

SUPREME COURT OF NIGERIA
26th JANUARY, 2007 SC. 199/2005
CORAM:- S. U. ONU, U. A. KALGO, G. A. OGUNTADE,
M. MOHAMMED, I. F. OGBUAGU, JJSC

SUNDAY UDOSEN APPELLANT
V.
THE STATE RESPONDENT

MURDER - Evidence - Contradiction - Lower courts did not properly consider - The inconsistencies in prosecution's two versions of evidence (H1)

MURDER - Witnesses - Hostile witness - Where two versions of evidence are so mutually contradictory - That they could not both be true - What prosecution and the court should do (H2)

MURDER - Intent - Transferred malice doctrine - As it was not shown that appellant - Intended to cause death or grievous harm to anybody - Prosecution failed to show the requisite intent under s.319 CC (H3)

EVIDENCE - Murder - Witnesses - Reliability - Two conflicting versions of prosecution's evidence - Matters that make PW7 seem unreliable (H4)

CRIMINAL PROCEDURE - Murder - Burden of proof - Rests with the prosecution - To prove guilt of the accused beyond reasonable doubt - Resulting doubt in the present case - Is resolved in appellant's favour - Unto discharging and acquitting him (H5)

FACTS

Before the Okigwe High Court of Imo State, appellant was charged with the offence of murder. He was alleged to have murdered one Eunice Ikezuagu on 21-11-1987. The prosecution called ten witnesses, while appellant who testified in his own defence called no witness. While on

road duty together with other policemen, along Okigwe-Enugu Express road, a Jetta saloon car speed past the police checkpoint, violating the order to stop. Appellant fired a bullet at the car which did not stop in spite of that. It was the tyre he aimed at. A little later, an alarm was raised that the body of the deceased was found along a lane off the express road. It was not quite clear how deceased had come to her injuries. The prosecution presented two versions of evidence, which were mutually conflicting and contradictory, and such could not both be true. One version was from the police men that were jointly on duty with appellant on the day of the incident. Another version was from the husband of the deceased, and a meat seller (PW7) who claimed he witnessed the incident.

The trial court relied on the two versions in convicting appellant at the end of trial. Appellant appealed to the Court of Appeal which felt that even the 1st version of evidence alone was sufficient to convict appellant. It dismissed the appeal. Dissatisfied, appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the prosecution proved its case against the appellant beyond reasonable doubt as required by law.

2. Whether the evidence of P.W.7 upon which the learned trial court convicted the appellant was properly and legally admissible.

3. If the answer to issue No.2 were (sic) rendered in the negative and in favour of the appellant, what would be the proper order to be made in the circumstance? Would it be a trial de novo or an acquittal?

4. Alternatively, whether the defence of accident under section 24 of the criminal code was not available to the appellant.”

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

Evidence - Contradiction

1. I think, with respect to the courts below, that they had not sufficiently borne in mind the inconsistencies in the two versions of the evidence called by the prosecution witnesses before the trial court. The evidence of P.W.8 Phillip Ibe, a Police A.S.P. was to the effect that the appellant when he left the police station on 21/11/87 for road duty, was issued with

20 rounds of ammunition. At the close of the day, the appellant returned 19 rounds of ammunition. This in effect means that the appellant had expended one round of ammunition. Now, the evidence of P.Ws. 2, 3, 4 and 6 was that the appellant fired a gun shot at the Jetta car as it sped away without stopping at the checkpoint. This piece of evidence in my view explained beyond argument how the 20 rounds of ammunition were reduced to 19.

The court below took the view that the guilt of the appellant was established without the evidence of P.W.7. By the approach of the court below, the guilt of the appellant was established by the evidence of P.Ws. 2, 3, 4 and 6. The trial court, on the other hand had come to a different conclusion at page 115 of the record when he said:

“I am satisfied and do find as a fact that none of the prosecution witnesses was at the spot where the accused fired his gun except the P.W.7.”

In *Lori v. State* [1980] 8-11 SC. 81 at 95-96, this Court per Nnamani JSC said:

“In a charge of murder, the cause of death must be established unequivocally and the burden rests on the prosecution to establish this and if they fail the accused must be discharged. See Rex Samuel Abengowe 3 W.A.C.A. 85; R vs. Oledima 6 WACA 202. It is also settled law that the death of the victim must be caused by the act of the accused or put differently it must be shown that the deceased died as a result of the act of the accused. (p. 105 A)

Witnesses - Hostile witness

2. It would appear that the two courts below ran into the difficulty because of the conflicting versions of the evidence before the trial court. The basic situation is that the two versions are so mutually contradictory that they could not both be true. In *Onubogu v. Queen* [1974] 9 SC.1, this Court per Fatayi-Williams JSC (as he then was) said at page 20:

“We are also of the view that where one witness called by the prosecution in a criminal case contradicts another prosecution witness on a material point, the prosecution ought to lay some foundation, such as showing that the witness is hostile, before they can ask the court to reject

the testimony of one witness and accept that of another witness in preference for the evidence of the discredited witness. It is not competent for the prosecution which called them to pick and choose between them. They cannot, without showing clearly that one is a hostile witness, discredit one and accredit the other. (See Summer and Leivesley v. Brown & Co.) (1909) 25 TLR 745). We also think that even if the inconsistency in the testimony of the two witnesses can be explained, it is not the function of the trial judge as was the case here, to provide the explanation. One of the witnesses should furnish the explanation and thus give the defence the opportunity of testing by cross-examination, the validity of the proffered explanation.”

On the supposition that the version of the evidence given by the P.Ws 2, 3, 4 and 6 was true, it is clear that the prosecution would have failed to establish an offence of murder against the appellant. These police witnesses were in agreement that a Jetta saloon car driving at speed refused to stop at a police checkpoint when ordered to do so. The appellant in reaction fired a gun at the tyre of the vehicle. Nobody in the vehicle died. The vehicle on the evidence escaped. Shortly after, the deceased was seen near a mammy market bleeding. It was not quite clear how the gun shot fired by the appellant, could have hit the deceased. The position she was, in relation to the vehicle fired at by the appellant was not indicated on the evidence. It was also not shown the location of the mammy market near the scene in relation to the vehicle fired at with a view to show that the appellant had been reckless by shooting at the vehicle speeding away. (p. 106 A)

MURDER - Intent - Transferred malice doctrine

3. The facts of this case do not fall within the scope or doctrine of transferred malice. If the appellant had intended to cause death to the occupants of the Jetta car and had by mistake or incompetence killed the deceased, he would be guilty of murder. But the evidence on record was that he fired at the Jetta car intending to disable it from escaping. Further, there was no evidence that the appellant had intended to cause grievous harm to any body and had in the process mistakenly killed the deceased.

See *R. v. Maye Nungu* [1953] 14 WACA 379. The crucial element here is that the position of the deceased in relation to the escaping vehicle or the mammy market was never established by the prosecution. The prosecution therefore failed to show the requisite intent under Section 319.

(p. 107 H)

B

Witnesses - Reliability

4. I observed earlier that the version of evidence given by P.W.7 could not stand at the same time with that of P.Ws. 2, 3, 4 and 6. P.W.7 said he saw one of two policemen shoot the deceased. If on the evidence of P.W.8, the appellant had only failed to account for one bullet, and P.Ws 2, 3, 4 and 6 had said they saw the appellant fire a gun shot at the escaping Jetta car, where would the appellant get the extra one bullet fired at the deceased? The P.W.7, not having positively identified any of the two policemen he saw talking to the deceased, and one of whom shot the deceased, had left open the possibility that some other two policemen excluding the appellant shot the deceased.

That aspect aside, the evidence of P.W.7 seems unreliable. He claimed to have witnessed the gruesome murder of the deceased but did not see the need to report what he had witnessed to the police until several weeks after.

Murder - Burden of proof - Rests with the prosecution

5. In *Alonge v. I.G.P.* [1959] 4 FSC 203 at 204, Ademola CJF stressing the burden of proof on the prosecution in a criminal case observed:

“Now, the commission of a crime by a party must be proved beyond reasonable doubt. The burden of proving that any person is guilty of a crime rests on the person who asserts it and this is the law as laid down in section 137 of the Evidence Ordinance, Cap 62. The burden of proof lies on the prosecution and it never shifts; and if on the whole evidence the court is left in a state of doubt, the prosecution would have failed to discharge the onus of proof of which the law lays upon it and the prisoner is entitled to an acquittal....”

The case of the prosecution in this case is bedeviled by the con-

flirting versions of the evidence given by prosecution witnesses. This has led to a situation where each of the versions does not make a consistent story as to who killed the deceased without being linked with the other; and both versions could not possibly have been true or correct.
 B The resulting doubt ought to have been resolved in favour of the appellant.

