

SUPREME COURT OF NIGERIA
24TH FEBRUARY, 2006. SC. 263/2002
CORAM:- I. L. KUTIGI, S. U. ONU, U. A. KALGO,
I. C. PATS-ACHOLONU, W. S. N. ONNOGHEN, JJSC

1. TUNDE ADAVA	APPELLANTS
2. OHIARE OHINO		
V.		
THE STATE	RESPONDENT

CRIMINAL PROCEDURE - Evidence - Witnesses - Allegation of inconsistencies in their statements to the Police - And their oral evidence - Will fail - Where trial judge finds them to be witnesses of truth (H1)

MURDER - Proof - Ingredients of the offence - That must be proved by the prosecution - Includes that death of the deceased - Was caused by the accused (H2)

MURDER - Proof - Cause of death - Where not established by the medical evidence - Or any other evidence - The charge is not proved (H3)

CONVICTION - Lesser offence - Where the accused is discharged and acquitted - Of the major charge - Court can convict for a lesser offence (H4)

FACTS

Before the Kogi State High Court, the appellants were charged with the offence of culpable homicide punishable with death (Murder) under s. 221(a) read with s. 79 of the Penal Code. The appellants were among a group of people returning from a political rally on 14-3-1996, armed with all sorts of dangerous weapons. The 1st appellant was armed with a dane gun. The crowd attacked the premises of some people including that of the deceased, where the 2nd appellant was alleged to have ordered the 1st appellant to shoot the deceased, and he shot him in the stomach. The

deceased was taken to a herbalist for treatment who said he could not remove the bullet.

The deceased was then returned to his home. The Police saw him in his home the following day and recorded his statement. The deceased died the second day on his way to hospital. A postmortem examination was conducted by a medical doctor who testified as PW1. He issued a Medical Report tendered as Exhibit 1. At the end of the trial, the judge found each of the appellants guilty as charged, convicted and sentenced them to death. Their appeal to the Court of Appeal was dismissed. They have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(1.) Whether the extra-judicial statements admitted in evidence as Exhibits 2, 5 & 6 were in conflict with the testimonies on oath of their respective makers P.W2, P.W4 and P.W5.

(2.) Whether the Medical Report, Exhibit 1, was conclusive as to the cause of death.

(3) Whether the defence of alibi was properly considered and rightly rejected.

(4) Whether the lower Court was right to have come to the conclusion that the prosecution had proved its case.”

HELD (Allowing the appeal but convicting for a lesser offence per KUTIGI JSC, PATS-ACHOLONU JSC dissenting)

Witnesses - Allegation of inconsistencies in their statements

1. Issue (1) relating to inconsistencies in the statements of witnesses to the Police and their oral evidence in Court, is in my view clearly misplaced. The role of a trial Court is to hear evidence and make findings of fact based on the credibility of the witnesses and decide the merit of the case based on the findings. In this case the learned trial judge who had the privilege of listening to the witnesses and watching their demeanour came to the conclusion that the witnesses presented by the prosecution were witnesses of truth. The Court of Appeal agreed with him. I have no reason to interfere. The Court below was right in holding that there were no material inconsistencies in the evidence of the prosecution witnesses.

Issue (1) therefore fails. (p. 734 C)

MURDER - Proof - Ingredients of the offence

2. It is settled that for a charge of culpable homicide punishable with death to succeed, the prosecution is required to prove the following ingredients of the offence -

- a. that the death of a human being has actually taken place;
- b. that such death has been caused by the accused;
- c. That the act was done with the intention of causing death; OR that the accused knew that death would be the probable consequence of his act.

I need not say that the above ingredients of the offence must all be proved together and that failure to prove anyone of them means failure of the charge itself. (p. 734 H)

MURDER - Proof - Cause of death

3. The medical evidence is to say the least very unsatisfactory. It is inconclusive. It has therefore failed to establish the cause of death.

P.W.2 who took the deceased to a herbalist and who was also taking him to a hospital when he died on the way, gave no description whatsoever of the condition of the deceased from the time he was shot until he died. The local herbalist who failed to help the deceased was also not called to give evidence about what he saw or observed and the general condition of the deceased when he was brought to him. The deceased was thus never taken to any hospital for treatment until he died two (2) days later on the way to a hospital. The medical evidence of P.W.1 is clearly not helpful at all. Neither in his evidence in Court nor in his Medical Report (Exhibit 1), did he say what the cause of death was. This is fatal to the case of the prosecution. The prosecution has thus failed to prove one of the essential ingredients of the charge, namely that the Appellants caused the death of the deceased. The charge against the Appellants is therefore not proved. They must be acquitted and discharged of that charge. (p. 735 H)

CONVICTION - Lesser offence

4. There is clearly abundant evidence on record which shows that the 2nd Appellant ordered the 1st Appellant to shoot at the deceased with his dane gun. And he complied with the order. The deceased was shot in the stomach and he died two (2) days later (see the evidence of P.Ws. 3, 4 & 5, the eye witnesses). By shooting his dane gun at the deceased, the 1st Appellant must have intentionally intended to cause the deceased bodily pain. This is a lesser offence under Section 240 of the Penal Code and punishable under Section 246 of the same Code for which each of them could have been convicted.

