

SUPREME COURT OF NIGERIA
6TH JUNE, 2008 SC. 204/2007
CORAM:- S. U. ONU, D. MUSDAPHER, G. A. OGUNTADE,
A. M. MUKHTAR, I. F. OGBUAGU, JJSC

JIMOH MICHAEL	APPELLANT
V.		
THE STATE	RESPONDENT

APPEALS - Scope - Points not appealed - Where there is an appeal on some points only of a decision appealed against - Other points not appealed against - Remain unchallenged and binding on Appellant (H1)

CRIMINAL LAW - Offences - Culpable homicide punishable with death - Ingredients - Prosecution must prove human death caused by intentional or reckless act of accused - Cause and intention being inferred from surrounding circumstances - As in this case (H2)

CRIMINAL LAW - Offences - Liability - Common intention - Where two or more persons form common intention - To do an unlawful act such as armed robbery as in this case - And in furtherance of the intention a person is killed - None of them can deny liability for the killing (H3)

FACTS

Before the Kogi State High Court Lokoja, Appellant and two others were jointly arraigned and tried for criminal conspiracy, culpable homicide, armed robbery and mischief by fire contrary to section 97(1), 221, 336 and 298(c) of the Penal Code. After trial, all the accused persons were convicted as charged and sentenced to various punishments for the respective offences charged. On the offence of culpable homicide, each accused person was sentenced to death. On the offence of mischief by fire, each accused was sentenced to 7 years imprisonment. It was in evidence that it was the first accused, one Benjamin Oyakhire, that fired the shot that killed the deceased and ignited the fire that burnt the bus and those that were in it. It was

also not in issue that the three accused persons were policemen of equal rank, who were working in concert on the fateful day as a mobile police unit.

While on duty, they had stopped and searched the ill-fated bus and its passengers and upon seeing that the passengers had substantial money in their possession, accused persons took them to a solitary place and robbed them. It was in the process of the robbery that the 1st accused fired at one of the passengers inside the bus. That shot both killed the passenger and ignited the fire that killed the rest of the passengers and destroyed the bus. Appellant appealed to the Court of Appeal against his conviction on only the offences of culpable homicide and mischief by fire. His contention is that he should not be held liable for the act of the 1st accused. His appeal was dismissed, hence this further appeal to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether the offence of culpable homicide punishable with death and setting the vehicle on fire as charged against the appellant were proved beyond reasonable doubt as affirmed by the Court of Appeal.”

HELD (Unanimously dismissing the appeal per **MUSDAPHER JSC**)
APPEALS - Scope - Points not appealed

1. The appeal by the appellant is confined to the affirmation of the conviction of the appellant by the Court of Appeal on the offences of culpable homicide and mischief by fire. The appellant did not appeal against his conviction on armed robbery and criminal conspiracy. It is the law that, where there is an appeal on some points only on a decision, the appeal stands or falls on those points appealed against only while the other points or decisions not appealed remain unchallenged. So, in instant case, the issue of criminal conspiracy and of armed robbery stand accepted as correct by the appellant and discussion on them does not arise. (p. 2569 H)

Culpable homicide punishable with death - Ingredients

2. In order to establish the offence of culpable homicide punishable with death, the law requires the prosecution to prove essentially the following (a) that the death of a human being has actually occurred,

(b) that such death was caused by the act of the accused's act or omission and was done with the intention of causing death or grievous bodily harm and (c) that the accused knew that, death would be a probable consequence of his act. It is also trite that a basic and essential element of the offence of culpable homicide required to be proved that the cause of death must be linked to the act or omission of the accused. Where the deceased died on the spot soon after an injury was inflicted by an accused person, the accused person will be guilty of causing the death.

It is also the law that, in a charge of culpable homicide, the nature of the weapon used, its weight and size are in the circumstances of the case essential in determining whether the conviction should be one of culpable homicide punishable with death or not.

In the instant case, all the three elements are present. (a) there was a common intention of the accused persons to commit unlawful act to wit robbery. (b) In furtherance of the offence of robbery a person was killed in circumstances amounting to culpable homicide punishable with death and (c) the deaths of the persons was a probable consequence of the prosecution of the robbery. It did not matter who shot Ajawu or set the bus ablaze. (pp. 2573 F/2576 A)

Offences - Liability - Common intention

3. Where two or more persons form a common intention to do an unlawful act, such as armed robbery and in furtherance of that unlawful act a person is killed, each of them is guilty of the killing under Section 79 of the Penal Code and none of them can claim that it was not his own act or attack that killed the deceased. In the case of *Alarape supra*, where common intention under Section 8 of the Criminal Code of Ogun State was interpreted, Iguh, JSC., delivering the leading judgment of the Supreme Court stated at page 102 thus:-

"xxxxxxxxx I need hardly point out that "common intention" in criminal law may be inferred from circumstances described in the evidence led before the court and need not be provable only by agreement of the accused persons. The test of liability under Section 8 of the Criminal Code Law of Ogun State, 1978, is not whether the other accused person counseled or procured the principal offences to use the lethal weapon that caused the death of the deceased but

whether it was a probable consequence of the prosecution of their joint unlawful act or intention.

