

SUPREME COURT OF NIGERIA

20TH APRIL, 2007. SC. 184/2006

**CORAM:- A. I. KATSINA-ALU, N. TOBI, F. F. TABAI,
I. T. MUHAMMAD, P. O. ADEREMI, JJSC**

1. MUSTAPHA MOHAMMED

2. LUKEMAN AIYEGBAMI APPELLANTS

V.

THE STATE RESPONDENT

MURDER - Proof - Circumstantial evidence - Can support conviction - Where it is cogent and compelling - And points to guilt with mathematical accuracy (H1)

MURDER - Proof - Findings of trial court - Is not perverse - Accused persons were properly linked - With murder of the deceased (H2)

CRIMINAL PROCEDURE - Murder - Confessional statement - Where voluntary, positive, direct and properly proved - Conviction can be solely based on it - Without corroboration (H3)

CRIMINAL PROCEDURE - Murder - Common intention - Three elements to be proved - Can be available in a confessional statement - As in this case (H4)

FACTS

The appellants were charged before the trial High Court with the offence of murder. The prosecution's case is that on 11-08-1995, one Salawu told Fashola (the deceased) that the 1st appellant wanted to see him. The deceased left to see the 1st appellant, did not return after a long time and PW1 went to search for him. He got to the house of 1st appellant and asked for the whereabouts of the deceased. 1st appellant denied seeing the deceased. A report was made to the Police about a missing person.

1st appellant was arrested. He took the Police to a bush where the headless corpse of the deceased was unearthed from a shallow grave. Appellants were charged with conspiring to commit murder and murder of late Fashola. The trial judge convicted the appellants. Their appeal to the Court of Appeal was dismissed. They have further appealed to the Supreme Court.

HELD (Unanimously dismissing the appeal per **TOBI JSC**)

MURDER - Proof

1. A court could properly infer from circumstantial evidence that the death of the deceased was caused by the act of the accused without any other evidence. For circumstantial evidence to support a conviction for murder, it must lead only to one conclusion that murder had been committed and that it was committed by the accused person. Before an accused person can be convicted for murder on circumstantial evidence, the fact of death should be proved by such circumstances as render the commission of the crime certain and leave no ground for reasonable doubt. The circumstantial evidence should be cogent and compelling, as to convince the court that no rational hypothesis other than murder can the facts be accounted for. A conviction for murder on circumstantial evidence must point to the guilt of the accused with the accuracy of mathematics. A court cannot convict on circumstantial evidence, especially in a case of murder where such evidence points in more than one direction. (p. 1929 F)

MURDER - Proof - Findings of trial court

2. The learned trial Judge said at pages 84 and 87 of the Record:

“The prosecution through the evidence of PW1, PW2, PW3, PW4 and PW5 have proved beyond reasonable doubt all the ingredients (a), (b), (c) above, which evidence was cogent and had linked the 1st and 2nd accused with the death of the deceased in a positive act of the 1st and 2nd accused causing serious injury to the deceased which in turn resulted directly in the death of the deceased... In the instant case, the facts proved in evidence by the prosecution led to the irresistible conclusion that the 1st

and 2nd accused persons and no other person or persons had the same opportunity to murder the deceased and that they were in fact those who murdered him... Circumstances have shown that the 2nd accused used charm - subusere (fall down for fun) on the chest of the deceased, who actually fell down in the house of the 1st accused - though did not die and evidence of PW1-5 showed the condition - signs of struggling around the shallow grave dug in the plot of land belonging to the accused..."

I was not there when evidence was given in court. The learned trial Judge was there. He listened to the evidence of the prosecution witnesses. He came out with the above. I do not see any perversity in the findings. This court cannot replace the above findings borne out from the evidence and plant its own. (p. 1931 B)

Confessional statement - Where voluntary

3. Where an accused person confesses to a crime, in the absence of an eye witness of killing, he can be convicted on his confession alone if the confession is positive, direct and properly proved. A free and voluntary confession alone is sufficient without further corroboration to warrant conviction. A conviction for murder can be based on the confessional statement of the accused.

It is important to say that when the confessional statements of the appellants were tendered, there was no objection, and so there was no trial within trial. In the absence of objection, this court can come to the conclusion that the statements were made voluntarily by the appellants. This court held in *Adio v. State* (1986) 2 NWLR (Pt. 24) 581 that a free and voluntary confession of guilt by an accused person, if it is direct, positive and satisfactorily proved occupies the highest place of authenticity when it comes to proving beyond reasonable doubt. The judgment of this court is valid. After all, the accused is the best person and in the best position to say whether he committed the offence or not; although he may decide to hide the truth from the court. If he says that he committed the offence, the prosecution need not prove the offence any longer. The confession is enough proof of the offence beyond reasonable doubt. (p. 1932 B)

Murder - Common intention

4. Learned counsel laboured so much on the issue of common intention or common purpose in the brief. He cited quite a number of cases. Rely-
 B ing on the case of Ogbali v. The State (supra), counsel submitted that as the three elements indicated by Bello, JSC (as he then was) in the case were not proved by the prosecution, the appellants ought to have been discharged and acquitted.

C I should take the three elements *seriatim*. The first is that there must be showing that the accused persons had found a common inten-
 tion to prosecute an unlawful purpose together. This was proved in evi-
 D dence by the prosecution witnesses. 1st appellant sent the 2nd appellant to call the deceased in the early hours of 11th August 1995. The common
 D intention of the appellants was to murder the deceased, which is unlaw-
 ful. Both had the common intention to prosecute the unlawful purpose of
 killing the deceased.

