceased attempted to assault her or even said anything to her that provoked her.” E*

As the learned trial Judge was of the view that the past incidents concerning the relationship between the deceased and the appellant’s husband had occurred before the deceased and the appellant do not amount to provocative acts of the deceased, the conclusion was reached that the defence of provocation was not available to the appellant. F

Before the court below, the question of whether the defence of provocation was available to the appellant was also considered by that court and it was rejected on the basis of the portion of the statement of the appellant in Exhibit 5. But in my humble view, it is necessary, in order to appreciate the events of the 9th of May, 1997, that led to the incident of that day, that a fuller portion of Exhibit 5 should have been considered by both the court below and the trial court. For that reason, the portion of Exhibit 5, which I consider germane in the circumstances, are as follows:- G H

“On the 9th May 1997, my husband arrived from Turan in the morning and the deceased lady arrived around 8 p.m. She went straight and joined my husband’s father at his “Ate” (round hut in the centre of the compound). By this time I was eating in the room with my husband and  
 B when her bag was brought to our room by the children, my husband after eating went out and joined her at “Ate” and I later followed my husband to “Ate” where I met the deceased and we greeted each other and thereafter I left. I tried to get some food for her from the wife of my husband’s brother but the deceased declined to eat. I went and bath (sic)  
 C and later joined them at “Ate”. While we were there at about 10p.m, my husband noticed the deceased was feeling sleepy and he touched her and asked her whether she want to go and sleep and she replied yes. It was then that my husband asked me to go and arrange a place for her to sleep. I  
 D complied and took her to my room and arranged bed for her and she slept on the bed covering her face and body with cloth. My two children were sleeping on the other bed in the same room. I tried to sleep with my children on the other bed but my mind could not rest because of the deceased who  
 E have caused my husband not to do my part time N.C.E. course, not to farm for me, clothes (sic) me and to take me and our children for treatment when need arise. Also my husband (sic) failure to pay the debt outstanding against me in our local bank. I had in mind to cause her some bodily  
 F injuries in order to make her keep away from my husband and so I took kerosine in a container poured it on her and light matches and dropped it on her and her body catches (sic) fire and she waked (sic) up and started shouting and in her attempt to rushed (sic) out of the hut, fire catches (sic) on the roof of the thatched house and I started using the drinking water  
 G in the pot to put it off.”

**Now, before deciding whether the courts below were right in their resolution of this question as to whether the defence of provocation was available to the appellant, it is necessary to advert  
 H to the provisions of Section 222(1) of the Penal Code quoted above. It is I think patent that a careful reading of its provisions reveal that what is paramount in the consideration of this section is whether the act of the offender was done whilst the offender was deprived of the**

**power of self control by grave and sudden provocation.**

**It is clear from the evidence adduced and accepted by the court that the deceased had been the lady friend of P.W.1, the husband of the appellant. It is also clear that P.W.1 wished to have as established that the appellant accepted that relationship. But it is manifest from Exhibit 5 that the appellant totally rejected that relationship of the deceased with her husband.** A careful reading of her statement shows very clearly her resentment of this relationship, more so when she felt that it was that relationship that deprived her of the love and care of herself and family: the failure of P.W.1 to repay to her account in her Bank the sum of N10,000 she had lent to the husband P.W.1. It may be said that these are matters which a reasonable person should accept and carry on with life. Be that as it may, matters came to a head on the 9th of May, 1997, when at about 8 p.m, the deceased arrived in the compound of the father of P.W.1. It is in the same compound where the house (hut) of P.W.1 is situated and where the appellant lived with him.

When she came that night, appellant and P.W.1 were having their dinner. P.W.1 immediately abandoned the appellant and her dinner to join the deceased who had taken a seat with the father of P.W.1. Later, the appellant joined them at the invitation of P.W.1. After some time after the deceased had intimated to P.W.1 that she wanted to sleep, P.W.1 then directed that the appellant should prepare a place for her to sleep. The appellant dutifully took the deceased to the room which she shares with her two sons. There the deceased slept on the bed of the appellant.