Consequently, the appeals succeed and they are hereby allowed. The convictions and sentences of death passed on each of the Appellants by the trial High Court and confirmed by the Court of Appeal are set aside. Each of the Appellants is discharged and acquitted of the charge under Section 221 read with section 79 of the Penal Code.

However, in exercise of the powers under Section 218 of the Criminal Procedure Code, Cap. 30 the Laws of Northern Nigeria 1963 Vol. 1, (applicable in Kogi State), each of the Appellants is found guilty of a lesser offence of voluntarily causing hurt without provocation under Section 246 of the Penal Code. Each of them is according, sentenced to imprisonment for a term of one (1) year only, with effect from 29th July 1999 when they were convicted by Okene High Court, Kogi State. (p. 736 E)

NOTABLE POINTS OF INTEREST**PATS-ACHOLONU JSC (DISSENTING)**

1. When court can infer cause of death without medical evidence

With greatest respect, I do not see any contradiction or unsatisfactory evidence given by the medical officer. From his report which is evidence in Court, it is for the Court to draw the necessary inference. Without his evidence it is not doubted that the deceased was shot and the Court can infer that by shooting the victim in the stomach, whoever or those who did or partook in the shooting or giving the orders must have intended or indeed shall be understood to intend the natural consequence of their act. If they

had merely intended to immobilize this innocent man, they could have shot him on the leg, but no! They shot him in the tommy. We must not reduce the trial of a person who in all his premeditation without any sort of provocation shot someone who suffered grievous bodily harm, to a theatre of absurd or subject all the facts of the case to a farcical analysis which would rob the case of the strength of the facts that assail it. B

It is to my mind inescapable that the death of the decedent is attributable and traceable to the violation of his person by the shooting which he suffered. (p. 740 A) C

2. *Need for court not to enthrone anarchy and political gangsterism*

It is difficult for me to be persuaded that when a person not proved or shown to be mad, demented or suffering from senile dementia deliberately shoots another person at his stomach and two days later that person dies and there is no real evidence that the victim activated his own death, that the perpetrator of such a crime does not contemplate the death of the deceased. To agree with the argument proffered by the Appellants would to my mind be a recipe for anarchy and political gangsterism particularly in a country where many very serious murders have so far proved difficult to investigate. It is simply barbarous for a group of politicians or their minions and supporters armed to the teeth to roam the streets and blindly decide who to shoot at will. I am not enamoured by the submission of the Appellants that they should be let go. I believe that this Court would not choose to grapple the case before it by inventing all sorts of subtleties and more or less standing the law on its head to literally give a handshake to the felon as the Appellant's counsel is espousing. (p. 741 C) D E F G

3. *Appellants cannot get away from the act of shooting an innocent person*

In my view, the Appellants cannot get away from the damnable horrific act of shooting an innocent person. It is a crime that cries to heaven for vengeance. Consider for example the fact that the two lower Courts made a concurrent findings of fact showing that the culprits were no other than the Appellants and convicted them for murder. I admit that this is a criminal matter in which the Court should at all times exercise great care in its H

analysis and conclusions and subject all the facts in evidence to merciless scrutiny to determine whether there has been proof beyond all reasonable doubt but not beyond any degree of certainty as that standard of proof belongs only to God. In this case it is difficult for me to use or rely on one
 B subterfuge or another to exculpate the Appellants. I do not buy the arguments of the learned Counsel for the Appellants. Having carefully examined this case thoroughly more particularly in the light of the empirical elements assailing it, I find it difficult not to agree with the decisions of
 C the lower Courts. (p. 742 B)

REPRESENTATION

Ibrahim Isiyaku Esq. for the Appellant.
 Respondent absent not represented.