In the final conclusion, this appeal is allowed. The judgments of the two courts below are set aside. The appellant is discharged and acquitted. (p. 109 D)
 C

NOTABLE POINTS OF INTEREST
MOHAMMED.JSC

1. Doubt in prosecution's case - Is to be resolved in appellant's favour
 D The trial court accepted both conflicting versions of the prosecution's case and convicted the appellant of murder. On appeal, the court below which did not see nor heard the witnesses who gave conflicting evidence, accepted one version as narrated by p.w.5 and p.w.7 and affirmed the conviction of the appellant. There is no doubt whatsoever that
 E from the conflicting evidence adduced by the prosecution as to how the deceased was killed, strong doubt had been raised from the evidence which the law requires to be resolved in favour of the appellant.
 F (p. 113 B)

OGBUAGU.JSC

2. Where contradiction in prosecution's case is substantial - Effects
 G It is now firmly settled that where two or more witnesses testify in a criminal proceeding and the testimony of such witnesses, is contradictory and irreconcilable (as in the instant case), it would be illogical to accept and believe the evidence of such witnesses. See the cases of Onubogu v. The State (1974) 9 S.C. 1 @ 2.
 H In other words, for any conflict, contradiction or mix-up in the evidence of the prosecution witnesses to be fatal to a case, the conflict or mix-up, must be substantial and fundamental. From what I have demonstrated herein above in this Judgment, the conflict, contradiction and/

or mix up as regards the evidence of the P.W.7 and the other prosecution witnesses I have mentioned specifically, are very substantial, fundamental and material. Therefore, the concurrent findings of fact by the two lower courts, must be set aside by me. This is because, there is a BIG DOUBT in my mind about the guilt of the Appellant. A doubt in the mind of a court, it is settled, presupposes that the case against the accused person, has not been proved beyond reasonable doubt. By this doubt, I hereby and accordingly resolve the same in favour of the Appellant.

Therefore, if on the whole of the evidence, the Court is left in a state of doubt (as I am in this instant case leading to this appeal), the prosecution, would have failed to discharge the onus of proof which the law lays upon it and the prisoner/accused person, is entitled to an acquittal. (p. 120 E/ 121 C)

3. Issue of non provision of an interpreter for the accused

In any case, I hold that failure to provide an Interpreter where an accused person is represented by counsel, and there is/was no objection raised at the trial court, this will not result in vitiating the trial or result in disturbing or interfering with the judgment of a trial court. It will or may be a different thing, where there is no counsel representing the accused person and where such failure, will or has led to a miscarriage of justice or that the accused person, has been prejudiced thereby as a result.

I concede that the law requires that there shall be adequate interpretation to an accused person of anything said in the course of the trial or proceedings in a language which he does not understand. In Ajayi v. Zaria N.A. (No.2) (1964) NNLR 61 this Court in allowing the appeal, held that the appellant discharged the burden of showing that a failure of justice, had taken place for want of interpretation or adequate interpretation by showing,

“that a reasonable person who was present at the trial might have supposed that the interpretation was defective to such an extent as to deny the appellant a fair trial”.

However, in the case of Queen v. Eguabhor (1962) 1 All NLR 287 @ ... it was held that if an/the accused person, does not and did not ask

for an interpreter, the failure to supply one, would be treated as a matter of procedure and that a conviction, may only be set aside, if the failure to supply an interpreter, had led to a miscarriage of justice. That if the accused person is represented by counsel, the objection, must be taken at the trial in the first instance, and not on appeal.

It must be stressed and this is also settled, that there is a distinction between a matter of procedure that affects substantial justice in the trial of a case and a matter of procedure which in no way, affects the justice of a trial of a case. Surely and certainly and this is also settled that an accused person who acquiesced to an irregular procedure that did not lead to a miscarriage of justice, cannot be heard to complain of the procedure on appeal. (p. 125 H)

D REPRESENTATION

H. E. Wabara Esq. (F. O. Otio with him) for the appellant.
L. C. Azuama Esq. D.P.P., Imo State (M. Udokwu Esq. State Counsel with him) for the respondent.

E

CASES REFERRED TO

- Lori v. State [1980] 8-11 SC. 81 at 95-96
- Rex Samuel Abengowe 3 W.A.C.A. 85
- R vs. Oledima 6 WACA 202
- Onubogu v. Queen [1974] 9 SC.1
- Summer and Leivesley v. brown & Co.)1909) 25 TLR 745
- R v. Maye Nungu [1953] 14 WACA 379
- Alonge v. I.G.P. [1959] 4 FSC 203 at 204
- Onubogu v. The State (1974) 9 S.C. 1 @ 2
- Nwosu v. The State (1986) 2 NWLR (Pt.35) 648
- Orepakan & 7 ors. In Re: Amadi & 2 ors. V. The State (1993) 11 SCNJ. 68 @ 78
- Enahoro v. Queen (1965) 1 ANLR 125
- Nasamu v. The State (1979) 6 S.C. 153
- Namsoh v. The State (1993) 6 S.C.NJ. (Pt.1) 55 @ 68
- Queen v. Eguabhor (1962) 1 All NLR 287

Egbedi & anor. v. The State (1981) 11 - 12 S.C 98; (1981) 10 S.C. 190 @ 192

STATUTES REFERRED TO

Criminal Code of Eastern Nigeria 1963, ss. 319, 32(1) - (4)

B

Constitution of Nigeria 1979 s. 36(6)(e)(a) & (e)

LEAD JUDGMENT BY OGUNTADE JSC

The appellant was at the Okigwe High Court of Imo State charged with the offence of murder. It was alleged that he, on 21-11 -87, murdered one Eunice Ikezuagu along Umulolo-Okigwe/Enugu Express road. The case was heard by Okoroafor J. The appellant was on 13-12-91 found guilty as charged and accordingly sentenced to death.

Dissatisfied, the appellant brought an appeal against the judgment of Okoroafor J. before the Court of Appeal Port Harcourt (hereinafter referred to as the ‘court below’). On 28/12/2005, the court below in a unanimous judgment affirmed the judgment of the trial court. The appellant has come before this Court on a final appeal. In the appellant’s brief filed by his counsel before this Court, the issues for determination in the appeal were identified as the following:

“1. *Whether the prosecution proved its case against the appellant beyond reasonable doubt as required by law.*

2. *Whether the evidence of P.W.7 upon which the learned trial court convicted the appellant was properly and legally admissible.*

3. *If the answer to issue No.2 were (sic) rendered in the negative and in favour of the appellant, what would be the proper order to be made in the circumstance? Would it be a trial de novo or an acquittal?*

4. *Alternatively, whether the defence of accident under section 24 of the criminal code was not available to the appellant.”*

The respondent formulated two issues for determination in the appeal. I shall be guided in the consideration of the appeal by the issues raised by the appellant, which said issues, amply accommodate the respondent’s issues. The appellant’s issues could be conveniently considered together. I shall so consider them.

At the trial, the prosecution in its case against the appellant, called ten witnesses. The appellant, who testified in his own defence, did not call any witness. The case made by the prosecution broadly speaking, was that, on 21/11/87, the appellant, a police corporal, was on road duty with some other policemen at about 4p.m. along Okigwe-Enugu express road. Whilst there, the policemen saw a Jetta saloon car with its headlights on which sped past the police checkpoint and in the process refused to stop despite being ordered to do so. The appellant, in reaction opened gun fire on the car shouting in the process “armed robbers, armed robbers.” The car did not stop. The appellant, with another police corporal, boarded a taxi which happened to be around at the time and pursued the Jetta saloon car. A little later, an alarm was raised that the body of a woman was found along a lane off the Enugu-Okigwe express road. She was bleeding. She was Eunice Ikezuagu (hereinafter referred to as ‘the deceased’). It was not quite clear how she had come by her injuries, going by the testimony of the other policemen on road duty with the appellant, who had observed the incident. The appellant had fired only one gun shot at the Jetta saloon car. No one else on the evidence available had fired a gun shot. At the close of duty for the day, an inventory taken at the police station to which the appellant and the other policemen on road duty with the appellant reported, revealed that, the ammunitions given to the appellant before he went on the road duty were more than he returned. There was evidence that the appellant had expended one of them.

Those who at the trial testified for the prosecution included the policemen who were on road duty with the appellant when the incident occurred. These policemen, P.Ws. 2, 3, 4 and 6 gave substantially the same evidence. P.W.4 testified that a mammy market was in the direction at which the appellant had fired a gun at the Jetta car. The evidence of P.W.6 is eye-opening and I reproduce it in full.

“I know the accused person. On 21/11/87 at about 4.30 p.m. when I and the other policemen were on road block check along Enugu - Port Harcourt Express road at Umulolo junction Okigwe, I and other three policemen were on Enugu Express lane we saw an approaching Jetta

Volkswagen car with full light on at a top speed. I ordered my men to stop it. They tried to stop it but it refused to stop. We shouted to the people on the Port-Harcourt lane to stop it. We shouted stop!, stop! the vehicle! The vehicle was passing on Enugu lane. The next I heard was a gun shot on the opposite side. The distance from my side to the opposite side was about 800 yards when we heard the gun shot we shouted running towards the vehicle. It was at that time I saw the accused crossing to the road with his gun at the hanger position. He was going from Port Harcourt lane to Enugu lane. He told me that the vehicle did not stop and he opened fire and the vehicle replied and that those people were armed robbers. He entered another vehicle and said he was pursuing them. I mobilized my men to pursue the vehicle. We pursued the vehicle with another vehicle. I could not see the vehicle we came back to Umulolo junction. When we came back we did not see the accused person. Five of us including the accused person pursued the vehicle. I did not see the accused until we closed. A woman came and reported to me that a woman fell down when the policemen were exchanging fire with the armed robbers. I asked the woman to show us the place. I found the woman dead in pool of blood at the mammy market. I reported the matter at Okigwe police station.....”

