

**SUPREME COURT OF NIGERIA**

18TH APRIL, 2008. SC. 54/2006

**CORAM:- N. TOBI, G. A. OGUNTADE, I. F. OGBUAGU, F. F. TABAI, I. T. MUHAMMAD, JJSC**

IME DAVID IDIOK ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Murder - Proof - Facts prosecution must prove beyond reasonable doubt - Include that it was accused person's omission - That caused the death of deceased (H1)

CRIMINAL PROCEDURE - Murder - Findings of trial court - Where not challenged vide grounds of appeal - They remain binding - An appellate court will not disturb them (H2)

CRIMINAL PROCEDURE - Murder - Evidence - Findings of trial court - That appellant tied deceased with a rope - Upheld by the Court of Appeal - Cannot be faulted (H3)

CRIMINAL PROCEDURE - Evidence - Conviction - Co-accused - Discredited evidence on same facts - Cannot on appeal ground conviction of co-accused - But present case is different - As trial court did not rely on same evidence - That convicted appellant - In discharging 1st accused (H4)

**FACTS**

Seven accused persons were originally charged before the Chief Magistrate's Court Eket, Akwa Ibom State for the murder of one Akpan Ekpa (deceased). The case was struck out for want of jurisdiction and all the accused persons were discharged. When they were about to be rearrested, four of them escaped. One of the three rearrested suspects died in prison custody. Before the Trial High Court, the 1st accused and appellant pleaded not guilty to the charge. The prosecution called six witnesses, while accused persons testified and called no witness.

At the close of hearing, the trial court discharged the 1st accused on the ground of insufficient strong evidence. The appellant was however, convicted and sentenced to death by hanging. Appellant's appeal to the Court of Appeal was dismissed. Still dissatisfied, appellant has further appealed to the Supreme Court. His major contention is that as the 1st accused was discharged, his own conviction was wrongful and should be set aside.

**ISSUES FOR DETERMINATION**

*"3.1. Whether in all the circumstances of this case, the prosecution proved the charge of murder against the appellant beyond reasonable doubt?"*

*II. Was the Court of Appeal right in affirming the conviction and sentence of the appellant in spite of the discharge and acquittal of the 1st accused, having found that the evidence adduced by the prosecution witnesses against the appellant is not interwoven and inseparable from that of the 1st accused"*

**HELD** (Unanimously dismissing the appeal per **OGBUAGU JSC**)  
***Murder - Proof - Facts prosecution must prove***

1. It is now firmly settled that for the prosecution to succeed in a murder charge under Section 319(1) of the Criminal Code, (as in the instant case) it must prove beyond reasonable doubt that,

*"(i) there was a killing.*

*(ii) the killing was unlawful as prohibited by Section 316 of the Criminal Code.*

*(iii) it was the act or omission of the accused person that caused the death of the deceased."*

*(iv) the accused intended to cause the death of the deceased.*

In other words, where a person is charged with the offence of murder, the prosecution must prove:

(a) Whether the person alleged to have been killed is dead.

(b) the cause of death; and

(c) Whether any act of the accused person is the cause of his death. (p. 1597 C/G)

***Murder - Findings of trial court - Where not challenged***

2. The above findings, have not been contested in the grounds of

appeal of the appellant. In effect or consequence, the said facts, stand or subsist.

This is because, finding or findings of fact, is or are the exclusive business of a trial court. If such finding or findings is or are not challenged on appeal, it or they, become binding on appeal. In such circumstances, an appellate court, will not disturb or interfere with such findings. It cannot even delve into the issue or pronounce on it. (p. 1599 B/D)

***Findings - That appellant tied deceased with a rope***

3. At page 41 of the records, the learned trial Judge stated inter alia.. as follows:

*“.....There is therefore direct evidence from P.W.4 that the 2nd accused (meaning the appellant) is one of the persons who tied the deceased with a rope and must be held responsible also for the injuries inflicted on the deceased.....”*

P.W.4 had on oath, testified that she saw when the appellant tied down the deceased in the presence of a crowd of people. She named two persons who were among the said crowd. At pages 175-176 of the records, the court below- per Omokri, JCA., stated inter alia, as follows:

*“The evidence of P.W.4 is that she saw the appellant tying the deceased up with climbing ropes.....”*

*From the evidence of P.W.4, there is only one inference to be drawn and that is that the appellant was acting in concert with the others in the killing of the deceased.*

I cannot fault the above. Afterwards, and this is settled, the role of a trial court, is to hear evidence, to evaluate the evidence, to believe or disbelieve witnesses, make findings of fact based on the credibility of the witnesses who testified and to decide the merits of the case based on the findings. (p. 1599 F)

***Evidence - Conviction - Co-accused***

4. I am aware of and this is also settled that where a trial court, in a joint criminal trial, discredited the evidence of a witness and because of doubt, discharged one of the accused persons standing trial before it, an appellate court, will be in error to use the same discredited

evidence on the same facts to order or find conviction for a co-accused. If a testimony of a witness, casts doubt on a trial Judge, the evidence given by that witness, must be rejected entirely. See the case of Adele v. The State (1995) 2 SCNJ. 256 at 262 - per Mohammed, JSC.

B The above proposition of the law, with respect, cannot by any stretch of imagination, be said to apply to the instant case. The court below at pages 178 to 179 of the Records, stated inter alia, as follows:

C *“In the first place the evidence of PW.4 was crisp, unequivocal and uncontroversial on what she said, namely that she saw the appellant tying up the deceased person with a climbing rope.*

D *Furthermore, from the evidence adduced by the prosecution witnesses the case of the appellant is not interwoven and inseparable from that of the 1st accused tying up the deceased. No one saw the 1st accused in company of the appellant when he tied up the deceased. It is not in every case where the accused is tried jointly with another that the discharge of one must lead to the discharge of the other, particularly, so, when the evidence against one accused is different from that against the other. It all depends on the evidence.*

E *The court below did not rely on the same evidence in discharging the 1st accused and in convicting the appellant. The evidence against the appellant and the 1st accused are like two parallel lines that cannot meet. “*

F (The underlining mine)

I agree. (pp. 1601 F/1602 D)

## NOTABLE POINTS OF INTEREST

### G TOBI JSC

#### 1. Murder - Circumstantial evidence defined

H The offence of murder, like all other offences, can be proved either by direct evidence or by circumstantial evidence. Direct evidence is evidence given by a witness who saw and watched the act of killing or murder. Circumstantial evidence is evidence given by a person who did not see or watch the act of killing or murder but whose evidence unequivocally leads to the commission of the offence by the accused person.