D

CASES REFERRED TO

OZAKI v. STATE (1990) 1 N.L.W.L.R. (PT.24) 92
 ONAFOWOKAN v. STATE (1987) 3 N.W.L.R. (PT.61) 538
 E OGUNTOLU v. STATE (1996) 2 N.W.L.R. (PT.432) 503
 UGURU v. STATE (2002) 9 N.W.L.R. (PT.443) 375
 GIRA v. STATE (1996) 4 N.W.L.R. (PT.443) 375

BOOK REFERRED TO

F

Sarkan on Evidence 15th Ed. p. 185

STATUTES & RULES REFERRED TO

Penal Code ss. 79, 221(1), 240 & 246
 G Criminal Procedure Code s. 218
 Supreme Court Rules O.6 r. 8(6)

LEAD JUDGMENT BY KUTIGI JSC

H The Appellants were charged with the offence of culpable homicide punishable with death under Section 221 (a) read with Section 79 of the Penal Code, Cap. 89 the Laws of Northern Nigeria 1963, Vol. III (applicable in Kogi State). They each pleaded not guilty to the charge.

The prosecution called a total of five (5) witnesses and closed its case. Each of the Appellants testified in his own defence and jointly called four (4) witnesses. At the end of the trial and in a considered judgment, the learned trial judge found each of the Appellants guilty as charged, convicted them and sentenced them to death. B

Being aggrieved by the decision of the trial High Court, the Appellants each appealed to the Court of Appeal holden at Abuja. In a reserved judgment, the Court of Appeal in a unanimous judgment dismissed the appeals and confirmed the decision of the trial Court. C

Still dissatisfied with the judgment of the Court of Appeal, the Appellants have now further appealed to this Court. Both sides filed and exchanged briefs of argument in compliance with the Rules of Court. At the hearing of the appeal, learned Counsel for the Appellants, Ibrahim Isiyaku Esq, adopted his brief. It was a joint brief. The Respondent was absent and was not represented. But having filed its brief, it would be taken as having argued the appeal vide Order 6 Rule 8(6) Supreme Court Rules. D

The Appellants in their joint brief have identified the following issues as arising for determination in the appeal - E

“(1.) Whether the extra-judicial statements admitted in evidence as Exhibits 2, 5 & 6 were in conflict with the testimonies on oath of their respective makers P.W2, P.W4 and P.W5.

(2.) Whether the Medical Report, Exhibit 1, was conclusive as to the cause of death. F

(3) Whether the defence of alibi was properly considered and rightly rejected.

(4) Whether the lower Court was right to have come to the conclusion that the prosecution had proved its case.” G

Before delving into the issues, let me first of all state the material facts of the case. The Appellants on 14/3/96 were in a group of people returning from a political rally armed with all sorts of dangerous weapons. The 1st Appellant was armed with a dane gun. The crowd attacked the premises of some people including that of the deceased, where the 2nd Appellant was alleged to have ordered the 1st Appellant to shoot at the deceased. The 1st Appellant shot at the deceased in the stomach. That was H

around 6.00 p.m on the same day (14/3/96). The deceased was then taken to a herbalist or native doctor for treatment. After seeing the deceased, the herbalist said he could not remove the “*bullet*” or “*pellet*.” The deceased was then returned to his home. The Police saw him in his home the following day on the 15/3/96 and recorded his statement. The deceased died on 16/3/96 on his way to hospital. A post mortem examination was conducted on the dead body by a medical doctor who testified as P.W.1. He issued a Medical Report tendered as Exhibit 1 in the proceedings.

Now, back to the issues reproduced above. Issues (1) & (3) can be disposed of quickly. **Issue (1) relating to inconsistencies in the statements of witnesses to the Police and their oral evidence in Court, is in my view clearly misplaced. The role of a trial Court is to hear evidence and make findings of fact based on the credibility of the witnesses and decide the merit of the case based on the findings. In this case the learned trial judge who had the privilege of listening to the witnesses and watching their demeanour came to the conclusion that the witnesses presented by the prosecution were witnesses of truth. The Court of Appeal agreed with him. I have no reason to interfere. The Court below was right in holding that there were no material inconsistencies in the evidence of the prosecution witnesses. Issue (1) therefore fails.**

As for issue (3) which is on the defence of alibi raised by the Appellants, the lower Courts rightly rejected same because there was overwhelming evidence on record fixing the Appellants at the scene of the crime on the fateful day (see for example OZAKI v. STATE (1990) 1 N.L.W.L.R. (PT.24) 92 ONAFOWOKAN v. STATE (1987) 3 N.W.L.R. (PT.61) 538. Issue (3) also fails.

I intend to take issues (2) & (4) together. Issue (2) is part of issue (4). They all go to show whether or not the prosecution proved its case beyond reasonable doubt against the Appellants.

It is settled that for a charge of culpable homicide punishable with death to succeed, the prosecution is required to prove the following ingredients of the offence -

a. that the death of a human being has actually taken place;

b. that such death has been caused by the accused;

c. That the act was done with the intention of causing death;

OR that the accused knew that death would be the probable consequence of his act.

I need not say that the above ingredients of the offence must all be proved together and that failure to prove anyone of them means failure of the charge itself.