The evidence of P.W.5 however was a departure from the drift of the evidence given by P.Ws. 2, 3, 4 and 6 who were the policemen on road duty with the appellant. At pages 62-63 of the record, P.W.5 testified *inter alia* thus:

“I went back to Okigwe and made a report and told the police that I suspected a foul play. A few weeks before the incident my wife had confided in me with a reasonable anxiety that there was a particular mobile police man who embarrassed and harassed her with illicit love overture to her and whenever she told him that she was married he would take offence or appear angry and started brandishing the gun to intimidate her. I took the deceased to the Umulolo junction to look for the policeman. I did not see the policeman. I took her to the Inspector who was in charge of the team and introduced her to him and pleaded with him to protect her. The market where the deceased went to was at Umulolo junction where the check point was. The deceased was running a restau-

rant at Orlu and the name of the restaurant was Green Repire Restaurant Orlu. Members of the police force eat there. After my report to the police they arrested the accused and charged him with murder.”

It is apparent from the evidence of P.W.5 reproduced above that his version of events would appear to suggest that the deceased had been deliberately fired at and killed by the appellant because she refused to succumb to some amorous overtures from some of the policemen on road duty.

P.W.7, a meat seller, who claimed to have witnessed the events which led to the death of the deceased gave a piece of evidence more explicit and in tandem with the evidence given by P.W.5. At page 67 of the record P.W.7 said:

“At about 3.30p.m. that afternoon I had kept the meat for sell a woman who used to buy the meat came. When the woman was coming I saw two policemen coming from the other side of the road. They started to call the woman with signs. The woman did not answer them. When they met the woman they asked her if she did not hear when they were calling her. The woman told them that she did not hear when they were calling her. They told her something which I did not hear. What I heard the woman tell them was if they do not know her husband and if they did not know that she was married. After the woman had told them that I heard one of the policeman asked her if she was Queen Elizabeth. The woman did not answer them but turned. It was at that time that one of the policemen asked the other to “Dash” her bullet. The other shot the woman. They ran away and everybody at the scene ran away. I ran away and hid myself under a heap of electric poles and from there I was watching my meat. The woman fell down when she was shot and I ran away. The woman was shot at the small market at the junction where people buy and sell. After the woman had been shot the policemen gathered at the place and stopped the traffic from both sides of the road. They talked together and dispersed. I did not hear what they said.”

The result was that, at the close of the prosecution’s case, there were two irreconcilable versions of evidence as to how the deceased met her death. On the one hand, there was the version of the evidence

from the policemen with the appellant on road duty that the appellant had only fired his gun at a Jetta car which had refused to stop at the police checkpoint when ordered to do so. According to these witnesses, the body of the deceased was later discovered bleeding at the mammy market near the express road. As against this version was the evidence of P.Ws. 5 and 7 conveying that the deceased was deliberately fired at and killed because she had refused to respond favourably to the sexual overtures made to her by two policemen. B

Remarkably however, P.W.7, who claimed to have witnessed the killing of the deceased, did not identify the appellant as the one who shot and killed the deceased. Neither did he identify the other policeman said to have been with the appellant just before the deceased was killed. C

The appellant testified in his own defence. He said that he was on road duty on 21/11/87 with some other policemen, when a Jetta saloon car sped past the police checkpoint. The car refused to heed an order to stop. The appellant claimed to have heard someone in the escaping car shout "shoot him". He also heard the leader of the police road duty team say, "stop that vehicle." In reaction, the appellant fired at the tyre of the vehicle. According to the appellant, two other policemen also fired at the same vehicle. The policemen raised an alarm shouting "Armed robbers! Armed robbers". They got another car to chase the Jetta car. They could not however apprehend it. Later, some women came to the police checkpoint to report that a robber shot down a woman during an exchange of fire. The appellant denied knowing the deceased. D E F

As I stated earlier; the trial judge found the appellant guilty and sentenced him to death. At page 116 of the record, the trial judge in a five page judgment said: G

"After a careful consideration of the evidence and the law involved in this case, I am satisfied that the prosecution has proved its case beyond all reasonable doubts and I have no doubt in my mind as to the guilt of the accused." H

Before he came to the above conclusion, the trial judge had in a brief evaluation of the evidence said at page 115:

"I have very carefully considered and weighed the evidence before

me and I find as a fact that it was only the accused person who fired his gun on that date during the road block. This was not denied by the prosecution witnesses. I am satisfied and do find as a fact that none of the prosecution witnesses was at the spot where the accused fired his gun except the P.W.7. The PW2 in his evidence said that the shooting was heard from a distance of about 600 yards. The PW7 testified that the accused and another policeman accosted the deceased Eunice Ikeazuagu and shot her. It is the case of the prosecution that the accused and one P. G. Omozele left the road block and boarded a taxi. The accused did not come back to the base until about 6.30p.m. when they were about to go home. I am satisfied that neither the accused person nor the members of the team fired at the Jetta vehicle. No fire was returned from the Jetta vehicle. This piece of evidence was put in to confuse the issue. It was only the accused person who ran from one lane to another shouting Armed Robbers! Armed Robbers! The P.W.7 impresses me as a faithful witness. He was very sure of his evidence.” (underlining mine)

The court below however took the view that even if the evidence of P.W.7 was not taken into account, the prosecution had still established the case against the appellant beyond reasonable doubt. At page 193-194 the court below said:

“I agree with the contention of the Respondent’s counsel from all discussed above that from the available evidence without that of P.W.7 there is sufficient evidence to prove the case of murder against the Appellant. Though it appears that most of the points were not discussed and considered by the trial judge, it seems that he stumbled at the right answer. The learned trial judge said he carefully considered the evidence and the law before reaching his conclusion. It is enough that he reached a right decision. Such cannot be affected by the fact that it was arrived at an insufficient or even some wrong reason. See *Lebile v. Reg. Trustees C. & S.* (supra) at p. 22. The prosecution clearly proved that the Appellant as a Mopol, killed the deceased by acting recklessly in a ‘trigger happy mood’ fashion in a way dangerous to life. This conclusion reached leaves only a remote possibility in favour of the Appellant. The case against him, as proved, has its base on firm probability. I (sic) should be

taken as saying that the case against the Appellant was proved beyond reasonable doubt.”

I think, with respect to the courts below, that they had not sufficiently borne in mind the inconsistencies in the two versions of the evidence called by the prosecution witnesses before the trial court. The evidence of P.W.8 Phillip Ibe, a Police A.S.P. was to the effect that the appellant when he left the police station on 21/11/87 for road duty, was issued with 20 rounds of ammunition. At the close of the day, the appellant returned 19 rounds of ammunition. This in effect means that the appellant had expended one round of ammunition. Now, the evidence of P.Ws. 2, 3, 4 and 6 was that the appellant fired a gun shot at the Jetta car as it sped away without stopping at the checkpoint. This piece of evidence in my view explained beyond argument how the 20 rounds of ammunition were reduced to 19.

The court below took the view that the guilt of the appellant was established without the evidence of P.W.7. By the approach of the court below, the guilt of the appellant was established by the evidence of P.Ws. 2, 3, 4 and 6. The trial court, on the other hand had come to a different conclusion at page 115 of the record when he said:

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It would appear that the two courts below ran into the difficulty because of the conflicting versions of the evidence before the trial court. The basic situation is that the two versions are so mutually contradictory that they could not both be true. In *Onubogu v. Queen* [1974] 9 SC.1, this Court per Fatayi-Williams JSC (as he then was) said at page 20:

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On the supposition that the version of the evidence given by the P.Ws 2, 3, 4 and 6 was true, it is clear that the prosecution would have failed to establish an offence of murder against the appellant. These police witnesses were in agreement that a Jetta saloon car driving at speed refused to stop at a police checkpoint when ordered to do so. The appellant in reaction fired a gun at the tyre of the vehicle. Nobody in the vehicle died. The vehicle on the evidence escaped. Shortly after, the deceased was seen near a mammy market bleeding. It was not quite clear how the gun shot fired by the appellant, could have hit the deceased. The position she was, in relation to the vehicle fired at by the appellant was not indicated on the evidence. It was also not shown the location of the mammy market near the scene in relation to the vehicle fired at

with a view to show that the appellant had been reckless by shooting at the vehicle speeding away. Under section 319 of the Criminal Code of Eastern Nigeria 1963 under which the appellant was charged, it is necessary that the prosecution must show evidence of intent to commit murder. B

The section provides:

316. Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say:-

(1) if the offender intends to cause the death of the person killed, or that of some other person; C

(2) if the offender intends to do to the person killed or to some other person some grievous harm;

(3) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such nature as to be likely to endanger human life; D

(4) if the offender intends to do grievous harm to some person for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such offence; E

(5) if death is caused by administering any stupefying or overpowering things for either of the purposes last aforesaid; F

(6) if death is caused by willfully stopping the breath of any person for either of such purposes; is guilty of murder.

