

SUPREME COURT OF NIGERIA
18TH DECEMBER, 2009. SC. 97/2008
CORAM:- G. A. OGUNTADE, M. MOHAMMED,
W. S. N. ONNOGHEN, C. M. CHUKWUMA-ENEH,
M. S. MUNTAKA-COOMASSIE, JJSC

MBANG EFOLI MBANG APPELLANT
V.
THE STATE RESPONDENT

EVIDENCE - Murder - Circumstantial evidence - Limits - The inference that the person last seen with the deceased is the murderer - Would be irrelevant - Where there is undisputed evidence as to how deceased died (H1)

MURDER - Liability - Common intention as basis - Requisites - It must be proved that there was common intention to prosecute unlawful purpose - In furtherance of which deceased was killed - As a probable consequence of that purpose (H2)

CRIMINAL PROCEDURE - Evidence - Confession of co-accused - Effect - A man's confession is only evidence against him - Not against his accomplices - Confession of 1st accused cannot therefore be used against appellant (H3)

FACTS

Appellant was the 2nd accused who was arraigned and tried alongside three others on a charge of murder, before the Ugep High Court of Cross River State. It was alleged that the accused persons murdered one Baba Okoi though the body of the deceased could not be found. The case of the prosecution against appellant was that he was the person who invited the deceased out of the deceased's house and that the deceased was not subsequently seen alive. Moreover, appellant had admitted that he was given a piece of human flesh and did eat it though he denied that it was the flesh of the deceased. Beyond this, none of the prosecution witnesses directly testified that appellant joined in killing the deceased.

However, the 1st accused confessed that he killed the deceased

and deposited his body in the river. Though 1st accused initially stated that some other persons were involved with him in the killing, he stated in a subsequent statement that he did the act alone. Nonetheless, it was in evidence that 1st accused and appellant belonged to the same warrior group which eats humans flesh. After hearing, the trial court convicted all four accused persons and sentenced them accordingly. Aggrieved, appellant appealed to Court of Appeal which dismissed his appeal. Hence he has come on a further and final appeal to Supreme Court.

ISSUE FOR DETERMINATION

"Whether the court of Appeal was right in holding that there was common intention between the appellant and other convicts to kill the deceased person in the light of the confessional statement of the 1st accused (co-convict) that he killed the deceased person without implicating the appellant however?"

HELD (Unanimously allowing the appeal per **OGUNTADE JSC**)
Murder - Circumstantial evidence - Limits

1. The inference that a person last seen alive with a person later found to have been murdered was the murderer could not be drawn in every case. It is an inference which may or may not be drawn depending on the ascertained evidence as to the manner the deceased met his death. Where there is undisputed evidence as to how the deceased met his death, the necessity to draw any inference that it was the person last seen with him alive who killed him would be irrelevant and unnecessary.

From the statements of the 1st accused it is Clear that the two courts below knew who killed the deceased and in what circumstances. The need to draw any inference as to who killed the deceased did not arise such inference is only drawn when the full facts are not known. (p. 2417 A/D)

MURDER - Liability - Common intention as basis

2. In *Ogbali & Anor V State* (1983) N.S.C.C. 156 at pp.157 to 158, this court considered the implication of Section 8 of the criminal code dealing with common intentions.

I may point out straightaway that to render two or more per-

sons liable for a murder by virtue of the provisions of the section, there must be evidence of the three elements that constitute the offence under the section. Firstly, there must be evidence showing that the accused persons had formed a common intention to prosecute an unlawful purpose together; secondly, that in furtherance of the execution of the unlawful purpose a person was killed in circumstances amounting to murder; and thirdly that the death of that person was a probable consequence of the prosecution of the unlawful purpose.