The Appellants contended that the prosecution has failed to prove the cause of death to be due to the gun shot wound allegedly inflicted by the 1st Appellant on the deceased.

I have said earlier on that when the deceased was shot on 14/3/1996, he was taken to a herbalist who said he could not help. He returned to his home. The Police saw him in his house on 15/3/1996 and recorded his statement. The deceased was being taken to a hospital on 16/3/1996 when he died on the way. A post mortem examination was conducted by a medical doctor who testified as P.W.1. Testifying on page 75 of the record he said -

“On the 16th day of March, 1996 about 9.30 a.m. I was on duty at the Specialist Hospital Obangede I performed a post mortem examination on the dead body in my opinion the hole might have been brought about by a hot object either directly or at a high velocity. What I mean is that a pellet from a gun might have caused such a hole.”

Under cross-examination, the doctor stated on page 76 of the record thus -

“No pellet was removed by me from the body of the deceased. I did not state in Exhibit “I” (Medical Report) that there was a burn on the body of the deceased. I did not say in Exhibit “I” that the probable cause of death was the penetration of a hot object a pellet is not as small as a needle.”

The medical evidence is to say the least very unsatisfactory. It is inconclusive. It has therefore failed to establish the cause of death.

P.W.2 who took the deceased to a herbalist and who was also

taking him to a hospital when he died on the way, gave no description whatsoever of the condition of the deceased from the time he was shot until he died. The local herbalist who failed to help the deceased was also not called to give evidence about what he saw or observed and the general condition of the deceased when he was brought to him. The deceased was thus never taken to any hospital for treatment until he died two (2) days later on the way to a hospital. The medical evidence of P.W.1 is clearly not helpful at all. Neither in his evidence in Court nor in his Medical Report (Exhibit 1), did he say what the cause of death was (see for example OGUNTOLU v. STATE (1996) 2 N.W.L.R. (PT.432) 503; UGURU v. STATE (2002) 9 N.W.L.R. (PT.443) 375; GIRA v. STATE (1996) 4 N.W.L.R. (PT.443) 375). This is fatal to the case of the prosecution. The prosecution has thus failed to prove one of the essential ingredients of the charge, namely that the Appellants caused the death of the deceased. The charge against the Appellants is therefore not proved. They must be acquitted and discharged of that charge. But in my view the matter does not end here.

There is clearly abundant evidence on record which shows that the 2nd Appellant ordered the 1st Appellant to shoot at the deceased with his dane gun. And he complied with the order. The deceased was shot in the stomach and he died two (2) days later (see the evidence of P.Ws. 3, 4 & 5, the eye witnesses). By shooting his dane gun at the deceased, the 1st Appellant must have intentionally intended to cause the deceased bodily pain. This is a lesser offence under Section 240 of the Penal Code and punishable under Section 246 of the same Code for which each of them could have been convicted.

Consequently, the appeals succeed and they are hereby allowed. The convictions and sentences of death passed on each of the Appellants by the trial High Court and confirmed by the Court of Appeal are set aside. Each of the Appellants is discharged and acquitted of the charge under Section 221 read with section 79 of the Penal Code.

However, in exercise of the powers under Section 218 of the

Criminal Procedure Code, Cap. 30 the Laws of Northern Nigeria 1963 Vol. 1, (applicable in Kogi State), each of the Appellants is found guilty of a lesser offence of voluntarily causing hurt without provocation under Section 246 of the Penal Code. Each of them is according, sentenced to imprisonment for a term of one (1) year only, with effect from 29th July 1999 when they were convicted by Okene High Court, Kogi State.

ONUJSC

I have had the privilege to read before now the judgment of my learned brother Kutigi, JSC just delivered.

I am so entirely in agreement with his reasoning and conclusion that I have nothing further to add thereto.

KALGO JSC

I have had a preview of the judgment just delivered by my learned brother Kutigi JSC and I agree with him that there is some merit in the appeal. The conviction of the appellants under section 221 (a) read with Section 79 of the Penal Code for the offence of culpable homicide punishable with death, cannot be upheld as the ingredients of the offence as required by law, have not been completely proved by evidence at the trial. One of the most important ingredients of the offence namely the cause of death of the deceased has not been proved. The evidence of the medical officer (Pw1) who performed the post mortem examination on the deceased and the medical report (Exhibit 1) which he wrote thereafter were not useful at all in determining the cause of death of the deceased. And although the deceased was alleged to have been shot on the stomach and he died within 48 hours, there was no evidence to show the extent of the injury on him, even though there was clear evidence that he was shot by the 1st appellant on the instruction of the 2nd appellant. This however must have caused bodily pain to the deceased which constituted the ingredients of the offence of voluntarily causing hurt without provocation

as defined by Section 240 and punishable under Section 246 of the Penal Code. The appellants were not charged with this offence, but can they be convicted of it? The answer is in the affirmative. By Section 218 of the Criminal Procedure Code Cap. 30 of Laws of Northern Nigeria 1963 -
 B applicable to Kogi State, an accused person can be convicted of a lesser offence if proved even though he is not charged with it. See Okwuwa V. State (1964) 1 All NLR 366. The offence of voluntary causing hurt without provocation is proved in this case against the appellants contrary to Section
 C 246 of the Penal Code.