In the second case it is immaterial that the offender did not intend to hurt the particular person who is killed. G

In the third case it is immaterial that the offender did not intend to hurt any person.

In the three last cases it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.” H

The facts of this case do not fall within the scope or doctrine of transferred malice. If the appellant had intended to cause death to the occupants of the Jetta car and had by mistake or incompe-

tence killed the deceased, he would be guilty of murder. But the evidence on record was that he fired at the Jetta car intending to disable it from escaping. Further, there was no evidence that the appellant had intended to cause grievous harm to any body and had in the process mistakenly killed the deceased. See *R v. Maye Nungu [1953] 14 WACA 379*. The crucial element here is that the position of the deceased in relation to the escaping vehicle or the mammy market was never established by the prosecution. The prosecution therefore failed to show the requisite intent under Section 319.

I observed earlier that the version of evidence given by P.W.7 could not stand at the same time with that of P.Ws. 2, 3, 4 and 6. P.W.7 said he saw one of two policemen shoot the deceased. If on the evidence of P.W.8, the appellant had only failed to account for one bullet, and P.Ws 2, 3, 4 and 6 had said they saw the appellant fire a gun shot at the escaping Jetta car, where would the appellant get the extra one bullet fired at the deceased? The P.W.7, not having positively identified any of the two policemen he saw talking to the deceased, and one of whom shot the deceased, had left open the possibility that some other two policemen excluding the appellant shot the deceased.

That aspect aside, the evidence of P.W.7 seems unreliable. He claimed to have witnessed the gruesome murder of the deceased but did not see the need to report what he had witnessed to the police until several weeks after. At page 69 of the record, P.W.7 was cross-examined. The exchanges went thus:

“Q: Did you make a statement to the police?
Ans: Yes and I made at Owerri.
Q: You made your statement after one month.
Ans: It took sometime before I made my statement.
Q: When did you make your statement?
Ans: The husband of the deceased saw me at the scene of the incident and carried me to his house and later came and carried me to the C.I.D. Owerri where I made my statement.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

Q: You said in your statement to the police that you accepted to be present at the scene of the incident because you were in sympathy with the husband of the deceased.

Ans: That is correct.

Q.: You did not tell the police in your statement that the husband of the woman was cursing and asking God to punish the people who were present at the scene and refused to come out to say so.

A.: I told the policeman who took down the statement so.”

Why did it take P.W.7 a few weeks to report a murder incident to the police and that only after he had seen the husband of the deceased at scene cursing persons who had witnessed the murder of his wife and refused to come forward? This seems to me a most unusual reaction in the circumstance.

In Alonge v. I.G.P. [1959] 4 FSC 203 at 204, Ademola CJF stressing the burden of proof on the prosecution in a criminal case observed:

“Now, the commission of a crime by a party must be proved beyond reasonable doubt. The burden of proving that any person is guilty of a crime rests on the person who asserts it and this is the law as laid down in section 137 of the Evidence Ordinance, Cap 62. The burden of proof lies on the prosecution and it never shifts; and if on the whole evidence the court is left in a state of doubt, the prosecution would have failed to discharge the onus of proof of which the law lays upon it and the prisoner is entitled to an acquittal.....”

The case of the prosecution in this case is bedeviled by the conflicting versions of the evidence given by prosecution witnesses. This has led to a situation where each of the versions does not make a consistent story as to who killed the deceased without being linked with the other; and both versions could not possibly have been true or correct. The resulting doubt ought to have been resolved in favour of the appellant.

In the final conclusion, this appeal is allowed. The judgments of the two courts below are set aside. The appellant is discharged and acquitted.

ONU JSC

Having been privileged to read in draft the judgment of my learned
 B brother Oguntade, JSC just delivered, I agree with him that the appeal
 must be allowed in the face of the conflicting evidence which albeit, the
 court below (the Court of Appeal, Port Harcourt affirmed).

In the first place, the prosecution called a total of ten prosecution
 C witnesses majority of whom were policemen. The first of two versions
 of the dastardly incident that led to the deceased's death was as to how
 the appellant, along with eight other mobile policemen, were on 21st day
 of November, 1987, posted to a Road Block duty at Umulolo Okigwe, on
 the Enugu-Aba Express Road when without any instruction or authority,
 D the Appellant fired his gun on a fast moving car that broke through a
 police barrier. The firing occurred at a point where a mammy market
was in session an offence punishable under section 319 (1) of the Crimi-
 nal Code.

E Secondly, how was the case proved when there was no connec-
 tion between the woman killed and the side of the Enugu-Aba Express-
 way from which the gun rang out vis a vis the entire story as to how
 relatively placed is the market and the distance from which the gun was
 F fired?

While it was further the prosecution's case that some of the po-
 licemen on the road block duty with the Appellant were PW2 - Cpl Stanley
 Amadiogwu, PW3 - Godspower Anyanwu, PW4 - Sgt Dennis Imosili,
 and PW6 - Inspector Isa Ambori, among others, it was common ground
 G that the police officers, at about 4:20pm of 21st November, 1987, while
 they were on road duty at the aforesaid Umulolo along the Aba Enugu
Express Road, and saw a Volkswagen Jetta car "ontop speed" on the
 Enugu - Aba Lane of the road with head lights on. The driver of the said
 H Jetta car, was said to have ignored all orders by the policemen on its lane
 to stop. The Appellant, along with the PW2, Stanley Amadiogwu and
 others, it was further added, were posted to man the Aba-Enugu Lane of
 the road, while PW4 with another team, were manning the Enugu-Aba

Lane of the Express Road.

PW3, Godspower Anyanwu, for his part, testified thus:

“There was no attack from the people in the vehicle that drove past. The woman who was killed (Eunice Ikezuagu) was not in the Jetta car.” (Brackets are mine). B

He further stated as follows:

“As a police officer you can use your firearm when you are in danger and no other way to escape and also in protection of anybody. In emergency, while on duty there must be an instruction from a senior officer before a policeman can use his firearm.” C

He more emphatically testified as follows:

“There is a mammy market near the road block just opposite Aba Lane. There was no encounter with armed robbers that day.” (Emphasis supplied). D

Cross examined, PW3 stated that the much he would do in a situation where a vehicle broke through police road block, is to pursue it and that he would not fire into a vehicle, until he was satisfied that the occupants were armed robbers. E

For PW4, Dennis Imoisili, his evidence at page 57 lines 28-30 is as follows:

“We signalled the car to stop and it did not stop. At about 450 yards from us. We had the accused crossing the road shouting armed robbers, armed robbers. He ran from Aba to Enugu-Aba Express lane with shouting of armed robbery. (Emphasis supplied). F

Reference was next made to page 59, line 4-5 wherein PW4 stated thus:

“The gun was shot towards the place the mammy market was holding.....The accused said that he fired at the vehicle. The PW6 was the leader of the mobile police officers by name Inspector Isa Ambori. His account of the incident especially as to the number of gun shots he heard, was riddled with self contradictions of absurd degree.” H (Underlining is mine for emphasis)

For PW8 the IPO, one Philip Ibe (an ASP) he testified as follows:

“After seeing the scene and after hearing the police at Okigwe I

ruled out the case of armed robbery. I invited the mobile police for ques-
tion (sic) including the accused person. I took them to the scene of crime.
After interrogation, I found out that it was the accused who short (sic)
the deceased.” (Underlining is mine).

B As to how relatively placed is the market in which the deceased
met her death, I am in entire agreement with my learned brother Oguntade,
JSC to resolve the benefit of doubt created thereby in Appellant’s favour.
Accordingly, the judgments of the two courts below are set aside. The
C Appellant is discharged and acquitted.

KALGO JSC

I have read in advance the judgment of my learned brother Oguntade
D JSC just delivered. I am in full agreement with his reasoning and conclu-
sions reached therein. He has, in my respectful view, carefully and prop-
erly considered all the issues arising in the appeal and I agree with him
that the appeal ought to be allowed. Accordingly, I allow the appeal, set
E aside the decisions of the trial court and the Court of Appeal and dis-
charge and acquit the appellant.

MOHAMMED JSC

F The judgment just delivered by my learned brother Oguntade
JSC in this appeal was read by me in draft before today. I agree with his
reasons and conclusion that this appeal has merit and therefore deserves
to succeed. This is because from the evidence on record, the prosecu-
G tion gave two versions of how the deceased met her death. One version
from the evidence of the police officers in the patrol team with the appel-
lant was that the appellant fired at a moving Jetta car which refused to
obey the orders of the police to stop at the checkpoint. Later, the corpse
H of the deceased was found in the market place bleeding from a bullet
wound. As the appellant was the only police on duty at the spot who
failed to account for one bullet, circumstantial evidence pointed at him as
being responsible for the death of the deceased under reckless circum-

stances of using his gun to cause the death of the deceased.