A circumstance is a fact, condition or event concerned with and influencing another event, person or cause of action. It is not that event, person or cause of action. A circumstance is a subordinate or accessory fact which has legitimate bearing on the main fact. And so, circumstantial evidence is not evidence based on the actual personal knowledge of the witness of the act of killing or murder, but of, other surrounding facts, which in their aggregate content lead cogently, strongly and unequivocally to the conclusion that the act, conduct or omission of the accused killed the deceased. A speculative or conjectural evidence cannot be basis for circumstantial evidence to convict an accused person for the offence of murder. (p. 1608 D)

## *2. Prosecution's role in calling witnesses and prosecuting suspects*

The prosecution is under no constitutional or statutory duty to call a particular witness or particular witnesses. The prosecution has not the legal duty to call a village or community of witnesses. An accused person cannot dictate to the prosecution witnesses it should call to prosecute him. And what is more, murder is not an offence which needs corroborative evidence for purposes of conviction. Therefore the calling of Nwok and Mma Nko, who were present at the scene when the appellant tied the deceased, is neither here nor there. The evidence of P.W.4 is enough and both the trial Judge and the Court of Appeal were correct in so holding.

Learned counsel cited *Onah v The State* (1985) 3 NWLR (Pt. 13) 236, on the duty of the prosecution to call vital witnesses. In that case, this court held that although the prosecution has the discretion to call whichever witnesses it considers necessary to prove the offence charged, its failure to call very vital witnesses where evidence may determine the case one way or the other will be fatal to its case. This court also held that where a party to a case has failed, refused or neglected to call a vital witness whose evidence may likely decide the case one way or the other, it will be presumed that had that witness been called his evidence would have been unfavourable to the party who ought to have called him.

With respect, the case is not apposite for a number of reasons. The case talked about vital witnesses. In the light of the evidence of PW4, I do not see how vital the evidence of Nwok and Mma Nko would

have been. At best they should have confirmed the tying role played by the appellant.

Learned counsel tried her hand on failure to arrest Nwok and Mma Nko. I do not think P.W.4 said that she saw Nwok and Mma Nko committing any or an offence to deserve the arrest of the two persons. In the event that they committed an offence, the prosecution is under no legal duty to charge all suspects to court. They have an unfettered discretion in the decision to prosecute. Again an accused person has no right to dictate to the prosecution person or persons that ought to be charged to court with him. (p. 1611 B)

*3. Discharge of an accused is not automatically based on that of a Co-accused*

It is not the law that once an accused person is discharged and acquitted, the co-accused must, as a matter of course or routine, be discharged and acquitted, like the night following the day and vice versa. It is not so. There is no such automatic position. It depends entirely on the facts of the case before the court. A court will only be right in discharging and acquitting the co-accused if the evidence in exculpation of the two accused persons is the same and nothing but the same; and not merely in some nexus or proximity. Putting it differently, where the court finds as a fact that no case has been made against an accused person, he can be discharged and acquitted, as in this case. The court can convict the co-accused on the basis of the inculpatory evidence against him, if any, again as in this case. (p. 1612 D)

**REPRESENTATION**

D. Ufot, (with her; J. Idigbe), for the Appellant.  
M. O. Liadi, (with him; M. Ewa), for the Respondent.

**CASES REFERRED TO**

Okoro v. The State (1988) 12 S.C. (Pt. II) 83  
H Ogba v. The State (1992) 2 NWLR (Pt. 222) 164  
Akpan v. The State (1994) 9 NWLR (Pt.368) 347  
Abosede v. The State (1996) 4 SCNJ 223  
Sule Ahmed (alia Eza v. The State (2001) 1 S.C. (Pt. I) 135

Okuoja v. Ishola (1982) 7 S.C. 314

Ejiwhomo v. Edet - Eter Mandillas Ltd. (1986) 5-9 S.C. 41 at 47

Adejumo v. Ayantegbe (1989) 6 S.C. (Pt. I) 76

Dr. Alakija v. Alhaji Abdullahi (1989) 5 S.C. 1

Dabo v. Alhaji Abdullahi (2005) 2 S.C. (Pt. I) 75

Ntam v. State (1968) NMLR 86

Akpan v. State (1991) 5 S.C. 1; (1991) 3 NWLR (Pt. 182) 646

Odu v. State (2001) 5 S.C. 116; (2001) 7 NWLR (Pt. 664) 283

Sobakin v. The State (1981) 5 S.C. 75; (1981) 5 S.C.

### **STATUTES & RULES REFERRED TO**

Criminal Code Act, 1990 ss. 7, 8, 316, 319 (1)

Evidence Act, 1990 s. 149 (d)

### **LEAD JUDGMENT BY OGBUAGU JSC**

This is an appeal against the decision of the Court of Appeal, Calabar Division, (hereinafter called “the court below”) delivered on 8th December, 2005, affirming the conviction and sentence of the appellant by Udofia, J., of the Eket Judicial Division of the High Court of Akwa Ibom State in his judgment delivered on 25th February, 1991.