 The second one is that in furtherance of such unlawful purpose a
 E person was killed in the circumstances amounting to murder. Both appel-
 lants played complementary roles in the murder of the deceased.

 The third one is that the death of that person assaulted is a prob-
 able consequence of the prosecution of the unlawful purpose. The third
 F element is anchored on the second one. It is clear from the totality of the
 evidence before the learned trial Judge that the death of the deceased was
 not just a probable consequence but a direct consequence of the pros-
 ecution of the unlawful purpose to murder the deceased.

G I should say that the above three elements will be assimilated or
 capable of being assimilated in a confessional statement. Once there ex-
 ists a confessional statement which is direct, cogent and unequivocal to
 the fact that the appellants murdered the deceased, the prosecution need
 not prove any of the three elements or all the three elements. (p. 1932 H/
 H 1933 F)

NOTABLE POINTS OF INTEREST

TABAI JSC

1. Admitted fact is not a fact in issue

A particular fact can only be said to be in issue when its assertion by a party is denied by the other and it thus becomes a fact in dispute. An admitted fact is not a fact in issue. And an issue is said to be joined on a particular fact making its proof necessary when its assertion is disputed by the opposing party. See further EDOSOMWAN v OGBEFUN (1996) 4 NWLR (Part 442) 266. It is settled therefore that when a particular fact is admitted it needs no further proof. (p. 1936 A)

MUHAMMAD JSC*2. The law will catch up with evil people*

In conclusion, I would only want to observe, as did the learned trial Judge that the facts of this case are miserable, sordid and morbid. The deeds carried out by the appellants are most shameful to remember, too ghastly to believe and most irritating to hear. The appellants are hideous, hypocritical and merciless human beings. The precious and sacred human life means nothing to them. Life, except in their own persons, can easily be exchanged for money. They thought they could use the illegally got money to sustain their living. No way! The law has caught up with them and is never a respecter of persons. Moreso, when our society is seriously sick. The harbingers of such sicknesses are those who cause havoc and disorder such as the appellants who can spill the blood of an innocent man in order to make “awure” i.e. concoction for money making. The continued existence of such evil people in the society is unwarranted and detrimental. Such people deserve to be vanished from the society in accordance with the provisions of the law of this country. (p. 1943 A)

REPRESENTATION

Oladipo Okpeseyi, Esq. for appellants.

A. A. Babawale (Mrs.) (DPP Ogun State) for respondents.

CASES REFERRED TO

EDOSOMWAN v OGBEFUN (1996) 4 NWLR (Part 442) 266

- Adio v. State (1986) 2 NWLR (Pt. 24) 581
- The Queen v. Agwo (1956-84) 10 SCND 35
- Esai v. The State (1976) 11 SC 39
- Ibo v. The State, (1971) NMLR 245
- B The State v. Ifu (1964) 8 ENLR 28
- Milla v. The State (1985) 3 NWLR (PL 11) 190
- Achbua v. The State (1976) 12 SC 63
- Obosi v. The State (1969) 1 NMLR 204
- Stephene v. Commissioner of Police (1986) 2 NWLR (pt. 25) 673
- C Mbolo v. The Queen (1964) NMLR 49 at 52
- EHIMARE 2 ANOR v OKAKAEMHONYON. (1985) 1 N.W.L.R. (Part 2) 177 at 183
- BARJE v GUNDUMA (2001) 13 NWLR (Part731) 673
- D MENAKAYA v MENAKAYA (1996) 9 NWLR (Part 472) 256
- IMOLOAME v WAEC (1992) 9 NWLR (Part265) 313

LEAD JUDGMENT BY TOBIJSC

- E This is a murder appeal. The prosecution's case is that on 11th August, 1995, one Asimiyu Salawu told Oladipupo Fasola (the deceased) that the 1st appellant wanted to see him. The deceased left to see the 1st appellant. After a long time, the deceased did not return. PW1 went in
- F search of him. He got to the house of the 1st appellant and asked for the whereabouts of the deceased. The 1st appellant denied seeing the deceased. A report of missing person was made to the Police.

- G The 1st appellant was arrested. After the arrest he took the Police to a bush where the headless corpse of the deceased was unearthed from a shallow grave. The appellants were charged with conspiring to commit murder and murder of Oladipupo Fasola. The trial Judge convicted the appellants accordingly. Their appeal to the Court of Appeal was dismissed. They have come to this court.
- H Briefs were filed and exchanged. Appellants formulated the following issues for determination:

“1. Whether the charge of murder preferred against the appellants was proved by the prosecution beyond reasonable doubt?”

2. *Whether it is not the duty of the prosecution to prove that circumstantial evidence does exist and further that the circumstantial evidence thus proved is such that leads to no other logical conclusion but the guilt of the accused person to ground conviction.”*

The respondent formulated the following issue for determination: B

“Whether the charge of murder preferred against the Appellants was proved by the prosecution beyond reasonable doubt.”