However the second version of the evidence led by the prosecution on how the deceased lost her life was through the evidence of p.w.5 the husband of the deceased and p.w.7 who claimed to be an eye witness not only to the shooting of the deceased by the appellant but also to the events that occurred between the appellant and the deceased that resulted in the act of shooting resulting in the death of the deceased. The trial court accepted both conflicting versions of the prosecution's case and convicted the appellant of murder. On appeal, the court below which did not see nor heard the witnesses who gave conflicting evidence, accepted one version as narrated by p.w.5 and p.w.7 and affirmed the conviction of the appellant. There is no doubt whatsoever that from the conflicting evidence adduced by the prosecution as to how the deceased was killed, strong doubt had been raised from the evidence which the law requires to be resolved in favour of the appellant.

Accordingly, I also allow the appeal, set aside the conviction and sentence of the appellant by the trial court and affirmed by the court below and acquit and discharge the appellant.

OGBUAGU JSC

This appeal, I must confess, has given me some concern. I will demonstrate the reasons for my concern in this Judgment. Firstly, there is the concurrent findings of fact by the two lower courts and the attitude of this Court not to interfere except in given circumstances, is no longer in doubt.

Secondly, in the index of the Records, Nos. 11 and 12, there are two Statements of a P.W.7. The name of the said P.W.7, is Cpl. Godson Omonsienlen - Cpl. No. 103698. The first statement appearing at pages 18 and 19 is/was made on 23rd November, 1987 and the second statement at page 20 is/was made on 3rd December, 1987. I have searched in vain in the Records, where the statement to the police of the P.W.7 - one Onyemerekwe Nmuoduche, is contained. His evidence appears at pages 66 to 71 of the Records. I have also perused the Records, and I cannot find where Cpl.

Godson Omonsienlen ever testified at the trial court. I note that in the “No case” submission at pages 86 to 87, Chief Ejimofor - learned counsel for the Appellant, did not say a word about the evidence of P.W.7 - either the Police Cpl or the meat seller.

B The Appellant in his first statement to the Police on 23rd November, 1987 at pages 29 and 30 of the Records stated inter alia, as follows:

“..... *I looked across Enugu lane and saw the mobile policemen on that lane waving a Jetta Car to stop but the car did not stop, immediately the car passed the road block what I heard was a terrible shooting from the Jetta Car, I ran across and released one bullet on the car but it was still going*”

.....When we went back to the scene of the incident, I discovered that a body (sic) (lady) who were (sic) (was) around during D the incident was shot down by the armed robbers”.

[the underlining mine]

In the second statement appearing at pages 30 and 31 of the Records and made on the same date - 22nd November, 1987, the substance E of which are the same with the first statement, the Appellant stated inter alia, as follows:

“..... *It was on the strength of the shooting I returned fire when we came back to the point, I discovered that during the incident a lady unknown to me, was hit down. Though during the firing everybody on that lane scattered.....*”

[the underlining mine]

In a third statement appearing at page 32 of the Records and made on the 25th November, 1987, the Appellant stated as follows:

G “In addition to my former statement, I have to state that I fired which I admitted but before I return fire to the said vehicle from my position, Sgt. Dennis father’s name unknown to me and Cpl. Goddy had already fired on the said vehicle, I did not want to speak for anybody, I H though (sic) since I have admitted returning fire to the said vehicle, they will say the truth themselves. Why I returned fire to the vehicle was that after the said officers had fired the vehicle which the shooting was heard, the vehicle did not stop. That is all”.

Eleven (11) witnesses including the Medical Doctor, testified for the prosecution. The Appellant, in his evidence in-chief at pages 92 to 94 of the Records after the “No case” submission of his learned counsel had been overruled, stated inter alia, as follows:

“..... I know all the prosecution witnesses except the P.W.7. B
..... When we got there I was deployed under the Police Inspector Ise Ambore I was deployed with P. W.2 and two others..... When the car broke through the barrier I heard “shoot him” from the direction of the car. Mbore gave a command to stop the vehicle. He said “Hay stop that vehicle”. When that command was given I fired at the tyre of the vehicle. I fired one bullet. One Omosole fired. One Sgt. Omonsienlen fired from another unit. C

After firing, the vehicle did not stop. Alarm was raised “Armed robbers. Armed robbers!”..... When I went back some women reported that a robber shot down a woman during exchange of fire and that they had reported the matter to the Inspector. When I heard the command of the Inspector I am expected to fire at the tyre of the vehicle. I did not see the deceased. I did not see the dead women (sic). There are about three huts on the scene as at that time people were selling and buying there. The Jetta car was about 14 yards from that hut when I fired at it”. D

The cross-examination of the Appellant was anchored, based on or directed mainly, to the evidence of P.W.7 - a meat seller. It was suggested to him that the deceased who was said to be the Proprietress of “Green Virgin Restaurant”, was killed by him because she refused making love with the Appellant and “to stop her pride that her husband is a lay magistrate”. That he killed the deceased in company of another policeman Goddy Imoisili. E

Now, part of the submissions of the learned counsel for the Appellant at pages 103 and 104 of the Records, appear as follows:

“..... The evidence of the accused person coupled with Exhibit A - A² show that the accused fired one bullet on the day of this incident. H
The contention that the accused was not the only one who fired that day was corroborated (sic) (meaning corroborated) by the evidence of PW6 Inspector Isa Ambore who testified that after the death of the deceased G

one woman came to him to report that while the policemen were exchanging gun (sic) (meaning gun) fire with the suspected armed robbers one woman came to him that a woman was hit by bullet".

B Learned counsel referred to the evidence of the PW6, which according to him, is that "when I came back I called my men together in order to know who and who among them participated in firing. I heard gun shots this was rapit (sic) gun shot. This was more than one gun shot (sic)".

C From the Records, the further submissions are recorded inter alia, as follows:

"From this evidence the issue of which bullet killed the deceased" Asks court to hold that it was not the bullet fired by the accused that killed the deceased. Refers the court to the case of R. v. Isa Abudehi (sic) D 1981 All WLR 668 at 669. There is no nexus whatsoever between the act of firing at the deatar (sic) car and the deceased. Submits that the confusion of the prosecution that by the mere fact that the accused participated in firing on the day of the incident caused the death of the deceased. It E implies on suspicion. Refers the court to the evidence of PW7. Says the evidence of PW7 is different from that of PW3, 4, 5 and 6.....".

The reply and submissions of the learned counsel for the prosecution - Okorie, Esq, are significant and remarkable. They appear at page F 106 of the Records. After referring to the evidence of PWs 2, 3, 4 and 6 respectively, the following appear inter alia, as follows:

"..... There is evidence before the Court on which the court will find there was a shooting incident which only involved only the accused person out of more than the policemen on duty on that day. G Urges the court to hold that it was in this shooting incident that left a woman down on the spot. Submits that the cause of the death of the woman's death was from the shooting incidents. Refers the court to the evidence of PW1. This has satisfied the provision of Section 308 of H the Criminal Code. From the evidence of the PW2, PW3, PW4, PW6, PW8, PW9 and PW10, he urges the court to hold that it was only the accused person who did not return at the end of the day complete rounds of ammunitions issued to him instead of 20 rounds assigned to him, he

returned 19. Asks the court to hold that it was only the firing bullet that killed the deceased. Asks the court to consider the evidence of the PW7 the only civilian witness who was at the material time selling grass cutter to the deceased woman, the court will hold that the person who killed the deceased is a police officer”.

B

[the underlining mine]

I note that his further submissions that appear at pages 107 to 111 of the Records are conflicting in material respects. At page 107, the following appear, inter alia:

“..... *From the totality of the evidence asks the court to hold that it was the accused who was the only person who fired that day and that it was the firing that killed the deceased. Submits that the killing is unlawful based on the evidence of PW2, PW3, PW4 and PW6 respectively within the of section 306 C.C (sic) in that it was not authorized by the superior police officer in charge of the road block or by a sentence of a court..... Submits that the accused intended to kill, not merely to do grievous bodily harm to the people in the Delta vehicle who for all intents and purposes are innocent citizens on the private journey.....*”.

C

D

E

[the underlining mine]

At page 109, the following appear, inter alia:

“..... *says the accused did not aim at the tyre of the vehicle but at the deceased.....*”.

F

What am I trying to show? One may ask. My answer is that from the case of the prosecution and as shown even from the address/submissions of its learned counsel, it is on one hand or in one breath, that it was, albeit, “the careless” or the negligent” or if you like, “the reckless” act of the Appellant of firing/shooting, that caused the death of the deceased having regard to the evidence of the PW2 to PW6th and 8th to 10th PWs. On the other hand or in another breath, that the Appellant deliberately killed the deceased because she refused the love overtures of the Appellant to her having regard to the evidence of the PW.7. So, there are two materially conflicting versions of how the deceased met her death. It therefore, can be seen and appreciated why in the beginning of this Judg-

G

H

ment, I confessed that this case and/or appeal, has given me some concern.