So, where two or more persons set out to steal, as is the case in the present appeal, and one of them is known by the others to be armed with a lethal weapon, all of them will be held criminally responsible for any consequences which result from the use of the weapon by the one who carried it, even if there is no evidence to show that there was any express concerted agreement that he was to use it. (p. 2574 D)

NOTABLE POINT OF INTEREST
MUKHTAR JSC

1. Proof beyond reasonable doubt is not beyond all shadow of doubt
The prosecution has brought all the relevant materials to prove its case beyond reasonable doubt. Beyond reasonable doubt has in a plethora of authorities been interpreted to be not beyond all shadow of doubt. In the case of Basil Akalezi v. State (1993) 2 NWLR (Pt. 273) page 1, Ogwuegbu, JSC., described the concept of proof beyond reasonable doubt thus:-

“Proof beyond reasonable doubt is not attained by the number of witnesses fielded by the prosecution. It depends on the quality of the evidence tendered by the prosecution. In the case of Miller v. Minister of Pensions (1947) 2 ALL ER. 372, it was held that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt and if the evidence is strong against a man, as to leave only a remote probability in his favour, which can be dismissed with the sentence; “of course it is possible, but not in the least probable,” the case is proved beyond reasonable doubt.”

Indeed, in the instant case, I would say the evidence against the appellant and his co-accused were strong enough to establish their guilt beyond reasonable doubt, and to support their conviction. (p. 2581 A)

REPRESENTATION

Chukwuma-Machukwu Ume, (with him; A. M. Njaka, and U. J. Chukwu), for the Appellant.
J. A. Abrahams, Attorney-General, Kogi State, (with him; A. B. Akogu,

DPP MOJ, Kogi State), for the Respondent.

CASES REFERRED TO

Okaroh v. The State (1990) 1 S.C. 169; (1990) 1 NWLR (Pt. 128) 614

Igabelle v. State (2006) 2 S.C. (Pt. II) 61; (2004) 15 NWLR (Pt. 896) B 314

Nwosu v. The State (1986) 4 NWLR (Pt.35) 348

Amaike v. The State (2004) 6 NWLR (Pt.870) 541

Araruna v. The State (1990) 6 NWLR (Pt. 155) 127

Ibrahim v. The State (1991) 5 S.C. 171; (1991) 4 NWLR (Pt 186) C 399

Alarape v. The State (2001) 2 S.C. 114;(2001) 12 SCNJ 162

Nwankwoala v. The State (2006) 7 S.C. (Pt. III) 1;(2006) 14 NWLR(Pt. 1000) 663 D

Buba v. The State (1994) 7 - 8 SCNJ 472

Nwokedi v. The State (1977) 3 S.C. 35;(1977) 3 S.C. (Reprint) 20

Oyakhire v. The State (2006) 7 S.C. (Pt.II) 69; (2006) 15 NWLR (Pt. 1001) page 157 E

STATUTE REFERRED TO

Penal Code Law, ss. 97(1), 221, 298(c) and 336

LEAD JUDGMENT BY MUSDAPHER

In Charge No. HCL/6C/2001, before High Court, Kogi State F holden at Lokoja, the appellant herein as the second accused with two others were jointly tried on four heads of charge of criminal conspiracy, culpable homicide, armed robbery and mischief by fire contrary to Sections 97(1), 221, 336 and 298 (c) of the Penal Code G Law. The charges read as follows:-

1st Head of Charge

“That you Benjamin Oyakhire, Jimoh Michael and Gershon Soba on or about the 17th day of February, 2001, at Okene within the Kogi State Judicial Division committed culpable homicide punishable with death in that you caused the death of Mamodu Abdullahi Ajawu and the death of Rafiu, John Ogara, Thomas Ona and Alfa by doing an act to wit: you shot Mamodu Abdullahi Ajawu with a rifle H

and set Rafiu, John Ogara, Thomas Ona and Alfa ablaze with the intention of causing their death and you thereby committed an offence punishable under Section 221 read along with Section 79 of the Penal Code.”

2nd Head of Charge

- B *“That you Benjamin Oyakhire, Jimoh Michael and Gershon Soba on or about the 17th day of February, 2001, at Okene within the Kogi State Judicial Division while armed with your service rifles robbed Saka Jimoh, Abdullahi Ajawu, Suleiman Badumos, and other passengers in a vehicle registration No. Osun XB 104 SGB of the total sum of N400,000.00 and you thereby committed an offence punishable under Section 298 of the Penal Code.”*

3rd Head of Charge

- D *“That you Benjamin Oyakhire, Jimoh Michael and Gershon Soba on or about the 17th day of February, 2001, at Okene within the Kogi Judicial Division set a vehicle with the registration No. Osun XB 104 SGB on fire, intending to cause or knowing that the said vehicle will likely be destroyed or damaged and you thereby committed an offence punishable under Section 336 of the Penal Code.”*

- E 4th Head of Charge

- F *“That you Benjamin Oyakhire, Jimoh Michael and Gershon Soba on or about the 17th day of February, 2001, agreed to do an illegal act to wit: to commit armed robbery, culpable homicide and to set ablaze property of another person and you thereby committed an offence punishable under Section 97 of the Penal Code.”*

The appellant and the other two accused persons pleaded not guilty to the heads of charge. After the trial before Eri, CJ., the accused, including the appellant herein, were convicted as charged.