With the above and the more detailed reason given in the leading judgment, I allow the appeal and set aside the appellants' convictions under Section 221 (a) of the Penal Code and discharge and acquit them of the offence under that section. I however convict the appellants of the offence
 D of voluntary causing hurt without provocation contrary to Section 246 of the Penal Code. I abide by all the consequential orders made in the leading judgment.

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PATS-ACHOLONUJSC

I have had the benefit of reading in draft the judgment of my distinguished, noble and learned brother Kutigi JSC and I have with
 F greatest respect, reservation about that judgment. I do not intend to state the whole factual situation of that case as it has been carefully elucidated in the judgment of my noble Lord. Here is a case in which someone who in company of others while roaming the street and apparently inebriated
 G with their political cause and demonstration of power instructed or directed one of his friends also returning from the same political rally to shoot the victim, which the man indeed did by shooting the victim in his stomach. This was as late at 6 p.m. The natives took the victim to a
 H herbalist who could not do anything due most probably to the nature of the wound which must have been very serious and beyond his training, knowledge or experience as a herbalist.

The Appellants were charged with murder and tried in the High Court. The High Court and the Court of Appeal came to the conclusion that

the Appellants caused the death of the decedent hence a further appeal to this Court. The Appellants in their brief formulated 4 issues for determination which are:

1. whether the extra-judicial statements admitted in evidence as Exhibits 2, 5 and 6 were in conflict with the testimonies on oath of their respective makers, PW.2, PW.4 and PW.5;

2. whether the Medical Report, Exhibit 1, was conclusive as to the cause of death;

3. whether the defence of alibi was properly considered and rightly rejected;

4. whether the lower Court was right to have come to the conclusion that the prosecution had proved its case.

In issue No. 1 the Counsel for the Appellants pointed at what he described as inconsistencies and contradictions of the Respondent's case. I have read the evidence of PW.2, PW.4 and PW.5 and I am unable to see the so called inconsistencies or contradictions as argued by the Appellants which too the lower Courts did not see. In their brief the learned Counsel for the Appellants argued thus; *"If the deceased died on 16th March, 1996 why did the Police arrest four suspects (not the two accused) for culpable homicide and transferred them to the Criminal Investigation Division on 15th March, 1996 when death had actually not taken place as at 15th March, 1996."* The argument sounded puerile; first, investigation of a case would naturally commence on the date of the report where possible and (b) investigation as experience shows, can go on for a long time and it is not uncommon for the Police to release some people first arrested and detained and only to pounce on a completely new people who investigation might have connected with the act. The lower Courts are ad idem that it is the Appellants who caused the death of that victim. The real question is whether it is a case murder.

The incident took place on the 14th March of 1996 and the deceased died two days later on being taken to a hospital. The Doctor who did the post mortem examination in his medical report stated amongst other things that *"in my opinion the hole might have been brought about by a hot object either directly or at a high velocity. What I mean is that a pellet from a gun*

might have caused such a hole.” Under cross-examination he said “..... I did not state in Exhibit 1 that there was a burn on the body of the deceased. I did not say in Exhibit 1 that the probable cause of death was the penetration of a hot object, a pellet is not as small as needle”.

- B With greatest respect, I do not see any contradiction or unsatisfactory evidence given by the medical officer. From his report which is evidence in Court, it is for the Court to draw the necessary inference. Without his evidence it is not doubted that the deceased was shot and the Court can infer that by shooting the victim in the stomach, whoever or those who did or partook in the shooting or giving the orders must have intended or indeed shall be understood to intend the natural consequence of their act. If they had merely intended to immobilize this innocent man, they could have shot him on the leg, but no! They shot him in the tommy.
- C
- D We must not reduce the trial of a person who in all his premeditation without any sort of provocation shot someone who suffered grievous bodily harm, to a theatre of absurd or subject all the facts of the case to a farcical analysis which would rob the case of the strength of the facts
- E that assail it.