It is clear from this narrative that the appellant cannot be described as happy in all the circumstances. The question then is, whether a woman who had been the subject of such neglect by P.W.1, would not feel provoked towards the deceased, the lover of her husband sleeping as if nothing was wrong on her own bed in her own house. Or the question put in another way is, whether a reasonable woman would not be provoked seeing an acknowledged lover of her husband, and who had been the object of pampering before her, not be deprived of the power of self-control by the conduct of P.W.1 and the deceased. But before this question is answered, **it must be noted that neither the court below nor the trial**

court considered whether having regard to the peculiar circumstances, the appellant was in full control of herself and/or was not deprived of the power of self control. I do not think that it was right not to have considered the entire statement of the appellant as per  
 B Exhibit 5, before determining the guilt of the appellant. Indeed, in so far as the trial court had decided that Exhibit 5 is what would be accepted as the defence of the appellant, then the court has a duty to examine fully the statement in the context of her defence. I have  
 C before now set out the relevant portion of the statement of the appellant, Exhibit 5. This statement clearly sets out what happened before the 9th of May 1997 and which culminated with the outward conduct of the deceased and the P.W.1, who directed the appellant to prepare where the deceased would sleep when he knew that the  
 D only place available is the hut where the deceased sleeps with her children.

In my view, it is the duty of the trial court to have considered whether a reasonable person in such circumstances in consequence  
 E of such conduct and the history of the existing relationship between the appellant and the deceased might be so rendered subject to passion or loss of control as to be led to use violence with fatal results, and secondly, that the appellant was in fact under the stress of such  
 F provocation. It is after a careful evaluation of such facts that the view can be formed as to whether manslaughter or murder is the appropriate verdict.

Now, though the courts below did not approach the question raised, as they should have done, the question then is, whether the  
 G case be sent back for retrial. But having regard to the principles laid down in the case of *Abodundu v. Queen* (1959) SCNLR 62, I do not think that the justice of the case demands that a re-trial be ordered. In the result, the appellant is discharged and acquitted. The judg-  
 H ments of the courts below are hereby set aside.

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KUTIGIJSC

I have had the privilege of reading in advance the judgment just

delivered by my learned brother, Ejiwunmi, JSC; I agree with his reasoning and conclusions. I have no doubt that the appellant must have been provoked by the continued presence and activities of the deceased inside appellant's matrimonial home, which the deceased as the lover of appellant's husband appeared to have taken over, including appellant's bedroom. I also allow the appeal. Conviction and sentence are set aside. The appellant is discharged and acquitted.

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**MUSDAPHERJSC**

I have read before now the judgment of my Lord, Ejiwunmi, JSC., just delivered, with which I entirely agree. I adopt the reasoning as mine and I abide by the conclusion arrived at.

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**PATS-ACHOLONUJSC**

I agree with the lead judgment (which I read in draft) of my learned and noble Lord, Ejiwunmi, JSC. The appraisal of the facts of this case at the trial stage and the decision of the immediate court below, I must confess, leave very much to be desired. It is difficult following the sequence of events that took place whether there was indeed proof beyond all reasonable doubt. When an accused is being tried for any case whatsoever, because of the principle of law ingrained in our Constitution that he or she shall be presumed innocent, it behoves of the court to subject every item of facts raised for or against him to merciless scrutiny. Nothing should be taken for granted as the liberty of the subject is at stake. Where there is a doubt in the mind of the court either as to the procedure adopted or failure to address on very important latent issues that assail or circumscribe the case, the court should acquit and discharge. Although the standard of proof is not that of absolute certainty (that should be in the realm of heavenly trials) the court seised of the matter must convince itself beyond all proof that such and such had occurred. It is essential to stress times without number that the expression, proof beyond all reasonable doubt - a phrase coined centuries ago and even ably applied by the Romans in their well developed jurisprudence and now verily applicable in our legal system, is proof that excludes every reasonable or possible hypothesis

except that which is wholly consistent with the guilt of the accused and inconsistent with any other rational conclusion. Therefore, it is safe to assume that for evidence to warrant conviction, it must surely exclude beyond reasonable doubt all other conceivable hypothesis than the accused's B guilt. The accused should be acquitted if the set of facts elicited in the evidence is susceptible to either guilt or innocence in which case doubt has been created.

I find it difficult to pigeon-hole this case on the plain of guilt C considering the special circumstances, to wit, the agony of a woman whose husband openly brought to the house his paramour to sleep in their matrimonial home, to be fed as well when the husband did not intend or make up his mind to marry her. An issue did arise as to whether this woman did not intend to kill the deceased. There was evidence that on that night D the appellant, her children and the deceased slept in the same room. How then could she pour kerosene on the deceased and set her ablaze without considering the effect of the fire on her own children? It does not quite make sense to me. She stated that the kerosine in the lantern spilled and E caught fire. This therefore created inconsistent scenarios. It indeed boggles the mind as to the rationality of setting the room ablaze without considering the harm on the children.