- G On the 1st head of charge, each accused was sentenced to death, on the second head of charge, each was sentenced to life imprisonment, on the 3rd head of charge, each of the accused was sentenced to 7 years imprisonment, on the 4th head of charge criminal conspiracy, each was sentenced to life imprisonment. All the sentences were ordered to run concurrently. Aggrieved with the decision, the appellant herein and the 3rd accused appealed to the Court of Appeal. On the 14/12/2006, the Court of Appeal dismissed the appeal of the appellant and affirmed the decision of the trial court. This is a further ap-

peal by the appellant to this court. The Notice of Appeal contains two grounds of appeal. One issue for the determination of the appeal was submitted by the learned counsel for the appellant. The issue reads:-

“Whether the offence of culpable homicide punishable with death and setting the vehicle on fire as charged against the appellant were proved beyond reasonable doubt as affirmed by the Court of Appeal.” B

Before the examination of the issue for the determination of the appeal, it is convenient to state briefly the facts. The facts are that, on the 17/2/2001, the appellant and the two other accused were serving Policemen in the PMF 37 Mobile Squadron of the Nigeria Police Lokoja, Kogi State. They stopped a commercial passenger vehicle registration No. OSUN XB 104 at Okene. The vehicle had earlier on took off from Oshogbo through to Akure to Okene and had 10 passengers including P.W.4 and P.W.5. The appellant and his partners arrested the vehicle, searched the passengers and saw that some of the passengers had a lot of money on them. The appellant and the other Policemen drove the vehicle on the Okene to Lokoja Federal Highway and stopped at a secluded spot where they robbed the passengers of their money at gun point. The total amount robbed was N400,000.00. In the process of the robbery one of the passengers, Mamodu Abdullahi Ajawu was shot dead by one of the Policemen. The vehicle was set ablaze and as a consequence the driver whose identity remained unknown, Rafiu, John Ogara, Thomas Ona Alfa and Sarafa Isiyaka, were burnt to death. P.W.4 and P.W.5 survived the ordeal by escaping. The only issue in controversy between the appellant and the other Policemen was who among them shot and killed the passenger who died of gun shot wounds and the other passengers who were burnt to death. Each accused including the appellant blamed one another. As mentioned above all the accused including the appellant were at the end of the trial found guilty as charged and sentenced. The appellant and one other unsuccessfully appealed to the Court of Appeal. H

The appeal by the appellant is confined to the affirmation of the conviction of the appellant by the Court of Appeal on the offences of culpable homicide and mischief by fire. The

appellant did not appeal against his conviction on armed robbery and criminal conspiracy. It is the law that, where there is an appeal on some points only on a decision, the appeal stands or falls on those points appealed against only while the other points or decisions not appealed remain unchallenged. So, in instant case, the issue of criminal conspiracy and of armed robbery stand accepted as correct by the appellant and discussion on them does not arise.

It is submitted for the appellant that the cause of death in the instant case cannot be attributed to the act of the appellant. The trial Judge found it was accused No. 1 who fired the gun that caused the death of the passenger and ignited the fire that caused the burning of the vehicle and the death of the other passengers inside the vehicle. The appellant also testified that it was accused No. 1 who fired the gun that caused the deaths and burnt the vehicle. It is submitted that since the appellant was not the one who fired the gun that caused the deaths and the mischief, the appellant could not be held responsible for them. It is argued that there must be evidence of intention between the act of the appellant and the resultant offences committed. Learned counsel referred to Okaroh v. The State (1990) 1 S.C. 169; (1990) 1 NWLR (Pt.128) 614. It is further stressed that the deaths of the victims are not unequivocally traceable to the act of appellant. Learned counsel referred to the cases of Okorogba v. State (1992) 2 NWLR (Pt.222) 224 at 253, see also Igabelle v. State (2006) 2 S.C. (Pt. II) 61; (2004) 15 NWLR (Pt.896) 314 at 336, Nwosu v. The State (1986) 4 NWLR (Pt.35) 348 at 359, Amaike v. The State (2004) 6 NWLR (Pt.870) 541 at 548, it is again argued that the appellant did not by his act cause the fire that caused the damages nor did the evidence manifest any intention on his part to do so.

On the issue of the conviction of armed robbery under Section 298 (c) of the Penal Code, it is submitted that the charge was framed against the appellant under Section 298 (b) and that the evidence of the weapon [i.e horse whip] used was not proper, learned counsel referred to the case of Araruna v. The State (1990) 6 NWLR (Pt. 155) 127. It is further argued that “horse whip” was not part of the charge nor is it a dangerous weapon; see Ibrahim v. The State

(1991) 5 S.C. 171; (1991) 4 NWLR (Pt.186) 399 at 417.