In this appeal, there was no evidence that the four appellants were engaged in a common purpose when the 1st accused killed the deceased Baba Okoi. Even if all of the accused relished the taste of human flesh there was no evidence that they had delegated the 1st accused to kill the deceased so that they could afterwards eat his flesh. (pp. 2417 F/H & 2419 A)

Evidence - Confession of co-accused - Effect

3. The 1st accused confessed that he alone killed the deceased. This statement true or false was never challenged. The appellant did not confess that he joined in the killing of the deceased. An accused making a confessional statement as to his participation in a crime is not confessing for his accomplices. A man's confession is only evidence against him and not against his accomplices and it is a misdirection which may lead to the quashing of the conviction to omit to warn a jury or assessor of this fact. (p. 2419 D)

REPRESENTATION

Nnamonso Ekanem Esq. (for the Appellant)

Mrs. Sylvia Shinaba (Dier Ugumanim Esq. and Anthony Okochu Esq. with her for the Respondent)

CASES REFERRED TO

Udesen V State (2007) 1-2 SC 27 at 39

Onah V State (1985) 3 NWLR (Pt.12) 236

Oladejo V The State (1987) 3 NWLR (Pt.61) 419

Edjekpa V Osia & 3 ors. (2007) 3 SC (Part 1) at 15

Ogundipe v The State (1994) 20 LRCN 303 at 306

Efe & Ors. V The State (1976) 10 NSCC 643 at 678

Emeka V State (2001) 14 NWLR (Pt.734) 666 at 683

Shodiya v. The State (1992) 3 NWLR (Part 230) 457 at 469

Mohammed V State (2007) 11 NWLR (pt. 1045) 303 at 320

Ogedengbe V Balogun (2007) 9 NWLR (Pt.1037) 380 at 397

Digbehin & 2 Ors. V. The Queen (1963) 1 All N.L.R. 388 at 392

B Yakubu Mohammed and Anor. V. The ‘ State (1980) 3-4 S.C.84 at pp. 96-97

STATUTE REFERRED TO

C Criminal Code, ss.8 and 319

LEAD JUDGMENT BY OGUNTADE JSC

This case revolves around a curious occurrence. A confession by the appellants that he and his co-accused ate human flesh. The D appellant and three others were arraigned before the High Court of Cross-River State sitting at Ugep for the offence of murder contrary to section 319 (1) of the criminal code. The appellant was the 2nd accused. It was alleged that the accused persons on 7/10/89 murdered one Baba Okoi at Nko Village of Cross-River State. Each of the E accused persons pleaded not guilty to the charge. At the conclusion of hearing, the trial Judge Obasse J. in his judgment found each of the four accused guilty of the offence and accordingly sentenced each to death.

F The appellant (who was the 2nd accused before the trial Court) was dissatisfied with the judgment of the trial court. He filed an appeal against the judgement before the court of Appeal at Calabar (hereinafter referred to as “*the court below.*” On 25/4/06, the court below in its judgment affirmed the judgment of the trial court. The G appellant has come on a final appeal before this court. In the appellant’s brief filed before us, only one solitary issue has been identified as arising for determination in the appeal. That issue is:

“*whether the court of Appeal was right in holding that there was common intention between the appellant and other convicts to H kill the deceased person in the light of the confessional statement of the 1st accused (co-convict) that he killed the deceased person without implicating the appellant however?*”

The respondent’s counsel framed the issue for determination thus:

“*whether the court of appeal was right in affirming the convic-*

tion of the appellant by trail High Court for the murder of Baba Okoi”

In approaching the issue for determination a perusal of the evidence of prosecution witnesses is helpful. The prosecution called six witnesses in support of its case. The appellant elected not to testify. None of the witnesses called by the prosecution directly testified that the appellant joined in the killing of the deceased. The case of the prosecution was built on two planks. First, that the appellant was the person who invited the deceased out of his house and that the deceased was not subsequently seen alive. The second was that the appellant stated that he ate human flesh. He added however that it was not the flesh of the deceased Baba Okoi.

P.W.2 testified for the prosecution and in a part of his evidence said. *“I know one Baba Okoi who is now dead. Before his death he was a soldier and he was serving in the Nigerian Army, Jos. On 7/10/89, the deceased came back from Jos to Nko. This was in the evening. At about 11.30pm, I saw one Mbang Efoli Mbang (i.e. the appellant) who called the deceased out. Mbang Efoli Mbang is the said accused person. Since I know the accused person as an Nko Man, I did not ask questions. Baba Okoi the deceased accompanied the said accused person out. I then went to bed.”*