Dissatisfied with the said decision, the appellant has appealed to this court on two (2) grounds of appeal. Without their particulars, they read as follows:

*“(a) The learned Justices of the Court of Appeal erred in law when they affirmed the conviction and death sentence of the appellant when the prosecution failed to prove its case beyond reasonable doubt.*

*“(b) The learned Justices of the Court of Appeal erred in law when they affirmed the conviction and sentence of the appellant notwithstanding the acquittal and discharge of the 1st accused Morris Ekpo Enoidem, who was charged together with the appellant for the death of the deceased.”*

The facts briefly stated, are that the appellant and six others, were originally charged before the Chief Magistrate’s Court, Eket for the murder of the deceased - one Akpan Ekpa. The case was struck out for lack of jurisdiction and all the seven accused persons, were

discharged. When they were about to be re-arrested, four of them escaped and police succeeded in re-arresting three of them of which one of them died in prison custody. At the instance of the prosecution, the trial High Court, deleted the names of the 2nd, 3rd, 5th, 6th and 7th accused persons which included the 3rd accused person who had died, from the charge sheet thus, leaving the 1st accused - one Morris Ekpo Enoidem and the appellant who pleaded not guilty to the charge. The prosecution called six witnesses while the 1st accused and the appellant, testified on their own behalf and called no witness. The appellant denied the charge. At the conclusion of the trial, the trial court, in a well considered judgment, discharged and acquitted the 1st accused person on the ground of insufficient strong evidence to convict him. The appellant, was however, convicted and was sentenced to death by hanging. Dissatisfied with the decision of the trial court, the appellant appealed to the court below that affirmed the said decision of the trial court, hence the instant appeal to this court.

When this appeal came up for hearing on 24th January, 2008, both learned counsel for the parties, adopted their respective Briefs. While the learned counsel for the appellant - Ufot (Mrs.), urged the court to allow the appeal and set aside the judgment of the court below, the learned counsel for the respondent - Liadi. Esqr., urged the court to dismiss the appeal and affirm the decision of the two lower courts. Thereafter, judgment was reserved *till today*.

*The appellant has formulated two (2) issues for determination namely,*

*“3.1. Whether in all the circumstances of this case, the prosecution proved the charge of murder against the appellant beyond reasonable doubt?”*

*3.2 Whether the Court of Appeal was right in affirming the conviction and sentence of the appellant notwithstanding the discharge and acquittal of the 1st accused?”*

*On the part of the respondent, two (2) issues have been formulated for determination namely,*

*“1. Was there sufficient casual link between the act of the appellant and the death of the deceased to justify the judgment of the trial court, as affirmed by the Court of Appeal?”*



*II. Was the Court of Appeal right in affirming the conviction and sentence of the appellant in spite of the discharge and acquittal of the 1st accused, having found that the evidence adduced by the prosecution witnesses against the appellant is not interwoven and inseparable from that of the 1st accused?"*

I am of the respectful view that the issues of both parties are substantially similar although differently couched. However, in dealing with the said issues, I will prefer taking the 1st issue of the appellant and the 2nd issue of the respondent in order to arrive at a just decision in respect of the subject matter of this appeal.

Issue 1 of the appellant

***It is now firmly settled that for the prosecution to succeed in a murder charge under Section 319(1) of the Criminal Code, (as in the instant case) it must prove beyond reasonable doubt that,***

***"(i) there was a killing.***

***(ii) the killing was unlawful as prohibited by Section 316 of the Criminal Code.***

***(iii) it was the act or omission of the accused person that caused the death of the deceased.***

***(iv) the accused intended to cause the death of the deceased."***

See the cases of *Grace Akinfe v. The State* (1988) 7 S.C. (Pt. II) 131; (1988) 3 NWLR (Pt. 85) 729 at 745; (1988) 7 SCNJ 226, *Okoro v. The State* (1988) 12 S.C. (Pt. II) 83; (1988) 5 NWLR (Pt. 94) 255; (1988) 12 SCNJ. 191, *Ogba v. The State* (1992) 2 NWLR (Pt. 222) 164; (1992) 2 SCNJ. 106, *Akpan v. The State* (1994) 9 NWLR (Pt.368) 347; (1994) 12 SCNJ. 140 and *Abosede v. The State* (1996) 4 SCNJ 223, just to mention but a few.

***In other words, where a person is charged with the offence of murder, the prosecution must prove:***

***(a) Whether the person alleged to have been killed is dead.***

***(b) the cause of death; and***

***(c) Whether any act of the accused person is the cause of his death.***

See the case of *Sule Ahmed (alia Eza) v. The State* (2001) 1

S.C. (Pt. I) 135; (2001) 18 NWLR (Pt. 746) 623 at 641, cited and relied on in the appellant's Brief. (It is also reported in (2001) 12 SCNJI).

Now, in paragraph 4.15 of the appellant's Brief, it is admitted or agreed that the prosecution proved the death of the deceased, (the reasons for the proof were stated), that there is no doubt that the prosecution also proved the cause of death through the Medical Doctor - Dr. Patrick Gordian Udofia. It is therein stated "from the above therefore, the evidence of P.W.5 (i.e. Dr. Udofia) "is conclusive proof of the cause of death of the deceased. In respect of whether the act of the accused person caused the death of the deceased, it is submitted inter alia, as follows:

*"It was contended on behalf of the appellant that while P.W.5's examination revealed that the deceased died of loss of blood due to the injuries inflicted on him by unidentifiable persons, the only act attributable to the appellant was the tying of the deceased with climbing rope as testified by P.W.4 Akon Okokon, the star witness on whose sole evidence (circumstantial) the appellant was convicted and sentenced to death.*

*It was also contended on behalf of the appellant that there being no casual link between the act of the appellant and the cause of death of the deceased, the appellant ought to have been acquitted and discharged by the trial High Court and indeed the Court of Appeal."*

(The underlining mine)

The question that quickly follows in my respectful view, is, what act of the appellant? In other words, there was an act of the appellant in respect of the deceased i.e. the tying of the deceased with climbing rope as testified by the P.W.4. I have noted that the appellant, merely denied killing the deceased. It is admitted in his Brief, that P.W.4 was a star witness and that the trial court believed his evidence. In his judgment, the learned trial Judge, made the following findings of fact:

*"1. That the deceased Akpan Ekpa died between the 6th and the 9th of April, 1988, as stated in the particulars of the charge.*

*2. That the deceased was tied with ropes at a square opposite his house and that of P.W.4 and that it was from that square that he*

was dragged to his house.