On the issue of common intention, it is submitted that the principle of common intention should not be too readily applied at all times. Learned counsel referred to the cases of Alarape v. The State (2001) 2 S.C. 114; (2001) 5 NWLR (Pt.705) 79 at 110, R. v. Offor & Offor (1955) 15 WACA 4, R. v. Mensa H & Anor. (1941) 7 WACA 212. R. v. Bade & Anor. (1944) 10 WACA 249. B

On the issue of common intention, the learned counsel submitted that there are five ingredients and all must be present vide Okeke v. State (1999) 2 NWLR (Pt 590) 246, Muonwem v. Queen (1963) 1 SCNLR 172, Akanni v. Queen (1959) SCNLR 183, Ajao v. Queen (1959) SCNLR 197, Alabi v. Queen (1959) SCNLR 269, Digbehin v. Queen (1963) 2 SCNLR 371. C

It is further submitted that where a co-accused went beyond what was tacitly agreed as the scope of the evil enterprise, the other accused should not be or held liable for the consequences of the extraneous acts. Learned counsel referred to Archbold Criminal Pleading Evidence and Practice 41st Edition P. 1423 and the case of R. v. Morrise (1966) 2 QB 100. D

The learned counsel for the respondent on the other hand submitted that, in a criminal trial the prosecution has the onus of proving its case against the accused person beyond reasonable doubt. Learned counsel referred to Section 138 of the Evidence Act and Woolmington v. DPP (1935) AC 462, Haruna v. COP (1985) NWLR (Pt. 557) 215, Onubogu v. The State (1998) 1 ACLR 141, Morka & Others v. The State (1988) ACLR 141, Nwankwo v. The State (1990) 2 NWLR (Pt.134) 627. E F

It is further submitted that to establish an offence of culpable homicide under Section 221 of the Penal Code, the prosecution must G establish beyond reasonable doubt that (a) the death of the deceased, (b) that the act or omission of the accused caused the death and (c) that the act or omission that caused the death was intentional or with knowledge that death or grievous bodily harm would be the probable consequence of the act or omission. Learned counsel referred H to the cases of Liguru v. The State (2002) 9 NWLR (Pt.771) 90, Gira v. The State (1996) 4 NWLR (Pt. 443) 375, Akpan v. The State (1994) 9 NWLR (Pt.338) 347.

It is submitted that the prosecution clearly established by credible evidence and beyond reasonable doubt all the necessary ingredients for the proof of culpable homicide against the appellant. The learned trial Judge found all the deceased died on the spot when the injury was inflicted. It is not necessary to prove the cause of death
 B where a person was attacked with a lethal weapon such as a gun and he died on the spot. See Bakuri v. The State (1965) NMLR 163 at 164. It is submitted that the deaths of all the deceased in the instant case were caused by gun shot and fire inflicted by the appellant and
 C his colleagues acting towards a common intention and a common end. It is again stressed that there is a clear nexus between the intention and the act of the appellant and his partners in crime and the deaths of all the six persons. That the learned trial Judge rightly found as a fact that the appellant and his partners in crime caused the deaths
 D of all the deceased persons and later shared the booty which they were able to cart away from the scene of the mayhem.

It is submitted that when the 1st accused fired the gun into the bus he did it in furtherance of the common intention already formed with the appellant and the 3rd accused as rightly found by the trial
 E Judge. See Alarape v. The State (supra) at 179 -184, Oyakhire v. The State (supra), Nwankwoala v. The State (2006) 7 S.C. (Pt. III) 1; (2006) 14 NWLR (Pt. 1000) 663. It is further submitted that the absence of the bodies is of no moment. See the cases of Dare Kada v. The State (1991) 11-12 S.C. 1; (1991) 8 NWLR (Pt. 208) 134 at
 F 137, Lori v. The State (1998) 1 ACLR 267.

It is again added that since the appellant and his colleagues had consented to the commission of crime which resulted in the death of the deceased persons, the appellant must be held liable for the
 G acts of each of his colleagues and partners in crime. See the cases of Solomon Ehot v. The State (1993) 5 SCNJ 65 at 77 -78, Buba v. The State (1994) 7 - 8 SCNJ 472.

On the offence of mischief by fire, it is common ground and that there is no dispute about it, that it was the gun shot that caused
 H the fire and accordingly the appellant even if he was not the one who fired the gun but by his partner in crime, he cannot escape liability for the act of his colleague as he had already a common intention with 1st accused to commit a crime. The appellant both in his evi-

dence and his statement to the Police admitted participating in the armed robbery and confessed to the sharing of the loot, he was therefore well aware of the charge and it was of no significance whether it was under Section 298 (b) or 298 (c) of the penal Code. There was no miscarriage of justice.