P.W.6, inspector Edet Okon was the investigating Police officer. He testified that he obtained the statements of the 1st accused and the appellant. The statements of the 1st accused are eye-opening in the attempt to know how Baba Okoi was killed. In the first of his two voluntary statements exhibit B on page 136 of the record, the 1st accused said:

“On Saturday, 7/10/89, we been day at where we dance our koje dance (hunters dance) Before I set to the place, Baba Okoi who he soldier been dey there before. As I look at him there he been drink plenty wine. I know say he don drink plenty because the drink wey he drink been make him not steady. By that time he been wear Housa dress and also Housa cap. Na one Bassey Okon Etim hold him hand (the soldier) and carry him From where we de dance out that he want take him to him house as he don drink plenty. As Bassey Okon Etim carry Baba Okoi out from the dancing place. Eteng Ibor and his father Ibor Okuresin follow. Ibor Okeresin was with a matchet that night. When Bassey Okon Etim leave the dancing place with

Baba Okoi who was drunk Eteng Ibor and Ibor Okuresin followed. Omini Uhuru and I follow (them) and meet them in Eteng Ibor house. Before me and Omini Uhuru reach Eteng Ibor house. I meet the body of Baba Okoi with no head. Eteng Ibor called me to come and share the dead body of Baba Okoi to meat. Na there told them

B *that they don spoil everything. I did not share the meat because I saw the body without head on the ground to be that of Baba Okoi who was in the dancing place with us. I been hear the time they blow whistle in the dancing that time they blow whistle in the town announcing that Baba Okoi who came, home from where he is working was missing. I was afraid to talk that time about what Eteng Ibor,*

C *Ibor Okuresin and Bassey Okon Etim do with Baba Okoi that Saturday night of 7/10/89. Na Omini Uhuru came tell me say he been go back to Eteng Ibor house but they (Eteng Ibor) told him that they*

D *been carry the body of Baba Okoi to throw away at where there is sugar cane farm where water there near Jesam. I think Omini Uhuru will tell” you better when you bring him Me and Omini Uhuru follow the three men with Baba Okoi because of the way they leave dancing place. My own family been get land case in court with the family*

E *of Baba Okoi. It is not true that I kill Baba Okoi because of the land matter my family and his family get in court. Even the case in court was in our favour. How can I kill Baba Okoi because of land matter as Baba Okoi no get even groundnut farm in the village and he was*

F *not living in the village. It was Bassey Okon Etim, Eteng Ibor and Ibor Okuresin who kill Baba Okoi. At the place Baba Okoi body been lie down at Eteng Ibor house. I saw Ibor Okuresin his father with matchet”.*

In a subsequent statement by the first accused, exhibit 'C' he
G said:

“In addition to the statement I made to the Police at Calabar, on 7/10/89 when we finish from Kojo dance, I came back home and go to shit for public latrin where dey at Etombe. As I return from latrin and cigar hungray me to smoke and I go to find cigar to buy at

H *that time where be about midnight and everybody been long sleep and I see somebody wey sit for our market shed at Nko. The man wear one trouser and jumper. I go near the man and ask who are you the man no answer and use my hand and hit him on the neck arid head and carry him and hit on the ground and then I Carry*

stone and hit him on the head. When I see say the man don die, I turn him to see his face. Na then I know say the man be Baba Okoi. When I know say man be Baba Okoi, and my brother. I no know welting I go do. I carry him put for my shoulder through Ebonogbnoti farm road to Lokpoi (river) beach and through him inside the river. I no been out his head or any part of his body because it was like B accident to me. All this things been happen on Saturday night wey be 7/10/89. I no been return to the village from that night till Monday morning. 9/10/89. From that Night 7/10/89 to Monday 9/10/89 I been hide at the roofing mat grove near the village. When I hear C say all the people in my compound have been arrested by the Police, I come out of my people. All the things I been tell the police before no be true as the blood of the person I killed been dey worry me. No body follow me kill Baba Okoi. From the night I kill Baba Okoi till Monday 9/10/89 that I come report myself to the police I no been D eat anything, even the food my wife bring to me for police Station I no been fit eat. All the people I tell the police before that they follow kill Baba Okoi was not true. The people I mentioned before be Eteng Ibor Uket his father Ibor Uket alias Ibor Okuresin, Omini Uguru and Bassey Etime Okon that they follow kill Baba Okoi. None of them E know anything about the killing of Baba Okoi. I only mention them because the blood of Baba Okoi was worrying me. The time I throw the body into the river was when the river in the river was too big. I think say the water don carry the body away.” F