3. That the deceased died from injuries inflicted on him at that square.

4. That the medical evidence from the P.W.5, Patrick Gordian Udofia is consistent with the type of injuries found on the deceased by P.W.1, P.W.2, P.W.3 and P.W.6.....” B

**The above findings, have not been contested in the grounds of appeal of the appellant. In effect or consequence, the said facts, stand or subsist.** See the cases of Okuoja v. Ishola (1982) 7 S.C. 314; (1982) 7 S.C (Reprint) 147, Ejiwhomo v. Edet-Eter Mandillas Ltd. (1986) 5-9 S.C. 41 at 47, Adejumo v. Ayantegbe (1989) 6 S.C. (Pt. I) 76; (1989) 3 NWLR (Pt. 110) 417; (1989) 6 SCNJ. 127, Dr. Alakija & Ors. v. Alhaji Abdullahi (1989) 5 S.C. 1; (1998) 6 NWLR (Pt.552) 1 at 24; (1998) 5 SCNJ 1 and Dabo v. Alhaji Abdullahi (2005) 2 S.C. (Pt. I) 75; (2005) 7 NWLR (Pt. 923) D 181; (2005) 2 SCNJ 76, and many others.

**This is because, finding or findings of fact, is or are the exclusive business of a trial court. If such finding or findings is or are not challenged on appeal, it or they, become binding on appeal.** See the case of Alhaji Usman & Garbe (2003) 7 S.C. 33; (2003) 7 SCNJ 38, 50-51. **In such circumstances, an appellate court, will not disturb or interfere with such findings. It cannot even delve into the issue or pronounce on it.** See the case of Alhaji Adeyemi & Anor. v. Chief Olakunri & 10 Ors. (1999) 12 S.C. (Pt. II) 92; (1999) 14 NWLR (Pt.638) 304 at 221 212, 213-214; (1999) 12 SCNJ. 224. **At page 41 of the records, the learned trial Judge stated inter alia, as follows:** F

**“.....There is therefore direct evidence from P.W.4 that the 2nd accused (meaning the appellant) is one of the persons who tied the deceased with a rope and must be held responsible also for the injuries inflicted on the deceased.....”** G

**P.W.4 had on oath, testified that she saw when the appellant tied down the deceased in the presence of a crowd of people. She named two persons who were among the said crowd. At pages 175-176 of the records, the court below-per Omokri, JCA., stated inter alia, as follows:** H

***“The evidence of P.W.4 is that she saw the appellant tying the deceased up with climbing ropes.....***

***From the evidence of P.W.4, there is only one inference to be drawn and that is that the appellant was acting in concert with the others in the killing of the deceased. Where a***

***person is seen by a witness tying up a human being with climbing ropes and later it turns out that the person tied met a violent death with multiple injuries or wounds, one does not need a witch doctor or prophet to know that the person who tied up the deceased is involved and connected with the death of the deceased. It is from this view point, that I come to the conclusion that the evidence of P.W.4 leads to guilt of the accused person and it leaves no degree of possibility that other persons could have been responsible for the commission of the offence. The evidence of P.W.4 is cogent, unequivocal, positive and conclusive. See Igho v. The State (1978) 3 S.C. (Reprint) 61; (1978) 11 NSCC 166 at 67-168.***

***Furthermore, a court is perfectly entitled to convict on the evidence of one witness if his evidence is credible, See State v. Igbo (1975) 5 S.C. (sic); (1975) 9-11 S.C. (Reprint) 80. In Ali v. State (1988) 1 NWLR (Pt. 68) I, it was held that a lone witness, if believed can establish the usually contentious issue as to who killed the deceased in a murder case. See also State v. Ajie (2000) 7 S.C. (Pt. I) 24.” (i.e. (2000) 11 NWLR (Pt.678) 434 at 440).***

***I cannot fault the above. Afterwards, and this is settled, the role of a trial court, is to hear evidence, to evaluate the evidence, to believe or disbelieve witnesses, make findings of fact based on the credibility of the witnesses who testified and to decide the merits of the case based on the findings.*** See the

***cases of The State v. Aigbangbee & Anor. (1988) 7 S.C. (Pt. I) 96; (1988) 3 NWLR (Pt. 84) 548; (1988) 7 SCNJ 128 and Grace A. Akabio & 2 Ors. v. The State (1994) 7-8 SCNJ (Pt. II) 429 at 458. My answer therefore to the issue, is rendered in the positive/affirmative.***

***Issue 2 of the respondent:***

***I note that in his/its said judgment, the learned trial Judge, treated the case or the evidence in respect of the 1st accused person, first at pages 39 and 40 of the Records. He stated inter alia, as fol-***

lows:-

*"It is clear that from the above evidence, there is no direct evidence against the 1st accused. The evidence against him, if any, is circumstantial. Conviction for murder can be based on circumstantial evidence which points irresistibly to the guilt of the accused. See the case of David Aganmonyi v. A.G. Bendel State (1987) 1 NWLR (Pt. B 26) at 27. The very fact that the 1st accused is from the same family with the deceased or that his relationship with the deceased was not cordial or that he queried P.W.3 why he should untie the deceased cannot in my view, lead to an irresistible conclusion that he was responsible for the death of the deceased. The circumstantial evidence against him is not therefore strong. At best it amounts to suspicion which cannot ground an offence no matter how strong. See the cases of:-*

*(a) Onah v. The State (1985) 3 NWLR (Pt. 12) page 236 D*

*(b) Okafor v. C.O.P. (1965) NMLR 89. The result therefore is that the circumstantial evidence against the 1st accused falls far below the standard required by law and no conviction can be based on it.*

*See the case of :-*

*Ukorah v. The State (1977) 4 S.C. 167; (1979) 4 S.C. (Re-print) 111."*

The learned counsel for the appellant can now see that the circumstances leading to the discharge and acquittal of the 1st accused are diametrically apart, from the evidence in the appellant's own case where there was direct evidence of his act which eventually led to the death of the deceased.