In the circumstance, I agree firmly with the judgment of my learned F and noble Lord, Ejiwunmi, JSC. I allow the appeal and set aside the two judgments of the lower courts. I abide by the orders in the leading judgment.

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#### AKINTANJSC

G The appellant, a woman, was arraigned before Makurdi High Court in Benue State for the offence of culpable homicide punishable under Section 221 of the Penal Code. She was accused of causing the death of another woman, Mrumum Dera, at Achia village, in Kwande Local H Government Area of Benue State on 9th May, 1997, by pouring kerosine on her and setting her ablaze. The appellant pleaded not guilty to the charge. At the trial, four witnesses testified for the prosecution. Apart from the first of these witnesses who was the husband of the appellant, the three



others were police officers involved in the investigation of the case. There was no eye-witness account of the incidents that led to the charge preferred against the appellant.

The prosecution relied mainly on the confessional statement made by the appellant and tendered at the trial by Police Sergeant Terhamba Ikyabo (P.W.4). The statement was recorded by the witness. The relevant portion of this evidence as recorded on pages 23 to 24 of the record is as follows:

*“On 20/5/97, I cautioned the accused person in English language and I explained the words of caution to her and she said she understood same. She then signed the words of caution. She then volunteered a confessional statement in English language and I recorded same in English language. Thereafter, I read over the statement to her in English language and she said it was correct and she appended her signature. I counter-signed the said statement as a recorder. I took her before my officer -Mr. Jonathan Attah, a Superintendent of Police. He read over the statement to the accused and she confirmed it as being her statement. Mr. Attah then endorsed the statement as being made voluntarily. The accused too signed the statement under the endorsement. I can identify the statement I am referring to by my writing and signature. The statement shown to me is the one I am referring to.*

*Egede: I seek to tender same in evidence.*

*Olatunde: (After conferring with accused): No objection.*

*Court: Statement dated 20/5/97 admitted in evidence without objection as Exhibit 5. It is to be read by P.W.4"*

*Jonathan Attah, the Superior Officer before whom the appellant was said to have been taken along with the confessional statement for confirmation was not called as a witness and no reason for the failure to call him was given. It may also be mentioned that the said statement was never read to the appellant after it was admitted in evidence. This is clear from the passage from the record quoted above where it was recorded that: “It is to be read by P.W.4.”*

Also omitted is evidence of an autopsy on the corpse of the deceased. All that was tendered was a medical report said to have been

written by a medical officer where it is written that “.....the immediate cause of death was due to shock” certified as the cause of death. There was no evidence to show that a post-mortem examination was actually carried out so as to establish whether the deceased suffered from any ailment prior to her death by shock which could have contributed to or was solely responsible for the shock that terminated the life of the deceased.

The onus was by law on the prosecution to prove that the appellant caused the death of the deceased. It was wrong in this case to assume that the burns on the deceased were solely responsible for the death of the deceased. The appellant gave evidence in her defence. She denied the charge preferred against her. She also denied making the confessional statement credited to her and gave her own account of the incident which was that she was not responsible for setting the woman ablaze as alleged by the prosecution. It may be mentioned that at the time the said confessional statement was to be tendered in the evidence, what was recorded on page 24 of the record is as follows: “Egede: “I seek to tender same in evidence. Olatunde: (After conferring with accused) No objection.”

Egede was the prosecution counsel while Olatunde was the defence counsel. It has not been shown that the appellant was aware that the contents of the statement were confessional and as I said earlier above, it was not on record that the statement admitted was ever read to the appellant and the superior officer before whom the appellant was said to have been taken and who was said to have read the statement to the appellant and made an endorsement thereon, was not called as a witness and no reason was given for the failure to call him. These omissions on the part of the prosecution, in my view, are very material.

I was privileged to have read before now the leading judgment just delivered by my learned brother, Ejiwunmi, JSC. For the reasons I have set out above and the other reasons given in the leading judgment, I also agree that the appeal should be allowed and that a verdict of not guilty, discharged and acquitted be substituted in place of that of conviction entered by the trial court and confirmed by the court below.