It is apparent that the statement of the 1st accused in exhibits 'B' & 'C' are inconsistent. In exhibit B, the 1st accused said he saw the headless body of the deceased which at first was to be butchered and shared out for eating. In exhibit 'C' however he stated that he killed Baba Okoi not knowing at the time who he was. He said he did G not know he was a man from Nko village. More important however is the declaration by the 1st accused that he acted alone in killing the deceased.

In his own statement, Exhibit 'E' at page 141 of the record, the appellant denied that he was privy to the killing of the deceased. H In exhibit 'E' the appellant said:

“On Saturday 7/10/89, I was in Nko my town. Also on that day, there was a burial ceremony for late Okon Moses who was killed during the war between Enyima and Onyedama early this year. As a

member Of Enyim Society, the mother invited us Enyim Society Members to be with her as the burial ceremony of our late Member was being performed. Enyim Society is made up Men who are ready to defend the entire Nko community whenever Nko is in war with other neighbouring villages, I know Baba Okoi, but I don't, know
 B where he stays. He is a friend to my brother Pieco Okon Ekpo. I used to see the photographs of Baba Okoi in my brother's house, I did not see Baba Okoi on Saturday 7/10/89 as recorded by the Nko Police and also the portion they wrote that I am a strong man in the community and that if nay killing of human being is done at Nko I would
 C be informed, is not also correct. The two portions are not my statements, but the rest are my statement. I have not know or heard anything about the death of Baba Okoi or take part in any way in his death. It was only, at the police station that I heard that Baba Okoi is
 D dead. As for the man killed in Onowa Enang Onen's house I was not present. He Onowa Enang Onen only gave me a piece of cooked human meat on Sunday morning 8/10/89 and I ate it because it was small. I did not take part in the killing of that man whose meat was not given to me nor knows how Onowa got the meat."

E I observed earlier in the judgment that the accused persons including the appellant elected not to testify in their own defence. The result is that the evidence against the appellant was no more than that he has called the deceased out of his house at 11.30pm on
 F 7/10/89 and the deceased was not subsequently seen alive. The appellant had also admitted eating human flesh. Now, how did the trial judge approach the evidence before him in the determination of appellant's culpability in the murder of Baba Okoi? In its judgment, at page 129 of the record, the trial court said.

G "There is also the evidence of PW.2 that the 2nd accused went and called out Baba Okoi at 10.30pm. That since then he had not seen the said Baba Okoi again. The PW. 2. said he knows the 2nd accused as an Nko man and so he did not ask questions. The 2nd accused did not deny going to call out the deceased at the time and
 H date as he rested his case on that of the prosecution. That (sic) law presumes him responsible for the missing or killing of Baba Okoi as he was the last person seen with Baba Okoi before his death. In the case of *Nwaeze v The State* (1996) 2 SCNJ page 42 it was held *inter-alia*:

where accused person is the person with whom the deceased was last with or seen with alive the implication of or necessary, inference to be drawn from the fact is that the accused murdered the deceased”.

It is true as stated by the defence Counsel that mere presence at the scene of crime is not conclusive that accused persons committed the offence. See *Garba Wakil & 1 Ors Vs State* (1985-86) BSNLR p. 188. But in the instant case the accused persons participated in the sharing of the human meat which the Prosecution state was that of Baba Okoi. Since there was no other report of any other person missing or killed at the time in Nko except Baba Okoi and since the accused persons rested their case on that of the Prosecution it is my opinion that they were not merely present but also participated in the killing of the deceased.