***I am aware of and this is also settled that where a trial court, in a joint criminal trial, discredited the evidence of a witness and because of doubt, discharged one of the accused persons standing trial before it, an appellate court, will be in error to use the same discredited evidence on the same facts to order or find conviction for a co-accused. If a testimony of a witness, casts doubt on a trial Judge, the evidence given by that witness, must be rejected entirely. See the case of Adele v. The State (1995) 2 SCNJ. 256 at 262 - per Mohammed, JSC.***

**The above proposition of the law, with respect, cannot by any stretch of imagination, be said to apply to the instant case. The court below at pages 178 to 179 of the Records, stated inter alia, as follows:**

***“In the first place the evidence of P.W.4 was crisp, unequivocal and uncontroverted on what she said, namely that she saw the appellant tying up the deceased person with a climbing rope. P.W.3 never testified all through his evidence before the court concerning the appellant. He never mentioned the name of the appellant..***

***Furthermore, he testified clearly that he did not know who tied the deceased. He did not testify that he saw the 1st accused tying the deceased. So there is no evidence before the court connecting the 1st accused to the appellant in respect of the tying up of the deceased. The evidence of P.W.4 was believed and accepted by the court.....***

***Furthermore, from the evidence adduced by the prosecution witnesses the case of the appellant is not interwoven and inseparable from that of the 1st accused tying up the deceased. No one saw the 1st accused in company of the appellant when he tied up the deceased. It is not in every case where the accused is tried jointly with another that the discharge of one must lead to the discharge of the other, particularly, so, when the evidence against one accused is different from that against the other. It all depends on the evidence.***

***The court below did not rely on the same evidence in discharging the 1st accused and in convicting the appellant. The evidence against the appellant and the 1st accused are like two parallel lines that cannot meet. “***  
**(The underlining mine)**

**I agree.** I have already hereinabove, expressed my view in this respect or regard.

**H** I note that the court below, even dealt with the defences open to the appellant including that of alibi all thoroughly considered by the trial court, in line with the settled law in the cases of R. v. Yaw Braimoh (1945) 11 WACA 49. The State v. Ojo (1973) 11 S.C. 331; (1973) 11 S.C. (Reprint) 199, Musa Sokoto v. The State (1976) 2

S.C. 133: (1976) 2 S.C. (Reprint) 75 and Opayemi v. The State (1985) 2 NWLR (Pt.5) 101, just to mention but a few. At page 178 of the records, His Lordship stated inter alia, as follows:-

*“More importantly, once an accused person is fixed at the scene of crime his defence of alibi must fail. In the instant case on appeal the court below believed the evidence of PW.4 that she saw the appellant tying up the deceased with climbing rope. The appellant in his evidence in court admitted that he knew PW.4 before the incident. The evidence of PW.4 fixed the appellant at the scene of crime therefore his defence of alibi must fail. See the cases of Ani v. State (2002) 5 S.C. (Pt.1) 33; (2003) 11 NWLR (Pt.830) 142 at 172. Ntam v. State (1968) NMLR 86. Akpan v. State (1991) 5 S.C. 1; (1991) 3 NWLR (Pt. 182) 646 and Odu v. State (2001) 5 S.C. 116; (2001) 7 NWLR (Pt. 664) 283.”*

I also agree. I therefore, render my answer to this issue, also in the affirmative.

In concluding this judgment, I also note that there are concurrent findings of fact by the two lower courts. The attitude of this court is not to interfere or disturb the same. See the cases of Nasamu v. The State (1979) 6-9 S.C. 153; (1979) 6-9 S.C. (Reprint) 112, Sobakin v. The State (1981) 5 S.C. 75; (1981) 5 S.C. (Reprint) 46 and Adio The State (1986) 2 NWLR (Pt. 24) 581, just to mention but a few.

The court below, saw no merit in the appeal to it by the appellant. I too, find no slightest merit in the instant appeal which I also dismiss. I accordingly, affirm the said decision of the court below. The appellant deserves the sentence passed/imposed on him by the trial court and affirmed by the court below.

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### **TOBI JSC**

Seven persons started this journey as murder accused at the Magistrate’s Court, Eket for the murder of Akpan Ekpa. The case was struck out by the Magistrate for lack of jurisdiction. They were re-arraigned before the High Court. In the intervening period, four of them escaped. Police re-arrested three. One of them later died in prison custody. Sequel to the above, the prosecution applied to the court to delete the names of 2nd, 3rd, 5th and 6th and 7th persons

from the charge. The name were accordingly struck out.

And so the number was reduced to two: 1st accused and the appellant. They were arraigned before the High Court. 1st accused was discharged and acquitted. Appellant was sentenced to death by hanging on 25th February, 1996. His appeal to the Court of Appeal B was dismissed. He has come to us.

Briefs were filed and exchanged. Appellant formulated two issues for determination:

C *“3.1 Whether in all the circumstances of this case, the prosecution proved the charge of murder against the appellant beyond reasonable doubt.”*

*3.2 Whether the Court of Appeal was right in affirming the conviction and sentence of the appellant notwithstanding the discharge and acquittal of the 1st accused.”*

D The respondent also formulated two issues for determination :

*“I. Was there sufficient causal link between the act of the appellant and the death of the deceased to justify the judgment of the trial court as affirmed by the Court of Appeal?*

E *II. Was the Court of Appeal right in affirming the conviction and sentence of the appellant in spite of the discharge and acquittal of the 1st accused, having found that the evidence adduced by the prosecution witnesses against the appellant is not interwoven and inseparable from that of the 1st accused?”*

F Learned counsel for the appellant, Mrs. Dorothy Ufot, submitted that the learned Justices of the Court of Appeal erred in law when they confirmed the conviction and death sentence of the appellant, when on the evidence adduced by the prosecution, it failed to prove the case against the appellant beyond reasonable doubt. G Counsel maintained that there was no direct evidence of the commission of the offence against the accused person, thus, the evidence against both of them was essentially circumstantial.

H She submitted that there was not enough circumstantial evidence to prove that the act of the appellant caused the death of the deceased. She dealt in some detail with, when circumstantial evidence is sufficient to support conviction in a murder case. She cited a large number of authorities and also called in aid the evidence of P.W.3, P.W.4 and P.W.5.