This is a case where the Appellant did not deny that he fired a gun shot. He lied when he testified that other policemen with him, also fired their respective gun. This is because, the evidence showed/shows that all the other policemen, accounted correctly the number of bullets issued to each of them. It was only the Appellant, who admitted that he fired at the tyre of the speeding Jetta car (sometimes called “Delta”). But the evidence of the PW7 who the trial court believed and the court below affirmed or justified the finding and holding of the trial court, in my respectful view, materially, complicated matters. His said evidence, made or rendered the case of the prosecution, very and most worrisome and confusing to me. More worrisome because, as I have stated, the trial court believed him. Worse still, this witness, NEVER made a Statement to the Police at any time before he testified in court. How he became a Police or Prosecution witness, is a matter of conjecture or speculation. Now, at page 115 of the Records, the learned trial Judge, stated inter alia, as follows:

“I have very carefully considered and weighed the evidence before me and I find as fact that it was only the accused person who fired his gun on that date during the road block. This was not denied by the prosecution witnesses. I am satisfied and do find as a fact that none of the prosecution witnesses was at the spot where the accused fired his gun except the P.W.7.....”.

I am satisfied that neither the accused person not (sic) (meaning nor) the members of the team fired at the Jetta vehicle. This piece of evidence was put in to confuse the issue. It was only the accused person who ran from one lane to another shouting Armed Robbers! Armed Robbers! The PW7 impresses me as a faithful witness. He was very sure of his evidence.

The defence of the accused is a denial of the offence. He told a lie when he said that each of the police-men at the road block released a shot - if they did so, each should have lost a bullet or so”.

At page 116, His Lordship continued thus:

“But this was not so. It was he, the accused person who lost a bullet.

After a careful consideration of the evidence and the law involved in this case, I am satisfied that the prosecution has proved its case beyond all reasonable doubts and I have no doubt in my mind as to the guilt of the accused’.

[the underlining mine]

Now, my concern seems to be more confounded or compounded with respect, by the court below. At pages 195 and 196 of the Records, Fabiyi, JCA in his lead judgment which Nsofor, and Aderemi, JJCA were in agreement with the reasoning and conclusion, stated inter alia, as follows:

“I have found that the prosecution proved the case against the appellant beyond reasonable doubt without the evidence of PW7. The evidence of P.W.7 will definitely continue to steer any reader of same in the face. The facts are revealing enough to gear the soul of any mortal. I feel I should keep my peace on same. I am unable to fault the learned trial Judge”.

What I understand by the above, is that without the evidence of the P.W7, the prosecution had proved its case beyond reasonable doubt - i.e. the evidence of the other witnesses - particularly that of the 2nd, 3rd, 4th, 6th and 10th PWs as to their account of what happened at the place of incident. I note that the court below, was unable to fault the finding of the learned trial Judge that the PW.7 impressed him as a faithful witness who was “very sure of his evidence” All these findings and holdings, are with respect, conflicting and confusing. Instead of proving the case of the prosecution beyond reasonable doubt, they have rather rubbished so to say, the same in my respectful but firm view. I have additional support for this my view, from the oral submission of Mr. Okorie - learned counsel for the Respondent on 2nd November, 2006, when this appeal came up for hearing. Learned counsel submitted that the decision of the trial court, was without exclusion of the evidence of any of the witnesses contrary according to him, to the submission of Mr. Wabara - the learned counsel for the Appellant. This is also in substance, his submission in paragraph

8.4 at page 11 of the Respondent's Brief. In other words, Mr. Okorie's submission is that the decision of the trial court, was based on the evidence of all the witnesses which in fact included that of the PW7. He referred the Court to page 116 lines 6 and 7 of the Records which he said B stated,

"that the totality of the evidence before it and that the evidence of the PW7, did not in substance, alter the evidence of the other witnesses. That it is not a case of accident. That it is a case of a person recklessly shooting at the market area".
C [the underlining mine]

Of course, the evidence of the PW7, was/is materially in every respect, at variance with the evidence of the other prosecution witnesses. It was/is heavily so to say, in grave conflict with the said evidence of the D other prosecution witnesses. Again, the last submission, suggests, and I can draw the inference that this means again, that the deceased, was not shot deliberately and at close range as testified by the PW7, but was killed in the way and manner stated by the other prosecution witnesses - E i.e. 2nd, 3rd, 4th, 6th and 10th PWs.

It is now firmly settled that where two or more witnesses testify in a criminal proceeding and the testimony of such witnesses, is contradictory and irreconcilable (as in the instant case), it would be illogical to F accept and believe the evidence of such witnesses. See the cases of Onubogu v. The State (1974) 9 S.C. 1 @ 2; (also referred to by the learned defence counsel at the trial court at page 104 of the Records); Nwosu v. The State (1986) 2 NWLR (Pt.35) 648 and Orepan & 7 ors. In Re: Amadi & 2 ors. V. The State (1993) 11 SCNJ. 68 @ 78. G

In other words, for any conflict, contradiction or mix-up in the evidence of the prosecution witnesses to be fatal to a case, the conflict or mix-up, must be substantial and fundamental. See also the cases of Enahoro v. Queen (1965) 1 ANLR 125; Nasamu v. The State (1979) 6 H S.C. 153 and Namsoh v. The State (1993) 6 S.C.NJ. (Pt.1) 55 @ 68. From what I have demonstrated herein above in this Judgment, the conflict, contradiction and/or mix up as regards the evidence of the P.W.7 and the other prosecution witnesses I have mentioned specifically, are

very substantial, fundamental and material. Therefore, the concurrent findings of fact by the two lower courts, must be set aside by me. This is because, there is a BIG DOUBT in my mind about the guilt of the Appellant. A doubt in the mind of a court, it is settled, presupposes that the case against the accused person, has not been proved beyond reasonable doubt. By this doubt, I hereby and accordingly resolve the same in favour of the Appellant. See *Namsoh v. The State (supra)*.

It must always be borne in mind and this is settled, that the burden of proving that any person is guilty of a crime, rests on the prosecution. The cardinal principle of law, is that the commission of a crime by a party, must be proved beyond reasonable doubt. This is the law laid down in Section 138 (1) of the Evidence Act. The burden never shifts. Therefore, if on the whole of the evidence, the Court is left in a state of doubt (as I am in this instant case leading to this appeal), the prosecution, would have failed to discharge the onus of proof which the law lays upon it and the prisoner/accused person, is entitled to an acquittal. See the cases of *Alonge v. Inspector-General of Police (1959) 4 FSC 203*; *Fatoyinbo v. Attorney-General, Western Nigeria (1966) WNLR 4*; and *The State v. Musa Danjuma (1997) 5 SCNJ. 126 @ 136-137, 156*.

This is why it is firmly established that if an appellant asserts that the prosecution has failed to prove the prisoner's guilt beyond reasonable doubt before conviction, it is for him to establish that it is so and it is the duty of an appeal court to examine the assertion against the whole background of the case and in particular, against the evidence leading to the guilt of the appellant. See the cases of *Oteki v. The State (1986) ANLR 371 @ 378* and *Edet Effiong Ekpe v. The State (1994) 12 SCNJ. 131 @ 135*. I have, so painstakingly, examined the assertion of the Appellant against the whole evidence of the said prosecution witnesses.

It is thus settled that if at the end of and the whole of the case, there is reasonable doubt created by the evidence given either by the prosecution or the prisoner, as to whether the offence was committed by him, the prosecution, has not made out the case and the prisoner, is entitled to an acquittal. See *Ekpe v. The State (supra) @ 136*. In considering the standard of proof required in a criminal prosecution, perhaps,

apart from Section 138(1) of the Evidence Act, the golden Rule enunciated by the House of Lords in the case of Woolmington v. The D.P.P. (1935) 25 C.A.R. 72, should be the guide.

Also settled, is that in a murder trial, the prosecution, must show conclusively, that the death of the deceased, was caused by the act of the accused person. In other words, there must be a nexus between the act of the accused person and the death of the victim. See the case of Lori v. The State (1980) 8-11 S.C. 81 @ 95 and 96. In the instant case, the evidence as to how the deceased met her death, and as found by me in this Judgment, are conflicting, a mix-up and inconclusive.

Finally, it is long settled that it is the duty of the prosecution to prove its case by evidence of such a quality and quantity as to leave the court in no reasonable doubt as to the guilt of the accused person. Thus, where the prosecution fails to prove an essential element in a criminal charge, an appellant convicted in such a trial, is entitled to have his appeal allowed and the conviction quashed. See the cases of Nwokedi v. Commissioner of Police (1977) NSCC 127; and Akinfe v. The State (1988) 3 NWLR (Pt.85) 729 @ 735; (1988) 7 SCNJ. 226. In other words, the burden is throughout, on the prosecution to prove its case beyond reasonable doubt. See the case of Esangbedo v. The State (1989) 4 NWLR (Pt.113) 57; (1989) 7 SCNJ. 10. This is why, having regard to the ingredients in proof of a murder charge, if there is inconsistency in the prosecution's case such as to cast doubt in the guilt of the accused person, the accused is entitled to be given the benefit of the doubt, and he should be discharged and acquitted. See also the cases of Kalu v. The State (1988) 4 NWLR (Pt.90) 503; (1988) 10 – 11 SCNJ. 1 and Abogade v. The State (1996) 4 SCNJ. 223 @ 231.