- The victim died two days after the incident and we are asked to believe that because he was not first taken to a proper hospital but to a herbalist who refused to have anything to do with the treatment after which he was taken home and when the situation deteriorated he was taken to a hospital but he died on the way, it could not be said to be murder. It is to my mind inescapable that the death of the decadent is attributable and traceable to the violation of his person by the shooting which he suffered.
- F
- G It is my belief and I hold dearly to it that when law and justice are subjected to abstract reasoning or reduced to mere fantasies that they are removed from the realm of realities, then the growth of jurisprudence is stunted and we may unwittingly use old worn out and outmoded methods, cliché and illogicality to confront a problem of the present time.
- H At page 185 of the 15th Edition of Sarkar on Evidence, the learned author relying on some decided cases in India said;

“There cannot be any guideline or yardstick to decide what will operate a sufficient motive for commission of a particular crime. It may

vary from individual to individual depending on character, psychology and various other factors”.

See Dasan v. State of Kerala (1987 Cri. L. J. 180, 183, 1986, Ker LT 598 (Ker) (DB). It is a trite law that in a case based on eye witness account of seeing someone gunning down another without any form of provocation, or purposefully inflicting grievous bodily harm to another, such a perpetrator of a felony intends and as decipherable from the act of shooting a victim in the stomach, demonstrates an uncanny recklessness of the life of a bystander. The import or intended motive is as in this case to cause incalculable harm or havoc or even death which to the perpetrators matters so little. In other words, the life of the victim is worth nothing more than a candle in the wind. It is difficult for me to be persuaded that when a person not proved or shown to be mad, demented or suffering from senile dementia deliberately shoots another person at his stomach and two days later that person dies and there is no real evidence that the victim activated his own death, that the perpetrator of such a crime does not contemplate the death of the deceased. To agree with the argument proffered by the Appellants would to my mind be a recipe for anarchy and political gangsterism particularly in a country where many very serious murders have so far proved difficult to investigate. It is simply barbarous for a group of politicians or their minions and supporters armed to the teeth to roam the streets and blindly decide who to shoot at will. I am not enamoured by the submission of the Appellants that they should be let go. I believe that this Court would not choose to grapple the case before it by inventing all sorts of subtleties and more or less standing the law on its head to literally give a handshake to the felon as the Appellant’s counsel is espousing. In the case of the State v. Nahar Singh (1998) Cri. LJ 2006 SC, an Indian case, it was held that where participation of the accused in the crime was established the evidence of motive paled into insignificance and should not be a ground to justify an acquittal. It cannot therefore be doubted to my mind that evidence of motive, that is, what actuated the Appellant to do what he did paled into nothingness in view of the truthfulness or unimpeachable evidence of eye witnesses. In all these what I am saying is that the order to shoot the victim was a premeditated act and

the person or persons who did the shooting could not care a hoot as to the resultant effect of their act. I believe that law and justice should at all times be the mirror by which the society gages how administration of justice devoid of all technicalities, or reliance on old hackneyed disputable mumbo jumbo expressions, is readily understandable and appreciated by a person in the street. It would seem with greatest respect that the majority judgment has in its wisdom let out the Appellants out of the hook by finally reducing their crime to that of a misdemeanor. I do not agree.

In my view, the Appellants cannot get away from the damnable horrific act of shooting an innocent person. It is a crime that cries to heaven for vengeance. Consider for example the fact that the two lower Courts made a concurrent findings of fact showing that the culprits were no other than the Appellants and convicted them for murder. I admit that this is a criminal matter in which the Court should at all times exercise great care in its analysis and conclusions and subject all the facts in evidence to merciless scrutiny to determine whether there has been proof beyond all reasonable doubt but not beyond any degree of certainty as that standard of proof belongs only to God. In this case it is difficult for me to use or rely on one subterfuge or another to exculpate the Appellants. I do not buy the arguments of the learned Counsel for the Appellants. Having carefully examined this case thoroughly more particularly in the light of the empirical elements assailing it, I find it difficult not to agree with the decisions of the lower Courts.

In the circumstances, I dismiss the appeal and affirm the judgment of the two lower Courts.

G

ONNOGHENJSC

This is an appeal against the judgment of the Court; of Appeal in appeal No. CA/A/96C/99 delivered on 5th June, 2002 by Abuja Division of the Court in which it confirmed the conviction and sentence of the appellants by the High Court of Kogi State in charge No. KGS/6C/96 for an offence of culpable homicide punishable with death under section 221(a) read with Section 79 of the Penal Code; Cap. 89 Laws of Northern

Nigeria 1963 as applicable to Kogi state.

The Law is settled that for an accused person to be convicted of the offence of culpable homicide punishable with death, the prosecution must prove the following ingredients of the offence, to wit:

(a) that a human being was killed.

B

(b) that the accused(s) caused the death of the deceased.