Since P.W.4 said that what she saw the appellant doing at the square was the tying up of the deceased and P.W.5 said the sort of wounds found on the deceased could not have been self-inflicted, the prosecution had the burden of proving beyond reasonable doubt, that it was indeed the appellant who inflicted these fatal wounds on the deceased to justify a conviction of the appellant for murder, learned counsel argued. She said that Nwok and Mma Nko were vital witnesses who ought to have been called to give evidence to testify to what they saw or what actually happened and their evidence may have assisted the trial court in finding out who really did what in respect of the injuries inflicted on the deceased. Counsel cited *Onah v. The State* (1985) 3 NWLR (Pt.12) 236, *The State V Ajie* (2000) 7 S.C. (Pt. 1) 24; (2000) 11 NWLR (Pt.678) 434, on the failure to call Nwok and Mma Nko as witnesses.

Learned counsel contended that from the circumstances surrounding the case, the circumstantial evidence against the appellant left too many crucial questions unanswered, such as:

*“(i) who carried the deceased away from the spot where he was tied and placed him on the veranda of his house?”*

*(ii) who inflicted the fatal injuries on the deceased?*

*(iii) who dragged him from the square to his house?*

*(iv) when were the injuries inflicted on him?*

*(v) what were the use to which Exhibits A, B-B3 and C were put, and who used them, if at all?*

*(vi) who beat the deceased to death?”*

To learned counsel, the trial Judge was left totally in the dark in respect of the above questions.

Learned counsel submitted on issue No.2 that, the conviction of the appellant cannot be sustained in the face of the discharge and acquittal of the 1st accused as there was no direct evidence, but circumstantial evidence against both of them. She cited the evidence of P.W.3 and P.W.4, Counsel pointed out that there were contradictions in the evidence of P.W.3 and P.W.4. Counsel argued that the Court of Appeal was wrong in coming to the conclusion that the case of the appellant is not inextricably interwoven with that of the 1st accused. She submitted that the two cases being inextricably interwoven with each other, the trial Judge ought to have given the benefit of doubt

to the appellant.

Counsel urged the court to allow the appeal for the following reasons:

- B *1. The prosecution did not prove that it was the act of the appellant that caused the injuries which led the deceased to bleed to death.*
- 2. The only act attributable to the appellant was the tying of the deceased.*
- C *3. The deceased did not die from the tying but from the injuries inflicted on him by unidentified persons.*
- 4. The prosecution failed to call vital and material witnesses whose evidence would have resolved this case one way or another.*
- D *5. The circumstantial evidence relied upon in convicting the appellant was not cogent and compelling and it admitted of other possibilities other than the guilt of the appellant.*
- 6. The resolution of the doubt in this case in favour of the 1st accused ought also to have enured for the benefit of the appellant.*
- E *7. The conviction and sentence of the appellant cannot be sustained given the acquittal and discharge of the 1st accused whose case was inextricably interwoven and inseparable with the case of the appellant.*
- F *8. Despite the fact that the appellant did not contest the findings of fact by the trial court, the said findings of fact did not establish the culpability of the appellant at all.*
- 9. Other persons with whom PW.3 left the deceased after untying him and giving him water to drink had the opportunity of committing the offence.*
- G *10. The case of the appellant is distinguishable from the cases of Michael Odigiji v. The State and Edet Obosi v. The State.*
- 11. The prosecution failed to prove a material and vital ingredient of the offence of murder.*
- 12. The numerous doubts surrounding the appellant's case ought to have been resolved in favour of the appellant.*
- H *13. The prosecution did not prove its case beyond reasonable doubt as required by law. 14. It is the interest of justice to allow the appellant's appeal."*

Learned counsel for the respondent. Mr. Munirudeen Liadi,

submitted in issue No.2 that there is sufficient causal link between the act of the appellant and the death of the deceased to justify the judgment of the trial court as affirmed by the Court of Appeal. He traced, in some admirable sequence and detail, the causal link in his Brief. He submitted that the death of the deceased was caused by the appellant, as there was sufficient evidence of causal link and connection between the act of the appellant and the deceased, cogent and compelling enough to sustain and affirm his conviction. Counsel enumerated at pages 6 to 9 what he regarded as uncontestable specific findings of the learned trial Judge on which the judgment of the Court of Appeal was anchored. Counsel urged the court to accept the specific findings on the ground that they were not appealed against. He cited *Adejumo v Ayantegbe* (1989) 6 S.C. (Pt. I) 76; (1989) 3 NWLR (Pt. 110) 417 and *Okuoja v. Ishola* (1982) 7 S.C. 314; (1982) 7 S.C. (Reprint) 147. He relied heavily on the evidence of PW.4. Counsel narrated the appellant's role in the murder at pages 9 to 12 of his Brief. He examined the ingredients of the offence of murder and the burden of proof by the prosecution at pages 12 to 14 and look the issue of absence of vital witnesses raised by the appellant. Counsel took time to answer the points raised by the appellant in his Brief and relied on Sections 7 and 8 of the Criminal Code Act. 1990.

Taking issue No.2. learned counsel submitted that the Court of Appeal was right in affirming the conviction and sentence of the appellant in spite of the discharge and acquittal of the 1st accused person having found that the evidence adduced by the prosecution witnesses against the appellant is not interwoven and inseparable from that of the 1st accused.

On the issue of contradiction, learned counsel submitted that the various instances of contradiction pointed out by the appellant had been exhaustively dealt with by the Court of Appeal, without the appellant challenging the decision thereon. It is therefore very inappropriate and incompetent for appellant to raise the issue, even if obliquely in his Brief. As the appellant did not apply for leave to raise the issues before the Court of Appeal, he was therefore precluded from advancing arguments on them, learned counsel argued. He did not agree with the appellant that there were uncertainties surrounding the death of the deceased. He also dealt in his Brief with the type

of rope that the appellant used in tying the deceased and the place the deceased was tied. He urged the court to dismiss the appeal.