Let me here deal briefly, with the complaint of the Appellant in paragraph 2.07 at page 4 and paragraph 7.02 at page 9 of his Brief that the P.W.7, was sworn on the Bible and testified in Ibo. That there is nothing on the Record, indicating that he spoke through an interpreter sworn or not. I note that this issue was raised in Issue 2 in the court below, thus –

“Whether the evidence of PW7 upon which the learned trial Judge

convicted the appellant was properly and legally admissible (Grounds 4, 5, 8 and 9).

The court below, at page 195 of the Records in dealing with the issue, stated as follows:

“The last point that was made in a bid to demolish the evidence of P. W7 is absence of a sworn interpreter. It was insinuated that the trial Judge performed the duty. On 6-11-89, when P.W.7 testified, the Appellant was represented by Chief A. O. Ejimofor and Ekavhiare Esq. It is not contained in the record that Chief Ejimofor raised a finger to protest that there was no sworn interpreter. One would have been tempted to ask Chief Ejimofor the language in which he conducted the cross-examination of P.W.7 at pages 69 - 71 of the Record of appeal. If English, who interpreted same. I am unable to surmise the rationale in the complaint. I honestly feel that the appellant has not been shown to be prejudiced in any manner. The stated insinuation against the trial Judge was most uncharitable”.

[the underlining mine]

Aderemi, JCA, (as he then was) also dealt with the issue in his concurrent/contribution at page 198 of the Records although he inadvertently and with respect, erroneously stated that the counsel of the Appellant, was Mr. A. C. J. Okorie who happened to be the Prosecuting State Counsel at the trial.

Surprisingly to me, in spite of the above pronouncement, this same issue has again, been raised in Issue 2 in the Appellant’s Brief thus:

*“Whether the Court of Appeal was right in affirming the judgment of the trial High Court based solely on the **uninterpreted evidence of PW7 rendered in Igbo language** (Grounds 4 and 5)”.*

I note that very lengthy submissions have been made in respect thereof spanning from paragraphs 8.24 to 9.18 at pages 16 to 27 of the Brief. In fact and indeed, in paragraph 9.00 at page 21 thereof, the Appellant and his learned counsel, have INVITED the court, to overrule or depart from its previous decisions in respect of non-observance of the Constitutional requirement relating to the Mandatory provision of an Interpreter to an accused who does not understand the language in which

the witness testifies.

The previous decisions are stated to be, Queen v. Imadebhor Eguabor (1962) 1 All NLR 287 and The State v. Salihu Mohammed Gwonto & ors. (1983) 1 SCNLR 142. Reliance is placed on Section 36 (6) (e) of 1979 Constitution of the Federal Republic of Nigeria (now Section 36 (6) (a) and (e) of the 1999 Constitution) and the case of Godwin Anyanwu v. The State (2002) 13 NWLR (Pt.783) 107.

Under “CONCLUSION, in No. 9 Reason for the Appellant urging the court to allow the appeal at page 33 of the Brief, it is stated as follows:

“9. *Because the constitutional right enshrined in Section 36(6)(e) of the 1999 Constitution should not be lost forever by an accused or his counsel who fails to request for an interpreter or the provision of improper or insufficient interpretation at the trial*”

I note that Issue II of the Respondent, deals also with the above provisions at paragraphs 9.01 to 9.20 of its Brief.

Section 36 (6) thereof, provides as follows:

“Every person who is charged with a criminal offence shall be entitled to - (a) to (d) - Not applicable.

(e) have, without payment, the assistance of an interpreter if he cannot understand the language used at the trial of the offence”.

As rightly noted by the court below, the Appellant, did not conduct his case personally. He was represented throughout the proceeding at the trial court from 22nd July, 1988 till the date of his conviction and sentence. The Records, do not show that at any stage of the trial, his learned counsel, ever complained or protested that there was no interpreter provided for him. This fact was not raised even as an issue in the trial court. It was raised for the first time at the court below which rejected the issue/complaint. There is no evidence from the Records or even in the Appellant’s Brief, how the non-provision of an Interpreter prejudiced his case or how it led to any miscarriage of justice. I hold with respect, that this complaint or issue, is bogus and an unnecessary dissipation of energy by the learned counsel in the submissions in respect thereof. Again, the learned counsel for the Appellant, has not answered or re-acted to the poser by the court below as to what language the learned counsel for the

Appellant, conducted his cross-examination of the PW7.

However, in the recent case of *Cypriacus Ogidi & 3 on. V. The State* (2005) 1 SCNJ. 67; (2005) 1 S.C (Pt.1) 98, my learned brother, Oguntade, JSC, wrote the Lead Judgment and Mr. Azuama of Counsel for the Respondent, in this appeal, was incidentally, counsel for the Respondent. In the above case, a total of nine (9) witnesses who testified at the trial High Court, two (2) of the four (4) witnesses called by the prosecution, testified in English language, while the remaining two (2), spoke in Igbo language. All the five (5) defence witnesses including the 4th appellant, testified in Igbo language. So, only two (2) out of the nine (9) witnesses, testified in English language. C

The Record of proceedings, did not show or state expressly anywhere, that an Interpreter was present in court when any of the witnesses on both sides testified. The 1st appellant, was represented by counsel (as the Appellant in the instant case was represented by counsel) throughout the trial. There was/is no record that his counsel, asked/applied for and was denied the use of an Interpreter. The said counsel, did not make any complaint or report to the trial Judge of the necessity to employ the services of an Interpreter for the benefit of his client (as also was the case in the instant case leading to this appeal). All those who testified, were cross-examined. There was/is nothing in the Record of proceedings, to show that the evidence given by the Igbo-speaking witnesses, was interpreted from Igbo language to English language. D E F

Kutigi, JSC in his concurrent Judgment at page 93, stated as follows:

“..... I have no doubt at all in my mind that if it had been shown or established that the appellant or his counsel applied to the trial court for the assistance of an interpreter and that the court refused or denied him that assistance that would have been a serious violation of Section 36(6)(e) which would have violated (sic) (meaning perhaps “viti-ated”) the trial. That was not the case here”. G H

I too, agree with the above statement of His Lordship as it is relevant in respect of this issue. In any case, I hold that failure to provide an Interpreter where an accused person is represented by counsel, and there

is/was no objection raised at the trial court, this will not result in vitiating the trial or result in disturbing or interfering with the judgment of a trial court. It will or may be a different thing, where there is no counsel representing the accused person and where such failure, will or has led to a miscarriage of justice or that the accused person, has been prejudiced thereby as a result.

I concede that the law requires that there shall be adequate interpretation to an accused person of anything said in the course of the trial or proceedings in a language which he does not understand. See the cases of Ajayi v. Zaria N.A. (1963) 1 All NLR 169 and The State v. Gwonto & ors. (1983) 1 SCNLR 142 the later also cited and relied on in both the Appellant's and Respondent's Brief. (it is also reported in (1983) NSCC 104 @ 112). In Ajayi v. Zaria N.A. (No.2) (1964) NNLR 61 this Court in allowing the appeal, held that the appellant discharged the burden of showing that a failure of justice, had taken place for want of interpretation or adequate interpretation by showing,

"that a reasonable person who was present at the trial might have supposed that the interpretation was defective to such an extent as to deny the appellant a fair trial".

However, in the case of Queen v. Eguabhor (1962) 1 All NLR 287 @ ... it was held that if an/the accused person, does not and did not ask for an interpreter, the failure to supply one, would be treated as a matter of procedure and that a conviction, may only be set aside, if the failure to supply an interpreter, had led to a miscarriage of justice. That if the accused person is represented by counsel, the objection, must be taken at the trial in the first instance, and not on appeal.

It must be stressed and this is also settled, that there is a distinction between a matter of procedure that affects substantial justice in the trial of a case and a matter of procedure which in no way, affects the justice of a trial of a case. See the case of Egbedi & anor. v. The State (1981) 11 - 12 S.C 98; (1981) 10 S.C. 190 @ 192 - per Aniagolu, JSC. Surely and certainly and this is also settled that an accused person who acquiesced to an irregular procedure that did not lead to a miscarriage of justice, cannot be heard to complain of the procedure on appeal.

Now, in the recent case of Sampson Nkeji Uwaekweghinya v. The State (2005) 3 SCNJ. 32 @ 42-43; (2005) 3-4 S.C. 29 @ 34 - 35 - per Musdapher, JSC, in his lucid and illuminating lead Judgment, stated inter alia, as follows:

“Although it is a Constitutional requirement that there shall be adequate and free interpretation to the accused of anything said in a language, which he does not understand, the procedure may however be dispensed with where the accused so wishes and the trial judge is of the opinion that the accused does not require any interpretation of the proceedings. The right of the accused to an interpreter cannot however be raised on appeal, unless he claimed the right during his trial and was denied it. See Queen v. Eguabhor (supra)”.

[the underlining mine]

Incidentally, the learned counsel for the Appellant, concedes at D paragraph 9.10 at page 24 of their Brief, the above state of the law. For said he,

“The prevailing state of the law is that a represented accused person cannot place reliance upon non-compliance with Section 36(6)(e) of the 1999 Constitution (formerly Section 33(6)(e) of the 1979 Constitution), thereby losing for all time or forever the fundamental right to which he is entitled pursuant to section 36(6)(e) of the 1999 Constitution of the Federal Republic of Nigeria if neither he nor counsel on his behalf requested for an interpreter or objected to lack of proper interpretation or at all at the earliest opportunity i.e. at the trial High Court.”