Learned counsel for the appellants, Mr. Oladipo Okpeseye, submitted on Issue No. 1 that for the prosecution to prove its case beyond reasonable doubt on the charge of murder, it must prove not any but all of the following, that: (a) the deceased died, (b) Death of the deceased resulted from the act of the accused person, (c) The act of the accused person was intentional with the knowledge that death or grievous bodily harm was its probable consequence. He cited *Onah v. The State* (1985) 3 NWLR (Pt. 12) 23G. He argued that the prosecution totally failed to link the death of Oladipupo Fasola to the act of the appellants and therefore did not prove the charge of murder against them beyond reasonable doubt. He cited *Uyo v. Attorney-General Bendel State* (1986) 1 NWLR (Pt. 17) E 418 at 426 and section 138 of the Evidence Act. He said that the Court of Appeal was wrong in holding that because there was no reply brief on the circumstantial evidence, the fact was conceded by the appellants. He contended that with or without a reply brief, the evidence on record, not the respondent’s brief, must establish the circumstantial evidence. F

Relying on section 36(5) of the 1999 Constitution, section 138 of the Evidence Act and the cases of *Okoro v. State* (1988) 5 NWLR (Pt. 94) 255 at 288; *R. v. Oledima* 6 WACA 202; *Isiekwe v. State* (1999) 9 NWLR (Pt. 617) 43 at 63; *R. v. Nwokocha* (1949) 12 WACA 453; *R. v. Owe* (1901) 1 All NLR 080; *Peter v. State* (19994) 5 NWLR (Pt. 342) 45 at G8; *Idemudia v. The State* (1999) 7 NWLR (Pt. 610) 202 at 215 and *Alarape v. State* (2000) 5 NWLR (Pt. 705) 79, learned counsel submitted that the prosecution did not successfully link the act of the accused persons with the death, H

Where a court is to rely on circumstantial evidence and or common purpose both the circumstance to be relied upon and of the com-

mon intention must be established by facts capable of proving by inference that death was caused by the act of either or both the appellants with mathematical accuracy, counsel argued. He cited *Akinmoju v. The State* (1995) 7 NWLR (Pt. 406) 204 at 212.

B Referring to *Ogbali v. The State*, SC 71/1982 (unreported), counsel contended that for common intention to apply, the prosecution must prove three elements: (i) there must be showing that the accused persons had formed a common intention to prosecute an unlawful purpose together, (ii) in furtherance of such unlawful purpose a person was killed in
C the circumstances amounting to murder, (iii) The death of that person assaulted is a probable consequence of the prosecution of the unlawful purpose. Dealing with the evidence of DW1, DW2, DW3 and DW4, learned counsel submitted that the prosecution did not prove common
D purpose. Relying on *Onah v. The State* (supra); *Muka v. The State* (1973) 5 SC 231 and *Okafor v. COP* (1965) NMLR 89, learned counsel submitted that suspicion no matter how strong cannot found a conviction.

On Issue No. 2, learned counsel repeated so much of the arguments on Issue No. 1. He further relied on *Akinmoju v. The State* (1995) 7 NWLR (Pt. 406) 204 at 212; *Abieke v. The State* (1975) 9-11 SC 60 at 65; *Anakwe v. The State* (1976) 9-10 SC 154 at 164 and *Bozin v. The State* (1985) 2 NWLR (Pt. 8) 465 at 471 and section 148 of the Evidence
F Act.

He examined the evidence of PW2, 3, 4 and 5 and submitted that the facts relied on by the prosecution to make the inference or proposition that the appellants murdered the deceased are most improbable when considered against the surrounding circumstances and cannot sustain a
G conviction. He urged the court to set aside the judgment, conviction and sentence of the appellants and enter in its place discharge and acquittal.

Mrs. A. A. Babawale, learned DPP of Ogun State, contended on the only issue that the prosecution in proof of any criminal charge against
H an accused person can rely on the following forms of evidence in proof of its case, viz: (a) confessional statement or (b) circumstantial evidence or (c) evidence of eye witnesses. She cited *Emeka v. State* (2001) 14 NWLR (Pt. 734) 666 at 683, She said that the prosecution relied on

circumstantial evidence and confessional statements of the appellants in proof of its case. She cited *Akinmoju v. The State* (1995) 7 NWLR (PI. 406) 204 at 212 and *Igbele v. State* (2004) 34 WRN 83 at 98.

On the submission of learned counsel for the appellants that they were not linked to the murder of the deceased, counsel submitted that the circumstantial evidence in the case led irresistibly to the guilt of the appellants as the evidence linked the appellants to the death of the deceased. Calling in aid the case of *Ariche v. State* (1993) 6 NWLR (Pt. 302) 752 at 764, learned counsel contended that where the appellants were the last linked with the deceased alive, the appellants are to furnish an explanation as to what led to the death of the deceased.

On the submission of counsel for the appellants that failure of the prosecution to call one Asimiyu Salawu, brother to the 1st appellant was fatal to its case, learned counsel contended that the prosecution is not bound to call every available witness, but such number of witnesses to prove its case beyond reasonable doubt. He cited *Ekpenyong, v. State* (1991) 6 NWLR (Pt. 200) 683 at 698. She urged the court to uphold the judgment of the two lower courts and dismiss the appeal.

Circumstantial evidence or confessional statement can result in the conviction of an accused for the offence of murder if the court is satisfied with the circumstances leading to the evidence and the confessional statement was made voluntarily and not under threat or duress.

I will take the two aspects in turn. First, circumstantial evidence.

A court could properly infer from circumstantial evidence that the death of the deceased was caused by the act of the accused without any other evidence. See *Ibo v. The State*, (1971) NMLR 245. **For circumstantial evidence to support a conviction for murder, it must lead only to one conclusion that murder had been committed and that it was committed by the accused person.** See *The State v. Ifu* (1964) 8 ENLR 28. **Before an accused person can be convicted for murder on circumstantial evidence, the fact of death should be proved by such circumstances as render the commission of the crime certain and leave no ground for reasonable doubt. The circumstantial evidence should be cogent and compelling, as to convince the**

court that no rational hypothesis other than murder can the facts be accounted for. See *Esai v. The State* (1976) 11 SC 39. **A conviction for murder on circumstantial evidence must point to the guilt of the accused with the accuracy of mathematics.** See *The Queen v. Agwo* (1956-84) 10 SCND 35. **A court cannot convict on circumstantial evidence, especially in a case of murder where such evidence points in more than one direction.** See *The Queen v. Iromachi* (1956-84) 10 SCND 34.