It is submitted further that there is no dispute that the appellant and his partners in crime were prosecuting an unlawful purpose of armed robbery in which process Mamodu Ajawu was shot and some passengers were burnt to death, in that case it did not matter whether the appellant himself fired the gun or not. He is deemed in law to have carried out the act himself. See Section 79 of the Penal Code Law and the cases of Akinkunmi v. The State (1987) 1 NWLR (Pt 52) 608, Alarape v. The State (supra), Adio v. The State (1986) 2 NWLR (Pt. 24) 581, Okor v. The State (supra), Oyakhire v. The State (supra) and Nwakwoala v. The State, (supra).

Now, the only issue formulated by the appellant is “*whether the offences of culpable homicide punishable with death and setting the vehicle on fire as charged against the appellant were proved beyond reasonable doubt as affirmed by the Court of Appeal.*” Thus, the complaints of the appellant against his conviction on conspiracy and armed robbery do not form part of the issue and I accordingly discountenance the arguments submitted by counsel on these matters. See Goubadia v. The State (2004) 2 S.C. (Pt.II) 1; (2004) 6 NWLR (Pt.869) 360. I will say no more about the complaints on the conviction for conspiracy and armed robbery.

In order to establish the offence of culpable homicide punishable with death, the law requires the prosecution to prove essentially the following (a) that the death of a human being has actually occurred, (b) that such death was caused by the act of the accused’s act or omission and was done with the intention of causing death or grievous bodily harm and (c) that the accused knew that, death would be a probable consequence of his act. It is also trite that a basic and essential element of the offence of culpable homicide required to be proved that the cause of death must be linked to the act or omission of the accused. See Dare Kada v. The State (1991) 11-12 S.C. 1; (1991) 8 NWLR (Pt.208) 134, Nwokedi v. The State

(1977) 3 S.C. 35; (1977) 3 S.C. (Reprint) 20. **Where the deceased died on the spot soon after an injury was inflicted by an accused person, the accused person will be guilty of causing the death.** See Adamu v. Kano N.A. (1956) SCNLR 65, Bakuri v. The State (1965) NMLR 163.

B **It is also the law that, in a charge of culpable homicide, the nature of the weapon used, its weight and size are in the circumstances of the case essential in determining whether the conviction should be one of culpable homicide punishable with death or not.** See Umaru v. Gwandu N. A. (1961) 1 All NLR
C 545 at 546.

The charge of culpable homicide as recited at the beginning of this judgment was contrary to Section 221 (a) read along with Section 79 of the Penal Code, see the case of Nyam v. The State (1964)
D ALL NLR 356. **Where two or more persons form a common intention to do an unlawful act, such as armed robbery and in furtherance of that unlawful act a person is killed, each of them is guilty of the killing under Section 79 of the Penal Code and none of them can claim that it was not his own act or attack**
E **that killed the deceased.** See Miri v. The State (1968) All NLR 55. See also Maijamaa v. The State (1964) 1 All NLR 212. **In the case of Alarape supra, where common intention under Section 8 of the Criminal Code of Ogun State was interpreted, Iguh, JSC., delivering the leading judgment of the Supreme Court stated**
F **at page 102 thus:-**

“xxxxxxxxx I need hardly point out that “common intention” in criminal law may be inferred from circumstances described in the evidence led before the court and need not be
G **provable only by agreement of the accused persons. See Ogu Ofor and Anor. v. The Queen (1955) 15 WACA 4 at 5. The test of liability under Section 8 of the Criminal Code Law of Ogun State, 1978, is not whether the other accused person counseled or procured the principal offenders to use the lethal**
H **weapon that caused the death of the deceased but whether it was a probable consequence of the prosecution of their joint unlawful act or intention.**

So, where two or more persons set out to steal, as is

the case in the present appeal, and one of them is known by the others to be armed with a lethal weapon, all of them will be held criminally responsible for any consequences which result from the use of the weapon by the one who carried it, even if there is no evidence to show that there was any express concerted agreement that he was to use it. See Jide Digbehin & 2 Ors. v. The Queen (1963) ALL NLR 392. ^B

See also *Gyang & Anor. v. The Queen (1954) 14 WACA 584*. The point that needs to be emphasized in these kind of cases is that once it is firmly established that two or more persons form the necessary common intention to prosecute an unlawful purpose an in furtherance of the execution of such an unlawful purpose and offence of such a nature that its commission was a probable consequence of the prosecution of such unlawful purpose is committed, each of them is deemed to have committed the offence. See *Atanyi v. Queen* ^C (1955) 15 WACA 34. ^D

In the present case, the learned trial Judge found as a fact see page 99 of the printed record thus:-

"In the main therefore, the three accused person who by agreement went out on a voyage to search for money decided to commit robbery and in the process of achieving their aim, they all committed plaintiff culpable homicide by causing the deaths of five human beings. Since there is overwhelming evidence and more particularly, Exhibit 2 that a gun was fired at Mamodu Abdullahi Ajawu, I believe and find as a fact that the probable consequence of firing a gun at a human being is the death of that human being. Secondly, I also believe and find as a fact that the probable consequence of firing a gun into a motor vehicle containing passengers and a jerry-can of petrol is undoubtedly a probable cause of the death of human beings in that vehicle including the destruction of that vehicle." ^E ^F ^G

The Court of Appeal affirmed these findings of fact. Applying the law therefore each of the accused including the appellant not only participated in the killing of the human beings but also in the destruction of the vehicle by mischief by fire. Needless to say that all the ingredients of the offences were proved beyond reasonable doubt. ^H

For the avoidance of doubt Section 79 of the Penal Code, provides:-

“When a criminal act is done by several persons in furtherance of a common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.”