But surprisingly, in spite of his knowledge of the prevailing state of the law, he still invited the Court to also depart from and/or overrule the said cases of Eguabhor and Gwonto (supra) and their kindred cases, G according to him,

“only to the extent of the rather stiff if not harsh conditions for the application of Section 36(6)(e) of the 1999 Constitution reproduced above that the rights of an accused person are violated even if he was represented by counsel and there had been no objection on the question of lack of interpretation or proper interpretation”.

Since the Appellant and his learned counsel at the trial court, did

not raise the issue/question of non-provision of an interpreter for his benefit, they were not entitled to raise it on appeal. I have hereinabove stated that the Appellant and his learned counsel, have not shown how the non-provision of an interpreter at the trial court which they acquiesced to, caused the Appellant, any prejudice or that it resulted into a miscarriage of justice, the said trial, cannot be vitiated on appeal. In any case, the court below, did not affirm the judgment of the trial court, based solely on the “uninterpreted” evidence of the PW7. I have noted in this Judgment, that the court below, at page 195 of the Records, stated inter alia, as follows:

“I have found that the prosecution proved the case against the appellant beyond reasonable doubt without the evidence of P.W.7.....”.

Before concluding this Judgment, I wish to touch on briefly, the submission on behalf of the Appellant in paragraph 8.42 at page 30 of the Brief to the effect that the Appellant obeyed the order or command of a Superior Officer - PW6, to stop the said car at the road block on the fateful day and that the said act, was therefore not unlawful though dangerous and could therefore, not come under the purview of Section 316 (a) (b) or (c) - I take it to be of the Criminal Code since it is not so stated. That in those circumstances, the Appellant, would therefore, be entitled to total acquittal, not being guilty of murder or even manslaughter. I note that this issue is also dealt with under Issue 1 of the Respondent in paragraphs 8.16, 8.28 and 8.29 of the Respondent’s Brief. See also page 11 of the Appellant’s Brief wherein part of the evidence of the Appellant is reproduced as to why the Appellant fired his gun. Then at page 12 thereof, there is the question posed therein thus:

“could it be contended as adumbrated by the lower court that the shooting of the tyre was not authorized? I think not”.

The question I or one may ask, is, Is a junior Police Officer, bound to obey an order from his Superior Officer even if such an order is manifestly unlawful?

In the case of Pius Nwaoga v. The State (1972) 3 S.C 6 @ 8 and 9, although the incident which led to killing of the deceased, happened during the civil war in this country where the Appellant was in the Biafran

Army and the deceased was a soldier in the same Army. The learned trial Judge, referred to the English case of *R. v. Smith (1900) 17 S.C.R. 561* and said:

“it was held that a soldier is responsible by military and civil law and it is monstrous to suppose that a soldier could be protected when the order is grossly and manifestly illegal. Of course, there is the other proposition that a soldier is only bound to obey lawful orders and is responsible if he obeys an order not strictly lawful”.

On appeal, this Court - per Ademola, CJN, stated as follows:

“..... To our mind, deliberate and intentional killing of an unarmed person living peacefully inside the Federal Territory as in this case is a crime against humanity.....”.

Although under Issue 1, Section 24 of the Criminal Code is relied on - i.e. “accident” but in order to properly consider the defence of “obedience to superior order”, I will refer to Section 32(2) of the Criminal Code. It provides as follows:

“A person is not criminally responsible for an act or omission if he does or omits to do the act under any of the following circumstances:-

(1) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

(2) in obedience to the order of a competent authority which he is bound by law to obey, unless the order is manifestly unlawful”.

(3) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

(4) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

The above provision is clear and needs no further interpretation. I wish to say that whether an order is or is not manifestly unlawful, must be a question of law. It is settled therefore, that if the order is manifestly unlawful, then any obedience to it, is not protected under this provision. However, Section 32(1), (2), (3) and (4), affords a complete defence in cases in which the provision is applicable. But paragraph (2) gives a limited protection in all circumstances to members of the Armed Forces - Military and Police.

In dealing with this point or issue by the court below at page 192 of the Records, the following appear, inter alia:

*“An order to stop a speeding vehicle is **not** an order to fire at the*

vehicle. A reasonable man must contemplate the fatality attendant to such an act.....”.

I agree.

I must say frankly, that the Appellant is a lucky man. The life of an innocent harmless lady, has been untimely terminated or extinguished. I say this because, at the same page 192 of the Records, the court below stated inter alia, as follows:

“At page 94 lines 9 - 12 of the Record of Appeal, the appellant in his examination in chief, said “there are about three huts on the scene at that time. People were selling and buying there. The Jetta car was about 14 yards from that hut when I fired at it. Thus, it is manifest that the appellant fired his gun opposite huts and a market which was in session and from a close distance as testified by him.....”.

Earlier, the court below had this to say inter alia, at the same page 192:

*“The appellant admitted that he fired at the tyre of the speeding Jetta car. It has been shown that the occupants of same were not armed robbers. PW2 and PW4 said no order was given to the appellant before he fired his gun which killed the deceased. **P.W. 6 did not say that he gave such an order to the appellant.** P.W.2, P.W.3 and P.W.4 asserted that no policeman can fire his gun **unless with the authority or order of a Superior Officer.** The Appellant, in his evidence said such an order must be clear. This is extant at page 97 lines 19 - 20 of the transcript Record of Appeal”.*

From page 191 to 192, the following appear inter alia:

“/ agree with the Respondent’s counsel that if the occupants of the Jetta car were not so branded by the policemen on Enugu - Aba lane of the Express road, it is curious how the Appellant who was more than 100 yards away and on Aba - Enugu Lane could in his “oracular magic” envision that they were armed robbers as to prompt his attacking them as he admitted that he did. It is clear that the Appellant after committing the abominable decided to cry wolf where there was really none. The occupants of the Jetta car were not armed robbers. The Appellant cried wolf to disguise his ulterior motive. And after firing, he was first to jump

into a taxi cab in his surmised pursuit of ‘armed robbers’ on Enugu - Abalane which was not his own lane. Curiously, he refused to return to his beat until about 6.30 p.m. while his colleague (sic) (s) returned immediately. There is no doubt that “conscience is like a wound, only truth can heal it”. Conscience is always nurtured by truth”

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Then at page 194, the court below stated inter alia, as follows:

“At the trial court, I cannot trace where a defence of **accident** was put up by the Appellant. It has been shown that the Appellant acted rashly and was **grossly negligent in shooting his gun at a speeding vehicle near a mammy market in session voluntarily and deliberately leading to the deceased’s death**. To put it shortly, the law is that negligence negatives a defence of accident. So also a rash action does. Refer to UZOKA v. STATE (1990) 6 NWLR (Pt.159) 680. And so, the defence has no foundation. The prosecution discharged the onus placed on it. See SHOLUADE v. REPUBLIC (1990) 1 ALL NLR 134”.

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From the foregoing, it can again be seen why at the beginning of this Judgment, I stated that this appeal has given me some concern. So, from what I have just reproduced above, it is clear to me that the court below, was justified in its decision. Either way - either from the evidence of the Policemen - i.e. the colleagues of the Appellant or of the meat seller, that the Appellant, was reckless and his recklessness, led to the death of the deceased. But this is a Court of law and not of sentiments which command no place in judicial deliberations. See Ezeugo v. Ohanyere (1978) 6 & 7 S.C.171 @ 184; Chief Onyia v. Oniah (1989) 1 NWLR (Pt.99) 514; (1989) 2 SCNJ. 143 and Omole & Sons Ltd v. Aderemi & 19 ors. (1994) 4 NWLR (Pt.336) 48 just to mention but a few. I have dealt with this point because, it was raised as an issue in the Appellant’s Issue 1.

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In concluding this perhaps, lengthy Contributions/Judgment in this case which touches on human life, if I go by sentiments, there is no way the Appellant (speaking for myself), should have escaped the hangman’s rope or noose from the findings of the court below affirming the decision of the trial court. But the law as regards doubt by a court and its resolution in favour of an Appellant, is now firmly settled in the decided

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authorities referred to by me while dealing with Issue 3 of the Appellant and Issue 1 of the Respondent. See also the cases of Nwokedi (alias Anazomu) v. The State (1977) 3 S.C. 35; Kala v. The State (1991) 11 SCNJ 19 @ 28; and Manshep Namsoh v. The State (1993) 5 NWLR (Pt. 292) 129 @ 145, 146; (1993) 6 SCNJ. 55 @ 71 - 72. So or therefore, from the state of the law, my answer to the said Issue 3 of the Appellant and Issue 1 of the Respondent, is in the Negative. The appeal succeeds and it is also allow by me.

It is from the foregoing and the more detailed Judgment of my learned brother, Oguntade, JSC, that I too find merit in this appeal. I too, set aside the said decision of the court below affirming the decision of the trial court. I too enter a verdict of Discharge and Acquittal in favour of the Appellant.