The Court of Appeal, per Fabiyi, JCA, said at pages 142 and 143 of the Record:

“From the evidence garnered at the trial court, it is clear that the 1st Appellant sent his junior brother Ashimiyu to call the deceased on 11-8-95 at about 6.00 a.m. The deceased went to the 1st Appellant’s house and got into the waiting hands of both Appellants. The 2nd Appellant, in his evidence in chief said he saw the deceased in the 1st Appellant’s house on the fateful day and that he used a charm - ‘subusere’ to hit him on the chest and he became weak and fell down. The next thing was the deceased’s indecent burial at 1st Appellant’s plot thereafter. Next was the delivery of the deceased’s head to the 3rd Accused by the 1st Appellant according to that witness on the same 11-8-95 to make ‘awure’, i.e. concoction, for money making. The Appellants were the last linked with the deceased alive. From the whole gamut of the circumstances, Appellants are sufficiently linked with the cause of death of the deceased. It will be an eye wash to find otherwise in my humble opinion. The deceased was last in the company of the Appellants before they started to embark upon pranks; it seems.”

The following circumstantial evidence can be gathered from the above findings of the Court of Appeal: (1) the 1st appellant sent his younger brother, Ashimiyu, to call the deceased. (2) The deceased answered the call of the 1st appellant and went to the house of the 1st appellant and was received by both the 1st and 2nd appellants. (3) The 2nd appellant used a charm “subusere” to hit the deceased on the chest and he became weak and fell down. (4) The indecent burial of the deceased at the plot of the 1st appellant. (5) The delivery of the head of the deceased to the 3rd accused

by the 1st appellant on 11th August, 1995 (the day of the murder) “to make “awure”, i.e. concoction for money making. (6) The appellants were the last persons with the deceased alive.

What is that submission that the appellants were not linked to the murder in the light of the above! **The learned trial Judge said at pages 84 and 87 of the Record:**

“The prosecution through the evidence of PW1, PW2, PW3, PW4 and PW5 have proved beyond reasonable doubt all the ingredients (a), (b), (c) above, which evidence was cogent and had linked the 1st and 2nd accused with the death of the deceased in a positive act of the 1st and 2nd accused causing serious injury to the deceased which in turn resulted directly in the death of the deceased... In the instant case, the facts proved in evidence by the prosecution led to the irresistible conclusion that the 1st and 2nd accused persons and no other person or persons had the same opportunity to murder the deceased and that they were in fact those who murdered him... Circumstances have shown that the 2nd accused used charm - subusere (fall down for fun) on the chest of the deceased, who actually fell down in the house of the 1st accused - though did not die and evidence of PW1-5 showed the condition - signs of struggling around the shallow grave dug in the plot of land belonging to the accused...”

I was not there when evidence was given in court. The learned trial Judge was there. He listened to the evidence of the prosecution witnesses. He came out with the above. I do not see any perversity in the findings. This court cannot replace the above findings borne out from the evidence and plant its own. The Record has no space for that and I will not attempt it because it is against our adjectival law.

A case is said to be proved beyond reasonable doubt either by direct oral evidence or by circumstantial evidence. Although witnesses can lie, circumstances cannot lie. Consequently, and in that sense, circumstantial evidence affords better proof beyond reasonable doubt - see *Adio v. The State* (1986) 2 NWLR (Pt. 24) 581.

That takes me to the confessional statements made by the appel-

lants. PW3, Sgt. Oluwole Babalola, in his evidence in-chief at pages 30 to 33 said that he obtained statements which were confessional in nature from the appellants and in compliance with the procedure, took the appellants to Mr. D.O. Aremu, Deputy Superintendent of Police, who signed the statements after the appellants confirmed their correctness. Mr. Aremu also asked the appellants whether the confessional statements were obtained under duress or promise or threat and they answered “No”.

Where an accused person confesses to a crime, in the absence of an eye witness of killing, he can be convicted on his confession alone if the confession is positive, direct and properly proved. See *Milla v. The State* (1985) 3 NWLR (PL 11) 190; *Achbua v. The State* (1976) 12 SC 63 and *Obosi v. The State* (1969) 1 NMLR 204. **A free and voluntary confession alone is sufficient without further corroboration to warrant conviction.** See *Obosi v. The State* (supra) and *Ataniyi v. The Queen* 15 WACA 34. **A conviction for murder can be based on the confessional statement of the accused.** See *Stephene v. Commissioner of Police* (1986) 2 NWLR (pt. 25) 673 and *Mbolo v. The Queen* (1964) NMLR 49 at 52.

It is important to say that when the confessional statements of the appellants were tendered, there was no objection, and so there was no trial within trial. In the absence of objection, this court can come to the conclusion that the statements were made voluntarily by the appellants. This court held in *Adio v. State* (1986) 2 NWLR (Pt. 24) 581 that a free and voluntary confession of guilt by an accused person, if it is direct, positive and satisfactorily proved occupies the highest place of authenticity when it comes to proving beyond reasonable doubt. The judgment of this court is valid. After all, the accused is the best person and in the best position to say whether he committed the offence or not; although he may decide to hide the truth from the court. If he says that he committed the offence, the prosecution need not prove the offence any longer. The confession is enough proof of the offence beyond reasonable doubt.