In the instant case, all the three elements are present.

(a) there was a common intention of the accused persons to commit unlawful act to wit robbery. (b) In furtherance of the offence of robbery a person was killed in circumstances amounting to culpable homicide punishable with death and (c) the deaths of the persons was a probable consequence of the prosecution of the robbery. It did not matter who shot Ajawu or set the bus ablaze, see also Fulani v. Bornu N.A. (1966) All NLR 260 and Miri v. State (supra), Garba v. Hadejia N.A. (1961) NNLR 44. All what I have been saying is that the prosecution have proved their case against the appellant beyond any reasonable doubt, consequently, the single issue submitted by the appellant for the determination of the appeal is resolved against the appellant. The appeal fails and is dismissed by me. I affirm the decisions of the courts below.

E **ONU JSC**

Having been privileged to have a preview of the judgment of my learned brother, Dahiru Musdapher, JSC., just delivered, I am in agreement with him that the appeal fails and it is accordingly dismissed by me. I too affirm the decisions of the courts below.

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the leading judgment by my learned brother, Musdapher, JSC. I agree with his reasoning and conclusion. The solitary issue for determination in this appeal is:-

“Whether the offence of culpable homicide punishable with death and setting the vehicle on fire as charged against the appellant were proved beyond the reasonable doubt as affirmed by the Court of Appeal?”

The evidence was that the appellant, a Policeman and two other Policemen had stopped a commercial vehicle registration. No. OSUN

XB104 on 17/2/2001, while on Police check point duties. The Policemen discovered the vehicle had amongst the goods being conveyed a lot of money. They caused the vehicle to be driven to a lonely and secluded spot. They stole N400,000.00 and in the process, shot and killed one of the passengers and later set the vehicle ablaze killing in the process five persons. B

The central issue to be determined by the trial court was who of the Policemen had shot and killed one of the passenger in the vehicle, and who had started the fire that killed the five passengers in the vehicle? This was a case of a common intention on the part of all the Policemen who were involved in this despicable act. They had all formed a common intention to commit an unlawful act and each of them would be guilty of committing the act. See Garba v. Hadeja N.A (1961) NNLR 44. C

This appeal has no merit. I would also dismiss it. D

MUKHTAR JSC

I have read in advance the leading judgment read by my learned brother, Musdapher, JSC. The facts that led to this appeal are succinctly and comprehensively stated in the leading judgment. The appellant in this appeal was the accused No. 2 in the High Court of Justice of Kogi State, the trial court where he pleaded not guilty to the four counts charge, the most serious charge of which is:- E

“That you, Benjamin Oyakhire, Jimoh Michael, and Gershon Soba on or about the 17th of February, 2001, at Okene within the Kogi State Judicial Division committed culpable homicide punishable with death in that you caused the death of Mamodu Abdullahi Ajawu and the death of Rafiu, John Ogara, Thomas Onah and Alfa by doing to wit: you shot Mamodu Abdullahi Ajawu with a rifle and set Rafiu, John Ogara, Thomas Onah and Alfa ablaze with the intention of causing their death and you thereby committed an offence punishable under Section 221 read along with Section 79 of the Penal Code.” F G H

Evidence adduced were evaluated by the trial court, and at the end of the day the learned trial Chief Judge found the appellant guilty as follows, and convicted him accordingly:-

“..... Accordingly, I find accused 1, accused 2 and accused 3 guilty of the offence of culpable homicide punishable with death contrary to Section 221 (b) of the Penal Code, in that, on the 17/2/2001, their individual and collective acts which were probable consequences of death of human beings, caused the death of Mamodu Abdullahi Ajawu, one Rafiu, John Ogara, Thomas Onah and Sarafa Isiaka; and so shall it be that the three accused persons are guilty of the offence as charged under head 1.”

The appellant appealed to the Court of Appeal, Abuja Division, against the conviction, but the court dismissed the appeal, and affirmed the decision of the trial court. Aggrieved by the decision of the lower court, the appellant/2nd accused has again appealed to this court on two grounds of appeal, from which learned counsel for the appellant distilled a sole issue for determination of the appeal in their Brief of Argument, which reads as follows:-

“Were the offences of culpable homicide punishable with death and setting vehicle on fire as charged against the appellant (accused 2) proved beyond reasonable doubt as affirmed by the Honourable Court of Appeal.”