In a charge of murder, the prosecution must prove the following ingredients

1. The deceased died.
- B 2. The deceased died as a result of the act, and conduct or omission of the accused.
3. If the deceased did not die immediately from the act, conduct or omission of the accused, the prosecution must prove that he died thereafter as a direct result of the act, conduct or omission of the accused. In other words, if the deceased died as a result of harm or injury; such harm or injury must be traced directly to the act, conduct and omission of the accused. Where there is any intervening force or factor, a court of law will not find the accused guilty of the charge of murder. See *The State v. Aibangbee* (1988) 7 S.C. (Pt. I) 96; (1988) 3 NWLR (Pt 84) 584, *Okoro v. The State* (1988) 12 S.C. (Pt. II) 83; (1988) 5 NWLR (Pt.94) 255.

The offence of murder, like all other offences, can be proved either by direct evidence or by circumstantial evidence. Direct evidence is evidence given by a witness who saw and watched the act of killing or murder. Circumstantial evidence is evidence given by a person who did not see or watch the act of killing or murder but whose evidence unequivocally leads to the commission of the offence by the accused person.

A circumstance is a fact, condition or event concerned with and influencing another event, person or cause of action. It is not that event, person or cause of action. A circumstance is a subordinate or accessory fact which has legitimate bearing on the main fact. And so, circumstantial evidence is not evidence based on the actual personal knowledge of the witness of the act of killing or murder, but of, other surrounding facts, which in their aggregate content lead cogently, strongly and unequivocally to the conclusion that the act, conduct or omission of the accused killed the deceased. A speculative or conjectural evidence cannot be basis for circumstantial evidence to convict an accused person for the offence of murder.

The learned trial Judge did not find any direct evidence of the offence of murder. He however relied on circumstantial evidence of

P.W.4. What did the witness say? The witness said in examination-in-chief at page 18 of the record: -

*“When I came back from the market I saw the son of the 2nd accused who told me that the father had arrested the deceased. I then walked towards my house. Then I saw the 2nd accused with a climbing rope in his hand. He was tying the deceased, Akpan Ekpa who was on the ground. There were many people. I then asked the 2nd accused why he should tie the deceased and place him where he kept him. I told the 2nd accused that what he did was not good. I then went to my house.”*

Under cross-examination, witness confirmed her evidence-in-chief:

*“At the time the 2nd accused tied down the deceased, the crowd of people were still there.”*

She further confirmed the act of tying and the question she asked the appellant in her re-examination:-

*“I asked the 2nd accused why he tied the deceased when I saw him at the spot he was tying him and with a climbing rope in his hand.”*

The learned trial Judge believed the evidence of P.W.4. He said at page 41 of the record,

*“There is direct evidence from P.W.4 that the 2nd accused is one of the persons who tied the deceased with a rope and must be held responsible also for the injury inflicted on the deceased. P.W.4 who said that she saw the 2nd accused tie-up the deceased has said in evidence that she is not related to the deceased apart from being neighbour. She also said that she had no previous quarrel with the 2nd accused. She therefore has no interest to serve in telling lies against the 2nd accused. I believe her testimony that she saw the 2nd accused tie-up the deceased and reprimanded him for doing so. This testimony has been unchallenged and uncontradicted by the 2nd accused. I accept it as establishing the fact stated by her.”*

The learned trial Judge correctly said that the appellant did not challenge the evidence of P.W.4. He did not say anything in respect of the evidence. He was quiet on it. And I ask, why was he quiet? While his quiet conduct is not tantamount to guilt in law, it is not even tantamount to innocence too.

The Court of Appeal agreed with the learned trial Judge. The Court said at pages 171 and 176 of the record:-

*“The evidence of P.W.4 is that she saw the deceased tied up by the appellant with a climbing rope (Ikpo). That piece of evidence remained uncontroverted. No one testified that the deceased was tied with a bicycle tyre.... In the first place the evidence of P.W.4 was crisp, unequivocal and uncontroverted on what she said, namely, she saw the appellant tying up the deceased person with a climbing rope.”*

The main contention of learned counsel for the appellant is that it was not the act of the appellant that killed the deceased. It is the case of the appellant that there is no causal link between the act of tying the deceased and the cause of death.

In his evidence-in-chief, P.W.5, the Medical Doctor, said in part at page 20 of the record:-

*“The actual cause of death as evidenced by the blood clot was haemorrhage shock due to loss of blood. The wounds I have described could not have been self-inflicted.”*

I have the impression from the evidence of P.W.5, the Medical Doctor, that the deceased died not only from the tying by the appellant, he must have died also from some other wounds he got from some other person or persons unknown. I do not however have any difficulty in coming to the conclusion that the deceased also died from the tying. In other words, the act and conduct of the appellant also contributed to the death of the deceased, and I so hold. I come to that conclusion because I believe that a climbing rope used in tying a human being can cause wound which could result in loss of blood. That must have added to the cause of death of the deceased. That is the point I am making. I do not therefore agree with the submission of learned counsel for the appellant that there is no link between the appellant and the cause of death of the deceased.

Learned counsel for the appellant referred to the case of *Bakare v The State* (1987) 1 NWLR (Pt.52) 579 and *Adekunle v The State* (1989) 12 S.C. 203; (1989) 5 NWLR (Pt. 123) 505, Where this court dismissing the appeals, according to counsel, held that the acts of the appellants caused the death of the deceased persons. Why the two cases, I ask? Of what relevance are they to the appellant? I thought

counsel was submitting that there was no causal link between the act of the appellant and the cause of death of the deceased. In the circumstances, I expected her to cite cases to indicate that principle. The two cases are certainly against the appellant.

Learned counsel for the appellant submitted that failure to call Nwok and Mma Nko as witnesses was prejudicial to the case of the prosecution. With respect, I do not agree with her. The prosecution has a discretion to call witnesses of its choice. The prosecution is under no constitutional or statutory duty to call a particular witness or particular witnesses. The prosecution has not the legal duty to call a village or community of witnesses. An accused person cannot dictate to the prosecution witnesses it should call to prosecute him. And what is more, murder is not an offence which needs corroborative evidence for purposes of conviction. Therefore the calling of Nwok and Mma Nko, who were present at the scene when the appellant tied the deceased, is neither here nor there. The evidence of P.W.4 is enough and both the trial Judge and the Court of Appeal were correct in so holding.