Learned counsel laboured so much on the issue of common

intention or common purpose in the brief. He cited quite a number of cases. Relying on the case of Ogbali v. The State (*supra*), counsel submitted that as the three elements indicated by Bello, JSC (as he then was) in the case were not proved by the prosecution, the appellants ought to have been discharged and acquitted. B

I should take the three elements *seriatim*. The first is that there must be showing that the accused persons had found a common intention to prosecute an unlawful purpose together. This was proved in evidence by the prosecution witnesses. 1st appellant sent the 2nd appellant to call the deceased in the early hours of 11th August 1995. The common intention of the appellants was to murder the deceased, which is unlawful. Both had the common intention to prosecute the unlawful purpose of killing the deceased. C

The second one is that in furtherance of such unlawful purpose a person was killed in the circumstances amounting to murder. Both appellants played complementary roles in the murder of the deceased. There is evidence that 2nd appellant used the charm of “subusere” to set the ball rolling and the charm which hit the deceased on the chest made him to fall down. The rest of it is now history and that history includes the severance of the head from the body. Who did what in that respect is not in evidence and so I will not speculate as our procedural law does not allow me to speculate. D

The third one is that the death of that person assaulted is a probable consequence of the prosecution of the unlawful purpose. The third element is anchored on the second one. It is clear from the totality of the evidence before the learned trial Judge that the death of the deceased was not just a probable consequence but a direct consequence of the prosecution of the unlawful purpose to murder the deceased. E

I should say that the above three elements will be assimilated or capable of being assimilated in a confessional statement. Once there exists a confessional statement which is direct, cogent and unequivocal to the fact that the appellants murdered the deceased, the prosecution need not prove any of the three elements F

or all the three elements.

I think I can stop here. I have said enough to dismiss the appeal. The appeal is accordingly dismissed. I affirm the decision of the Court of Appeal. I also affirm the conviction of the appellants for conspiracy to murder and murder of Oladipopu Fasola and the sentence of death passed on them. It is a pity that they have to face the hangman. There is nothing I can do to help them. The law says so and I bow to the law. So be it.

C

KATSINA-ALU JSC

I read in draft the judgment delivered by my learned brother, Niki Tobi, J.S.C., in this appeal. I agree with his reasoning and conclusion. I also dismiss the appeal.

D

TABAI JSC

I had a preview of the leading judgment of my learned brother Niki Tobi JSC and I also think that the appeal lacks merit. The facts are clearly set out in the leading judgment and I need not repeat them.

There was no direct eye witness account of the alleged murder of the deceased, Mr. Oladipupo Fashola, by the Appellants. The entire evidence upon which the Appellants' convictions and sentences were affirmed by the Court below is circumstantial. Although Mr. Okpeseyi, learned counsel for the Appellant submitted two issues for the determination of this appeal, it is my view that the only issue is whether the evidence presented to the trial court meets that standard of proof beyond reasonable doubt.

The cause of death of late Mr. Oladipupo Fashola is not disputed. The evidence of the PW4 Dr. Olugbenga Olanrewaju Agbalajobi was positive and unequivocal. The Appellants conceded that much in paragraphs 1.10 and 4.26 of the Appellants' Brief. Learned counsel for the Appellants however contended strenuously that the death was not linked to the act or acts of the Appellants. It was counsel's further submission that there was no such circumstantial evidence so strong as to lead to the inference

of common intention or common purpose of the Appellants to commit murder. Counsel also argued that the failure of the prosecution to call Asimiyu Salawu is, by virtue of the provisions of section 149(d) of the Evidence Act, and the decision in ONAH v THE STATE (1985) 3 NWLR (Part 12) 236 at 24-242 and OPEYEMI v THE STATE (1985) 2 NWLR (Part 5) 101 at 108, fatal to the prosecution's case. According to counsel the entire evidence of the prosecution is that of mere suspicion which, he submitted, does not meet the standard of proof required. He urged finally that the appeal be allowed.

In the Respondent's Brief of Argument, Mrs. Babawale, learned Director of Public Prosecutions Ogun State cited AKINMOJU v THE STATE (1995) 7 NWLR (Part 406) 204 at 212 and IGABELE v THE STATE (2004) Vol. 34 WRN on the meaning of circumstantial evidence and submitted that the circumstantial evidence and confessional statements of the Appellants clearly established their guilt. She submitted that common intention and conspiracy are not capable of direct proof and can only be inferred from circumstances and that there is abundant evidence leading to the inference of the Appellants' common intention. She relied on ALARAPE v THE STATE (2001) 5 NWLR (Part 705) 79 at 103. With respect to the prosecution's failure to call Asimiyu Salawu as a witness, learned D.P.P. argued that the duty of the prosecution is not to call a particular witness but such number of witnesses sufficient to prove its case and that in this case the Appellants were at liberty to call any witness not called by the prosecution. She relied on EKPEYONG v THE STATE (1991) 6 NWLR (Part 200) 683 at 698. She urged, finally, that the appeal be dismissed.