(c) that the act of the accused(s) that caused the death of the deceased was done with the intention of causing death, Or that the accused(s) knew that death would be the probable consequence of his (their) act.

C

It is trite law that these ingredients must co-exist before such a conviction can be secured particularly as failure to establish any of the ingredients will result in an acquittal.

Section 221 of the Penal Code which creates the offence of culpable homicide punishable with death provides as follows:-

D

“221. Except in the circumstances mentioned in Section 222 culpable homicide shall be punished with death:-

(a) If the act by which the death is caused is done with the intention of causing death; or

E

(b) If the doer of the act knew or had reason to know that death would be the probable and not only a likely consequence of the act or of any bodily injury which the act was intended to cause.”

F

The facts of the case showed clearly that on 14/3/96 the appellants were in a group of people who attended a political rally armed with various offensive weapons. The 1st appellant in particular was armed with a dane gun with which he shot the deceased on the stomach on the ‘orders’ of the 2nd appellant. The deceased did not die on the spot neither was he rushed to the hospital for treatment Rather the deceased was taken to a native doctor for treatment with the intention of removing the pellets lodged in his body. The native doctor could not extract the pellets and the deceased was subsequently returned to his home. He died two days from the day he was shot - i.e on 16/3/96. The appellants were charged, tried and convicted of culpable homicide punishable with death and sentenced accordingly. Upon appeal the Court of Appeal confirmed their conviction

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H

and sentence resulting in the present further appeal where the main issue is whether the prosecution proved the cause of death of the deceased as attributable to the act of the appellants.

I agree with the reasoning and conclusion of my learned brother, B Kutigi, jsc that the prosecution failed to prove the cause of death of the deceased. PW1 is the medical officer who conducted a post mortem examination on the body of the deceased and issued a report which he later tendered in the proceedings as exhibit 1 in which he stated the probable cause of death as *“Pentorutu from a penetrating abdominal injury.”*

C At page 75, PW1 stated, under examination in chief, as follows:-

“On the 16th day of March, 1996 about 9.30 am I was on duty at the Specialist Hospital at Obangede I performed a post mortem examination on the dead body in my opinion the hole might have D been brought about by a hot object either directly or at a high velocity. What I mean is that a pellet from a gun might have caused such a hole.”

However, under cross examination, the witness stated at page 76 thus:-

E *“No pellet was removed by me from the body of the deceased. I did not state in exhibit 1 (medical report) that there was a burn on the body of the deceased. I did not say in Exhibit 1 that the probable cause of death was the penetration of a hot object, a pellet is not as small as a needle.”*

F The above is the totality of the expert evidence the prosecution and the trial court relied upon in proof of the cause of death. The evidence is made worse by the fact that the deceased was never taken to a hospital for treatment prior to his death - in fact he died on his way to the hospital on 16/3/96, two days after the incidence. If he had been taken to a hospital and treated prior to his death, the medical doctor who managed him would G have testified as to the nature of the injury the deceased was admitted and treated for which would have thrown more light on the cause of death. As it stands both the testimony of PW1 and the medical report he issued after H performing the post mortem examination of the body, exhibit 1, never stated the cause of death of the deceased. PW1's opinion that *“the hole might about by a hot object.....”* Is neutralized by his admission under cross examination that he never stated in exhibit 1 that there was a burn

on the body of the deceased which would have been the case if the hole was made by a hot object as he later testified. Another important fact is that PW1 never stated in exhibit 1 that the probable cause of death was a penetrating hot object neither did he recover any pellet from the body during post mortem examination. The failure to say positively what the cause of death was in exhibit 1 is fatal to the case of the prosecution particularly as one of the ingredients of the offence of culpable homicide punishable with death is thereby not established. The consequence is that the appellants ought not to have been convicted of that offence and the Court of Appeal erred in confirming that conviction.

I also agree with my learned brother that under Section 218 of the Criminal Procedure code, Cap 30 Laws of Northern Nigeria, 1963 as applicable to Kogi State, the appellants can be found liable for a lesser offence but I do not agree that such lesser offence is voluntarily causing hurt without provocation under Section 246 of the Penal Code. The said Section 246 provides as follows:-

“246 - Whoever, except in the case provided for by Section 244; voluntarily causes hurt be punished with imprisonment for a term which may extend to one year or with fine which may extend to forty naira or with both.

It is clear that the above provision deals with punishment for voluntarily causing hurt What the law regards as hurt and voluntarily causing hurt are defined in sections 240 and 242 of the Penal Code as follows:-

“240. Whoever causes bodily pain, disease of infirmity to any person is said to cause hurt.”

“242. Whoever does any act with the intention of thereby causing hurt to any person or with the knowledge that he is likely thereby to cause hurt to any person does thereby cause hurt to any person, is said voluntarily to cause hurt.”