Learned counsel cited *Onah v The State* (1985) 3 NWLR (Pt. 12) 236, on the duty of the prosecution to call vital witnesses. In that case, this court held that although the prosecution has the discretion to call whichever witnesses it considers necessary to prove the offence charged, its failure to call very vital witnesses where evidence may determine the case one way or the other will be fatal to its case. This court also held that where a party to a case has failed, refused or neglected to call a vital witness whose evidence may likely decide the case one way or the other, it will be presumed that had that witness been called his evidence would have been unfavourable to the party who ought to have called him.

With respect, the case is not apposite for a number of reasons. The case talked about vital witnesses. In the light of the evidence of P.W.4, I do not see how vital the evidence of Nwok and Mma Nko would have been. At best they should have confirmed the tying role played by the appellant. In *Onah*, this court held that the prosecution ought to have called Eke Agbo as eye witness to the murder of the deceased; a witness the court held was a vital one. Certainly, Nwok and Mma Nko cannot fall into the category of Eke Agbo, who

was a witness to the murder of the deceased.

In Onah, Uwais, JSC., (as he then was) said,

*“The evidence which indicated that the appellant was responsible for the murder of the deceased was the evidence of P.W.4 whose testimony was based on ipse dixit of Eke Agbo. Eke Agbo was not called as a witness by the prosecution. She is a vital witness in the case.....”*

I am of the view that Onah is not relevant here. I cannot therefore invoke Section 149(d) of the Evidence Act, 1990.”

Learned counsel tried her hand on failure to arrest Nwok and Mma Nko. I do not think P.W.4 said that she saw Nwok and Mma Nko committing any or an offence to deserve the arrest of the two persons. In the event that they committed an offence, the prosecution is under no legal duty to charge all suspects to court. They have an unfettered discretion in the decision to prosecute. Again an accused person has no right to dictate to the prosecution person or persons that ought to be charged to court with him.

And that takes me to the second issue. It is not the law that once an accused person is discharged and acquitted, the co-accused must, as a matter of course or routine, be discharged and acquitted, like the night following the day and vice versa. It is not so. There is no such automatic position. It depends entirely on the facts of the case before the court. A court will only be right in discharging and acquitting the co-accused if the evidence in exculpation of the two accused persons is the same and nothing but the same; and not merely in some nexus or proximity. Putting it differently, where the court finds as a fact that no case has been made against an accused person, he can be discharged and acquitted, as in this case. The court can convict the co-accused on the basis of the inculpatory evidence against him, if any, again as in this case.

In this appeal, the learned trial Judge was very clear in his findings on both the 1st accused person and the appellant. On the 1st accused person, the learned Judge said at pages 39 and 40 of the record;

*“The prosecution has submitted that from the above evidence against the 1st accused I should conclude that he was connected with the death of the deceased because there was no other co-existing*



*circumstances which could weaken the logical inference that could be drawn from the evidence of P.W.3. The very fact the 1st accused is from the same family with the deceased or that his relationship with the deceased was not cordial or that he queried P.W.3 why he should untie the deceased cannot in my view, lead to an irresistible conclusion that he was responsible for the death of the deceased. The circumstantial evidence against him is not therefore strong. At best, it amounts to suspicion which cannot ground an offence no matter how strong... In the circumstances, I hold that the prosecution has not proved the case against the 1st accused beyond reasonable doubt and he is entitled to a discharge and acquittal"*

On the 2nd appellant, the learned trial Judge said at page 42 of the record:-

*"I hold therefore that the prosecution has shown that the 2nd accused was one of the persons who between the 6th and 9th of April, 1988, murdered one Akpan Ekpa at Nduo Eduo Village within this Judicial division. I find the 2nd accused Ime David Idiok guilty of murder as charged and I convict him accordingly."*

Dealing with the issue, the Court of Appeal said at page 179 of the record:-

*"Further, from the evidence adduced by the prosecution witnesses the case of the appellant is not interwoven and inseparable from that of the 1st accused. No one saw 1st accused tying up the deceased. No one saw the 1st accused in company of the appellant when he tied up the deceased. It is not in every case where the accused is tied jointly with another that the discharge of one would lead to the discharge of the other particularly so, when the evidence against one accused is different from that against the other. It depends on the evidence. The court below did not rely on the same evidence in discharging the 1<sup>st</sup> accused and in convicting the appellant. The evidence of P.W.4 stands and strictly against the appellant alone. Therefore, the evidence against the appellant and the 1st accused are not two parallel lines that cannot meet."*

I entirely agree with the Court of Appeal. I cannot put the situation better.

It is in the light of the above and the more detailed reasons given by my learned brother, Ogbuagu, JSC., in his judgment that I too dismiss the appeal.

**OGUNTADE JSC**

I have had the advantage of reading in draft a copy of the leading judgment of my learned brother, Ogbuagu. JSC, I am in agreement with him that this appeal has no merit. I would accordingly dismiss it and affirm the judgment of the court below.

**TABAI JSC**

I have a preview of the leading judgment of my learned brother, Ogbuagu, JSC., I agree entirely with his reasoning and conclusion. The P.W.4 was an eye witness and whose testimony the learned trial Judge accepted and relied upon. She asserted that she saw the 2nd accused person and even reprimanded him for doing so. This evidence, according to the learned trial Judge, was not challenged and he accepted it. The finding in that respect was the exclusive preserve of the trial court. It is not surprising therefore that the finding was endorsed by the Court below. And I have no reason to disturb the finding.

In the premise, I also dismiss the appeal for lack of substance.

**MUHAMMAD JSC**

I have had the advantage of reading before now the judgment just delivered by my learned brother, Ogbuagu, JSC. I am in agreement with his reasoning and conclusions. The appeal is unmeritorious. I G dismiss same and abide by all orders made by my learned brother, Ogbuagu, JSC.

H