Let me first of all point out, with respect, that learned counsel for the Appellants wasted a lot of time and space in putting forth arguments that were either irrelevant or never helped the cause of the Appellants. After conceding, for instance, at page 4 of the Appellants' Brief of Argument that the entire evidence upon which the prosecution could establish its case was circumstantial, he argued extensively on the lack of direct evidence. Again the fact that on the 11/8/95 the 1st Appellant sent one Asimiyu Salawu to call the deceased from the house of the PW1 Saidi

Opeifa is not in issue. A particular fact can only be said to be in issue when its assertion by a party is denied by the other and it thus becomes a fact in dispute. An admitted fact is not a fact in issue see *OLUFOSOYE v OOLORUNFEMI* (1989) 1 NWLR (part 95) 26 at 39; *EHIMARE 2 ANOR v OKAKA EMHONYON.* (1985) 1 N.W.L.R. (Part 2) 177 at 183 *BARJE v GUNDUMA* (2001) 13 NWLR (Part 731) 673. And an issue is said to be joined on a particular fact making its proof necessary when its assertion is disputed by the opposing party. See further *EDOSOMWAN v OGBEFUN* (1996) 4 NWLR (Part 442) 266. It is settled therefore that when a particular fact is admitted it needs no further proof. See *MENAKAYA v MENAKAYA* (1996) 9 NWLR (Part 472) 256; *IMOLOAME v WAEC* (1992) 9 NWLR (Part 265) 313.

In this case the first link of the 1st Appellant to the deceased is that on the fateful day 11/8/95 he sent the said Asimiyu Salawu to call the deceased from the house of the PW1. That is the assertion of the prosecution and same was never denied by the 1st Appellant. He admitted that fact in his statement on the 24/8/95 (copied at pages 7-10 of the record. See page 9 of the record). He repeated the same admission in his statement on the 2/9/95. See page 11 of the record). He admitted this in his testimony in court on the 22/4/97 at lines 19-20 page 45 of the record. *Even* the said Asimiyu Salawu stated so in his statement to the police. See page 3 of the record. The fact was therefore clearly not in issue. Yet learned counsel for the Appellants, in purported reliance on section 148(d) of the Evidence Act and case law authorities argued strenuously that the failure to call Asimiyu Salawu was fatal to the prosecution's case. The submissions were completely irrelevant and I would say, with respect, that learned counsel for the Appellant did not help the Appellants and indeed this Court in the manner he presented his legal submissions.

On this issue of whether the prosecution proved its case against the Appellants beyond reasonable doubt the prosecution relied on circumstantial evidence and the statement made by each of the Appellants and 3rd and 4th accused persons to the police. With respect to the circumstantial evidence the prosecution established the following facts. The first is that on the 11/8/1995 the 1st Appellant sent his brother Asimiyu Salawu

to the house of the PW1 and invited the deceased and the deceased went to the house of the 1st Appellant. The next is that deceased's headless corpse, wearing the same clothes he had on when he left the PW1's house, was found in a shallow grave in the farmland of the 1st Appellant.

B

The third is that although the head of the deceased was not recovered, there is the evidence, accepted by the trial Court, that it was taken by the 1st Appellant and 4th accused to the 3rd accused who burnt it to ashes for preparation for aware or money making venture. In my view these pieces of evidence, even without more, positively linked the murder of the deceased to the 1st Appellant. For circumstantial evidence to constitute sufficient proof of the guilt of an accused person, it must be conclusive, unequivocal and convincing as to lead irresistibly to no other conclusion than the guilt of the accused person. It must be such evidence that leads to not more than one conclusion. See NIYI AKINMOJU v THE STATE (2000) 6 NWLR (Part 662) 608 at 618 and 626, OMOGODO v THE STATE (1981) 5 SC 5; BELLO v THE STATE (1994) 5 NWLR (Part 343) 177.

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As respects the statement of the Appellants the learned trial Judge at page 85 lines 29-34 and page 86 lines 1-2 said:-

“I am satisfied that the confessions of the 1st and 2nd accused as contained in Exhibit D on the one hand, and E-E1 on the other hand are free and voluntary confessions which are direct and positive, having regarded them as a whole without reference to external facts and same have been properly proved to be so and that each of the 1st and 2nd accused could be convicted on them.”

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I agree entirely with this opinion of the learned trial Judge. The learned trial Judge found that the confessional statements, Exhibit “D” “E-E1” were freely and voluntarily made. This finding is supported by ample evidence. I will add that the statement of the 1st Appellant, Exhibit F, also falls into this category. It is settled principle of law that a free and voluntary confession of guilt made by an accused person if direct and positive is sufficient to warrant his conviction even without some corroborative evidence. Exhibits D and F are direct and positive as to the

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guilt of the 1st Appellant and they alone were enough to sustain his conviction. In like manner Exh. E and El is sufficient to sustain the conviction of the 2nd Appellant. Furthermore, each of these was even sufficiently corroborated by the circumstantial evidence which I have mentioned above. In addition, the statement of each of the Appellants against the other constitutes some corroboration. See JOSEPH IDOWU v THE STATE (2000) 12 NWLR (Part 680) 48 at 69 84 and 87; KOIKI v THE STATE (1976) 4 SC 107; IKEMSON v THE STATE (1989) 3 NWLR (Part 10)455.

On the totality of the evidence before the Court the learned trial Judge stated at page 87 lines 3-7 thus:

“In the instant case, the facts proved in evidence by the prosecution led to the irresistible conclusion that the 1st and 2nd accused persons and no other person or persons had the opportunity to murder the deceased and they were in fact, those who murdered him.”

I cannot fault this conclusion of the learned trial Judge. It is the only rational conclusion in view of the strong circumstantial evidence, the confessional statements of each of the Appellants, their incriminating evidence against each other and the incriminating evidence of the 3rd and 4th co-accused persons. It is my view therefore that the lower Court rightly confirmed the decision of the trial court. For the foregoing reasons and fuller reasons clearly set out in the leading judgment of my learned brother Tobi JSC, I also dismiss the appeal for lack of substance.