On the other hand, sections 241, 243 and 247 of the Penal code deal with causing grievous hurt. They provide as follows:-

*“241. The following kinds of hurt only are designated as grievous:-
(a) emasculation;*

(b) *permanent deprivation of the sight of an eye or the hearing of an ear or the power of speech.*

(c) *deprivation of any member or joint;*

(d) *destruction or permanent impairing of the powers of any member or joint;*

(e) *permanent disfiguration of the head or face;*

(f) *fracture or dislocation of a bone or tooth;*

(g) *any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain or unable to follow his ordinary pursuits.”* Emphasis supplied.

“243. *Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt is said voluntarily to cause grievous hurt.*”

While section 247 concluded thus:-

“247. *Whoever, except in the case provided for by section 245, voluntarily causes grievous hurt, shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.*”

From the testimonies of PW3, 4 and 5 who are eye witnesses of the drama that unfolded on 14/3/96 there is abundant evidence on record to establish the fact that the 2nd appellant ordered the 1st appellant to shoot at the deceased with his dane gun which he carried on the day of the incident; that the 1st appellant did shoot at the deceased in the stomach and the deceased died two days after the shooting. These facts have been concurrently found by the trial and lower courts and no reason has been advanced before this court why they should be set aside or disregarded.

It is therefore an established fact that the 1st appellant, by aiming and shooting his gun at the deceased must have intended to cause the deceased grievous hurt particularly as the hurt endangered the life of the deceased and/or caused the deceased to be, during the space of two days, in severe bodily pains or unable to follow his ordinary pursuits as provided by section 241(g) of the Penal Code. It is my respectful view that when section 241(g) provides for “during the space of twenty days” it means simply that the sufferer must be in pains within the period of the 1st to the twenty days of the infliction of the grievous hurt, it does not say that the

deceased must suffer pains for twenty days before the hurt inflicted can be classified as grievous. In any event paragraph (g) of section 241 supra identifies two separate and independent hurts to be classified grievous hurt. These are:-

(a) any hurt which endangers life or

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(b) which causes the sufferer to be, during the space of twenty days, in severe bodily pain or unable to follow his ordinary pursuits.

It is my considered opinion that the hurt inflicted on the deceased by shooting a dane gun at him clearly endangered his life and the deceased actually died two days thereafter. The hurt so inflicted therefore qualifies as grievous hurt, independent of whether the deceased died a day after the shooting or nineteen days or twenty days thereafter provided it was “during the space of twenty days” of the infliction of the hurt.

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I therefore hold that the lesser offence for which appellants can be convicted and, which I hereby so convict them, is the offence of voluntarily causing grievous hurt without provocation contrary to section 241(g) of the Penal Code and punishable under section 246 of the said Code. It is further ordered that the appellants TUNDE ADAVA and OHIARE OHINO be and are hereby sentenced to six years imprisonment with hard labour with effect from 29th July, 1999 and a fine of N1,000.00 each.

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The appeal is therefore allowed in part.

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Chief Editor's Comment

The dissenting opinion of Pats-Acholonu is so convincing that one may wonder why the majority were not like minded. An aspect of the facts of this case provides what seems to be a justification for the majority stand. We desire to comment briefly on that salient aspect for parties/counsel to note so as to avoid it in future.

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There is no doubt that in some cases the court can infer cause of death and go on to convict the accused even without any medical evidence at all as rightly reasoned

by Pats-Acholonu JSC in his dissenting judgment at p. 740 A, see Alarape v. State (2001) 2 KLR (pt 116) 543, and Effiong v. State (1998) 5 KLR (PT 65) 1347 where the deceased died on the spot. But the majority in the present case, per Kutigi JSC at p. 735 H felt that the medical evidence failed to establish cause of death and acquitted the accused
B persons. This view can be supported by the facts of this case where instead of deceased person's relations taking him to hospital straightaway they first took him to a herbalist. Even when the herbalist told them he had no magic herb that can extract a bullet from a person's body, they wasted two days before going to hospital and deceased died on
C their way to the hospital. So, one may wonder whether there was actually any bullet at all in the deceased person's body as the medical evidence showed that non was removed during postmortem examination.

The lack of urgency demonstrated by the deceased and his relations in not
D rushing to the hospital at once suggests that he was never in any danger as a result of the shooting, or that they desired his death. They took no steps to mitigate the effect of the shooting on the deceased. Those relations of his ought to have been tried for murder of the deceased. How can they be romancing a case of bullet shot with a herbalist, and staying two days at home before remembering that there is a hospital, towards the
E extinction of the 20th century AD? This coupled with the inconclusive medical evidence (see p. 735 C - G) may be what made the majority judgment to go the way it went.

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