This sole issue was adopted by the respondent in its’ Brief of Argument. In canvassing this issue, the learned counsel for the appellant submitted that there is need for strictest proof of all ingredients of murder. He placed reliance on the cases of Igabele v. State (2006) 2 S.C. (Pt.II) 61; (2004) 15 NWLR (Pt.896) page 314, Nwosu v. The State (1986) 4 NWLR (Pt.35) page 348, and Amaiike v. State (2004) 6 NWLR (Pt.870) page 541. The pertinent question here, is what are the ingredients of culpable homicide. The prosecution in a charge of culpable homicide must establish the following beyond reasonable doubt:-

“(a) The death of the deceased;
(b) That the act or omission of the accused person caused the death of the deceased;
(c) That the said act or omission was intentional or with knowledge that death or grievous bodily harm would be the probable consequence of his act or omission.”

Section 220 of the Penal Code defines culpable homicide thus:-

“220. Whoever causes death -

(a) *by doing an act with the intention of causing death or such bodily injury as if likely to cause death;*

(b) *by doing an act with the knowledge that he is likely by such act to cause death: or*

(c) *by doing a rash or negligent act; commits the offence of culpable homicide.”* B

I will in the course of this contribution endeavour to set out whether the necessary materials to warrant the conviction of the appellant are in the record. The learned counsel for the respondent has in his Brief of Argument submitted that when accused No. (1) fired the gun into the bus, he did it with the common intention already formed with accused No. (2), (the appellant in this case) and accused No.3 as rightly founded by the trial court. He cited the cases of *Alarape v. The State* (2001) 2 S.C. 114; (2001) 12 SCNJ 162, *Oyakhire v. The State* (2006) 7 S.C. (Pt.II) 69; (2006) 15 NWLR (Pt.1001) page 157. Indeed there are various pieces of evidence in the Record of Proceedings that support the above contention, particularly the evidence of accused No. (1) to be found on page 58 of the Record of Proceedings, which I will reproduce hereunder. It reads:- D

“When we got to a Total Filling Station, Okene, I instructed the bus driver to turn towards the road on the left aside. I did not direct him again. Accused 2 took over and directed the bus driver. It became dark. We got to a place. I did not know it was a primary school. Accused 2 told me “this is the place.” We, the three accused persons came down from the bus. We ordered the passengers to come out of the vehicle “one by one”. We instructed them to lie face down on the ground which they all obeyed.” E
(Underlinings mine, for emphasis).

The above excerpt of evidence, though evidence of a co-accused clearly manifests their common intention to commit crime right from the inception of the action they took that led to crimes they were alleged to have committed. The fact that the evidence was that of a co-accused does not prevent it from being a credible and reliable evidence, once he was jointly tried with the other accused persons. H
See *Idahosa v. Queen* (1965) NMLR 85.

Then there is the evidence of the appellant on page 64 of the printed Record of Proceedings where he gave the following testi-

mony:-

“Accused 1 ordered me to enter the bus and sit by the side of the driver. He ordered accused 3 to sit by the side of the conductor of the bus As they were entering the bus, accused 1 dropped two bags from the booth of the bus in my presence. Accused 1 aimed at the passengers through the aid of the bus side minor, and started to fire them with his gun inside the vehicle.”

The above pieces of evidence show that they were all together when the crime was committed, knew exactly what was going on and each had parts they played, the fact that he kept hammering on the word ‘ordered’ i.e. that they were taking instructions, notwithstanding.

In the circumstance in this case there was definitely a common intention amongst the three of them, within the context of the provisions of Sections 79 and 80 of the Penal Code. I believe that the use of the word ‘order’ was merely to camouflage their own intention or action to mean that they did not act on their own volition, but under the influence or directive of accused 1. When one reads the supra evidence together with the evidence of accused 3 under cross-examination, it becomes clearer that the appellant was a willing and active alliance, for on page 70 of the printed record would be found this evidence:-

“The three of us, accused persons are of the same rank in the Police Force.”

Then one will ask, if that was the position, what informed the appellant’s action of taking orders from accused 1? Was it the fact that he was physically stronger than the other two of them i.e. himself and accused 3, or was it the fact that it was only accused 1 that had a gun in his possession? I think not, as the latter is not definitely true for I think he has been economical with the truth. This is notwithstanding the fact that the appellant said accused 1 was his senior. See page 64 of the printed Record of Proceedings. There is evidence however that, they are all of the same rank in the Police Force as is contained in their caution statements to the Police, Exhibits 1, 8, and 9, where they were all put down as Police constables (PC).

The above arguments relate and answer the questions on the other charges the appellant and his co-accused persons were con-

victed of. The prosecution has brought all the relevant materials to prove its case beyond reasonable doubt. Beyond reasonable doubt has in a plethora of authorities been interpreted to be not beyond all shadow of doubt. In the case of Basil Akalezi v. State (1993) 2 NWLR (Pt. 273) page 1, Ogwuegbu, JSC., described the concept of proof beyond reasonable doubt thus:- B

“Proof beyond reasonable doubt is not attained by the number of witnesses fielded by the prosecution. It depends on the quality of the evidence tendered by the prosecution. In the case of Miller v. Minister of Pensions (1947) 2 ALL ER. 372, it was held that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt and if the evidence is strong against a man, as to leave only a remote probability in his favour, which can be dismissed with the sentence; “of course it is possible, but not in the least probable,” the case is proved beyond reasonable doubt.” C D

Indeed, in the instant case, I would say the evidence against the appellant and his co-accused were strong enough to establish their guilt beyond reasonable doubt, and to support their conviction.