MUHAMMAD JSC

I have had the advantage of reading in draft, the leading judgment of my lord, Tobi, JSC. I am in full agreement with his conclusion that the appeal on hand merits nothing but dismissal. I too dismiss the appeal and affirm the judgment of the court below. In doing so however, I will want to comment briefly on the issue of circumstantial evidence raised in the appeal. The issue of circumstantial evidence is covered by issue No. 2 of the appellant’s issues. It is the submission of learned counsel for the appellants that any piece of evidence from which circumstantial evidence

may be inferred must itself be a proven fact failing which it cannot properly ground a valid inference. Learned counsel went on to ask who killed the deceased? He argued that an inference on the act that became the cause of death cannot be made from the deceased's mere relationship or association with the appellants and the fact that the deceased was last seen with the appellants cannot be a basis to infer murder. He cited the case of *Igboji Abieke & Anor. v. The State* (1975) 9-11 SC 60 at 65, B

Learned counsel contended that the prosecution did not prove fighting, beating as threatening words by the appellants to kill the deceased. The prosecution could not be said to have proved that the use of charm (subusere) by the 2nd appellant led to the traumatic amputation of the head and neck of the deceased neither could it be said that evidence had been led of circumstances from which the court can reasonably infer that charms used on the deceased was capable of traumatic amputation, by the state of the evidence on record. The appellants having been seen last with the deceased is not an established fact from which an inference can be drawn to conclusively prove with mathematical accuracy that they killed the deceased. Learned Counsel argued that there was no evidence of finger prints on the deceased's body or cloth, no evidence of foot print analysis found at the burial site, no evidence that the cloths of the appellants worn on the fateful day were analyzed for hair follicles etc, from the deceased. Indeed the investigation particularly at the burial place and at the houses of the appellants lacked any professionalism and therefore it served no useful purpose for the prosecution. No link was made between the appellants and the crime of murder. D E F

Fine! The law has defined what circumstantial evidence connotes. It is the proof of circumstances from which, according to the ordinary course of human affairs the existence of some fact may reasonably be presumed. Put in a mathematical language, it is that evidence of surrounding circumstances which by un-designed coincidence, is capable of proving a proposition with the accuracy of mathematics. See: *Akin Mogu v. The State* (1995) 7 N.W.L.R. (pt. 406) 204 at page 212. From the facts of this case ably summarized by my lord Tobi, JSC, it is stated as follows:- G H

“The prosecution’s case is that on 11th August, 1995, one Asimiyu Salawu told Oladipupo Fasola (the deceased) that the 1st appellant wanted to see him. The deceased left to see the 1st appellant. After a long time, the deceased did not return. PW I went in search of him. He got to the house of the 1st appellant and asked for the whereabouts of the deceased. The 1st appellant denied seeing the deceased. A report of a missing person was made to the Police. The 1st appellant was arrested. After the arrest he took the Police to a bush where the headless corpse of the deceased was unearthed from a shallow grave.”

There was a finding of fact on the above scenario by the trial court which was upheld by the court below.

It is quite clear from the facts of this case which appear to me to be straight forward and from the evaluation of the evidence placed before his court, the Learned Trial Judge had no alternative than to arrive at the conclusion which furnished the bedrock of this appeal. The law has for long been settled that circumstantial evidence may ground conviction where direct evidence is not available, provided the circumstantial evidence is considered by the trial Judge to be unequivocal, positive, direct, cogent, compelling and points vociferously to no other conclusion, than the guilt of the accused, the accused can be found guilty and be convicted accordingly. See: Amaka v. State (2004) vol. 11, MJ.S.C. 147; The Queen v. Agwo (1956-84) 10 SCNJ, 35; Okoro v. State (1993) 3 N.W.L.R. (pt. 282) 425; Kasa v. State (1994) 2 N.W.L.R. (pt. 325) 143.

It was in evidence as found by the Learned Trial Judge that the 1st appellant admitted going to his plot of land in the bush at Oke-Ogbon in the company of PW 1, PWs 3-5 and from which bush the headless corpse of the deceased was exhumed. It was found that a knife was used at the farm to sever the head of the deceased from the body after which both appellants dug a grave and buried the headless body after which still, the 2nd accused carried the head to one Alfa, These are confessions made by the appellants in their respective statements to the Police which were not faulted at the trial. Quoted below is the finding of the learned trial Judge;

“In his statement Exhibit E-E1 however, he Admitted he and the

1st accused, when the deceased was still in the unconscious state after the charm on him, but while still alive, carried the deceased - he holding the deceased by the left arm and the 1st accused by the right arm, carried him to the plot of land belonging to the 1st accused at Oke-Ogbon - but the man died there and the 1st accused severed the head from his body and he went home to bring a hoe for digging the grave and quickly substituting hope for despair by thinking that burying the deceased would solve all their problems - a good end does not justify a bad means. It would now appear both the 1st and 2nd accused were passing the bulk as to who cut or severed the head of the deceased from the body. It mattered not who - the important thing is that one of them did.”

I am therefore at a loss when learned counsel for the appellants was arguing that any piece of evidence from which circumstantial evidence may be inferred must itself be a proven fact failing which it cannot properly ground a valid evidence. I am positive that the learned counsel seems to lose sight of the provision of section 27 of the Evidence Act, Cap 112, Laws of the Federation of Nigeria 1990. As a reminder, the section provides as follows:-

“27(1) A 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 person who makes them only.”