This is an appeal against concurrent findings of two lower courts, which this court will generally not interfere with or upset, unless the findings are perverse, not supported by evidence and have led to miscarriage of justice or any principle of law or procedure have not been complied with. See Enang v. Adu (1981) 11-12 S.C. (1981) 11- 12 S.C. (Reprint) 17; Igwe v. State (1982) 9 S.C. 174; (1982) 9 S.C. (Reprint) 87, and Osayeme v. State (1966) NMLR 388. E F

I agree with my learned brother, that this court will not interfere with the concurrent findings of the lower courts, as it has no reason to do so. In this respect, I find no merit in this appeal, and I also dismiss it. I affirm the judgment of the Court of Appeal, Abuja G Division.

OGBUAGU JSC

This is an appeal against the decision of the Court of Appeal, Abuja Division (hereinafter called “*the court below*”) delivered on 14th December, 2006, affirming the decision of the High Court of Kogi State, sitting at Lokoja delivered on 2nd April, 2001, convicting H

and sentencing the appellant and two other accused persons each to death on the 1st count, to life imprisonment on the 2nd count and to seven (7) years imprisonment on the 3rd count.

Dissatisfied with the said decision, the appellant, has appealed to this court on two grounds of appeal. In his Brief of Argument, one issue for determination and which the respondent adopted in its own Brief, has been formulated. It reads as follows:-

“Were the offences of culpable homicide punishable with death and setting vehicle on fire (sic) as charged against the appellant (accused 2) proved beyond reasonable doubt as affirmed by the Honourable Court of Appeal.” (there is no? mark)

When this appeal came up for hearing on 13th March, 2008, while Ume, Esqr., - learned counsel for the appellant, adopted the appellant’s Brief and urged the court to allow the appeal in respect of counts 1 and 3, Abrahams, Esqr., - learned counsel for the respondent, also adopted their Brief and urged the court, to dismiss the appeal as a deterrent to other Police Officers and affirm the decision of the court below.

The facts of the case leading to this appeal in brief or summary, are heart rending, blood chilling, shocking to the marrow, callous, wicked and barbaric to say the least. The appellant who was the 2nd accused, along with two other accused persons all of them serving Policemen, stopped the commercial vehicle and after searching all the passengers and seeing or knowing that two of the passengers, carried large sums of money, drove the vehicle aimlessly on the Okene-Lagos Federal High Way for some hours before driving it, to a secluded place or spot. After robbing the passengers of their money at gun point, one of the passengers -Mamodu Abdullahi Ajawu, was shot dead by one of them. They then, set ablaze the said vehicle and six of the passengers including the driver, were burnt to death. Only the P.W.4 and P.W.5, survived to tell the story of their ordeal in the hands of the appellant and his said two fellow participants in crime. They were arraigned before Eri, CJ., on a four count charge and after the trial, all the three accused persons including the appellant, were convicted and sentenced as a fore- stated.

From the overwhelming evidence as appears in the records, I do not have the slightest doubt that the said decision of the trial court

affirmed by the court below, cannot (even by magic so to say) be faulted by me or any reasonable person or by any court reading the abundant and credible evidence contained to the Record of Proceedings.

In fact, I have had the advantage of reading before now, the leading judgment of my learned brother, Musdapher, JSC., just delivered. I completely and without any reservations, agree with his reasoning and conclusion which I wholly adopt as mine. My answer to the lone issue of the parties is rendered by me also in the affirmative.

For the meaning of “*proof beyond reasonable doubt.*” See the cases of Hycinth Egba v. The King (1950) 13 WACA 105, Regina v. Herworth & Fearnley (1955) 3 NWLR 331 at 334 - per Lord Goddard, CJ., and Akalezi v. The State (1993) 2 NWLR (Pt.273) 1 at 13; (1993) 2 SCNJ. 19 at 29-30, just to mention but a few.

The learned trial Chief Judge in concluding his judgment at page 107 of the records, stated inter alia, as follows:-

“Be that as it may, I hereby state in the strongest term that the conduct of the three accused persons in this crime was in the circumstances barbaric and reminiscent of the stone age when civilization of any form appeared unknown. I see the three accused persons clearly as people who have no regard whatsoever for the sanctity of human life. From my careful observation of them throughout this “trial, their apparent sign of remorse is to me deceitful. Undoubtedly, the three accused persons are all unfit for decent Society, which we most cherish.”

So be it!

In conclusion, there *is* also the concurring findings of fact by the two lower courts and the attitude of this court, is not to interfere. I too, dismiss the appeal which is completely unmeritorious.