What further proof would one require in addition to free, voluntary and un-induced confessional statements made by the appellants before a legally constituted authority? Certainly none! Although the law places the heavy duty of proving the guilt of an accused person beyond reasonable doubt on the prosecution before it can secure a conviction, this court has held in plethora of cases that circumstantial evidence may, sometime, prove a case beyond reasonable doubt. But for circumstantial evidence to support a conviction in a criminal trial such as this, Humphrey H J. in the case of R. v. Taylor & 2 ors. 21 Cr. App. P 20, stated that such evidence must:-

“be cogent, complete and unequivocal. It must be I compelling

and must lead to the irresistible conclusion 5 that the prisoner and no one else is the murderer. The facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

B In this appeal, the circumstantial evidence linking the appellants to the death of the deceased was ably summarized by the court below as follows;-

“From the evidence garnered at the trial Court, it is clear that the 1st appellant sent his junior brother Ashimiyu to call the deceased on 11/8/95 at about 6.00 a.m. The deceased went to the 1st appellant’s house and got into the waiting hands of both appellants. The 2nd appellants, in his evidence-in chief said he saw the deceased in the 1st appellant’s house on the fateful day and that he used a charm – subusere to hit him on the chest and he became weak and fell down. The next thing was the deceased’s indecent burial at 1st appellant’s plot thereafter. Next was the delivery of the deceased’s head to the 3rd Accused by the 1st appellant according to that witness on the same 11/8/95 to make ‘awure’ i.e. concoction, for money making. The appellants were the last linked with the deceased alive. From the whole gamut of the circumstances, appellants are sufficiently linked with the cause of death of the deceased.”

Further, I think common sense will dictate that if a person was last seen with another, the latter has the duty to inform the former’s family or the authority of the whereabouts of the former. If he was involved in an accident and died, or devoured by an animal, the latter still has a duty to alert the former’s family or authority. The appellants did neither in this case till when the Police took the matter up, when the 1st appellant led them to the ritual place.

See: Obosi v. State (1965) N.W.LR 129, Ukoh v. State (1971)1N.W.LR. 140; Nwaeze v. State (1996) 2 N.W.LR. (pt. 428) 1, Igbo v. State (1978) 3 SC 87; Uche v. State (1973) 1 ALL NLR (pt. 11) 181; Akinmoju v. State (1995) 7 N.W.L.R) (pt. 406) 204; Emeka v. State (2001) 14 N.W.LR. (pt. 734) 666 at 685 B-E; Ariche v. State (1993) 6 N.W.LR. (pt. 302 752 at 764 C-F.

What else can anyone say!

In conclusion, I would only want to observe, as did the learned trial Judge that the facts of this case are miserable, sordid and morbid. The deeds carried out by the appellants are most shameful to remember, too ghastly to believe and most irritating to hear. The appellants are hideous, hypocritical and merciless human beings. The precious and sacred human life means nothing to them. Life, except in their own persons, can easily be exchanged for money. They thought they could use the illegally got money to sustain their living. No way! The law has caught up with them and is never a respecter of persons. Moreso, when our society is seriously sick. The harbingers of such sicknesses are those who cause havoc and disorder such as the appellants who can spill the blood of an innocent man in order to make “awure” i.e. concoction for money making. The continued existence of such evil people in the society is unwarranted and detrimental. Such people deserve to be vanished from the society in accordance with the provisions of the law of this country. I dismiss this appeal. I affirm the decision of the court below.

ADEREMI JSC

I agree with my learned brother, Niki Tobi, JSC whose reasoning for judgment, I had the privilege of a preview that the appeal is devoid of merit.

The whole case, on a proper study of it, rests on circumstantial evidence: the peculiar ingredients, as far as the present case is concerned, are: (a) Mustapha Mohammed (1st appellant) sent one Ashimiyu, his younger brother, to call the deceased, Oladipupo Fasola, (b) the deceased positively responded to the call by going to the house of the 1st appellant where he was received by the 1st and 2nd appellants, (3) the 2nd appellant (Lukeman Aiyegbami) used a charm called “SUBUSERE” in assaulting the deceased on the chest who consequently became weak and fell down, (4) the hurried burial of the headless body of the deceased, (5) though 1st appellant denied seeing the deceased, upon his arrest he took the Police to a spot in a bush where the headless body of the deceased was buried.

The question then to ask is, whether the facts as narrated are sufficient to support circumstantial evidence from which nothing but the guilt of the appellants could be inferred. Circumstantial evidence in criminal law is often described as the narration of surrounding circumstances which by undersigned coincidence is capable of proving with a clear-cut accuracy the guilt of the person. For it to support a conviction in a criminal trial, particularly in murder cases, such circumstantial evidence must be cogent, complete and of course, unequivocal. Indeed, it must be compelling and must be such that leads to only one irresistible conclusion that it is the prisoner and no one else is the murderer. Those facts narrated, as being the base of circumstantial evidence must be incompatible with the innocence of the accused and must be incapable of proffering any explanation of any other reasonable hypothesis than that of the guilt of the prisoner. Perhaps I should here say that criminal jurisprudence has come to recognize the potency of circumstantial evidence in proving murder cases. Arguably, circumstantial evidence is often the best evidence in establishing case of murder. See *Ogundipe & Ors v. The Queen* (1954) 14 WACA 458 and *Esai & Ors v. The State* (1976) 11 S.C. 39. I have had a careful study of the whole facts of this-case; there are no other co-existing circumstances which are capable of weakening or destroying inference of the guilt of the appellants.

In the result, it is my judgment that this appeal is unmeritorious; it must be dismissed and I also dismiss it while affirming the decision of the Court of Appeal and of course the conviction of the appellants for conspiracy to murder and the murder of Oladipupo Fasola.

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