And at page 131, the trial court concluded its reasoning thus: *“The Prosecution’s case from the evidence before me is to the effect that Baba Okoi was murdered on 7/10/89 at Nko, that there was no other death reported on the said 7/10/89 or at the period, and that the person butchered and eaten by the accused persons was Baba Okoi. And since the accused persons were satisfied with the evidence of the Prosecution and did not wish to explain any fact or rebut any allegation against any of them and coupled with the analysis as per the evidence adduced against each of the accused persons, I am inclined to believe the version of the Prosecution’s case. That is that the accused persons jointly committed the offence as charged. Each of the accused persons is therefore found guilty for murdering Baba Okoi at Nko Village on 7/10/89 contrary to Section 319(1) of the Criminal Code.”*

It is apparent that the trial Court based the conviction of the Appellant on two pivots:

1. That he was the person who invited the deceased out of his house on 7/10/89 and thus was the person last seen with him.

2. That the appellant admitted eating human flesh on 8/10/89 and since the deceased was the only person declared missing in the village the accused persons could only have eaten the flesh of the deceased Baba Okoi.

The Court below would appear to have completely accepted the reasoning of the trial court as valid and sound. At pages 218 -

220 of the record of proceedings, the Court below per Ibiyeye J.C.A. said: -

“From the foregoing review of evidence, I agree with the submission of the learned counsel for the respondent that the appellant by his act of inviting Baba Okoi out of his (Baba Okoi) house at Nko at about 11.30 p.m. made the killing of the deceased possible by other convicts in this case. The appellant in these circumstances could not exonerate himself from the knowledge of how the deceased met his death. The law presumes him responsible for the missing and/or killing of Baba Okoi as he was the last person seen with the deceased before he was seen no more. See Nwaeze V The State (1996) 2 SCNJ where it was held that where an accused person is the person with whom the deceased was last with or seen with alive, the implication or necessary inference to be drawn from the fact is that the accused person murdered the deceased. In the instant case, there is unchallenged evidence that the appellant was last seen with Baba Okoi From - available evidence baba Okoi had been beheaded and the body was butchered into pieces and shared among certain persons including the appellant. The appellant even confessed in exhibit ‘E’ that he ate his own share of the human flesh of a person he did not know who he was. Although the appellant claimed not to know the identity of the human flesh that he ate on 8/10/89, evidence abounds that that was the flesh of Baba Okoi who he took but at 11.30p.m. on 7/10/89. The irresistible conclusion from the foregoing is that the appellant -was neck deep involved in the common intention of his cohorts to provide a person that would be killed and shared his flesh for consumption. This common intention was carried with Baba Okoi as the victim and his flesh was shared out among members of a society who operated under the name of hunters of human heads of which the appellant was a member. The appellant who would have extricated himself from the horrible Act by explaining his own side of the story failed to do so. He instead relied on the prosecution’s case. It is settled law that where an accused person elects not to give evidence in explanation of what actually happened, he must accept responsibility for his action as inferred from his conduct in the prevailing circumstances, See Nafiu Rabiu v The state (1990) 2 NWLR 50.”

And at pages 220 -221, the Court below concluded thus:

“It is true that the head of the human body butchered and shared for consumption by the appellant is not seen. Notwithstanding the absence of the head of the deceased it is now very well settled that even where the entire body of the victim of a heinous crime such as murder is not seen, the element of death is satisfied if the prosecution is able to establish positive and conclusive evidence that the person murdered was the victim. In the instant case, I also agree with the findings of the learned trial Judge that the appellant and the convicts carried out the murder of Baba Okoi and the absence of his head is not fatal to the case of the prosecution. See Princewell v The State (1994) 2 LRCN 303; Efe & Ors. V The State (1976) 10 NSCC 643 at 678; Edim v The State (1971) 7 NSC 269; Ogundipe v The State (1994) 20 LRCN 303 at 306. I agree with the findings of the learned trial judge that the evidence of the entire prosecution witnesses and exhibits showed unequivocally the nexus between the deceased person’s death and the heinous acts of the appellant and other convicts. The findings are in no way erroneous, perverse and not based on inadmissible evidence nor are they speculative. This Court can therefore not find any basis to interfere with them. See Buba v. The State (1994) 20 LRCN 367; Ogunozee v. The State (2000) 3 NSCQR 55. In other words the said findings that the deceased, Baba Okoi, had been murdered by the appellant among other persons, are unimpeachable and they are founded on legally admissible evidence. I also resolve issue 2 against the appellant.”

In his brief of argument, the appellant’s counsel has argued that the fact ‘that the appellant was given human flesh to eat would not alone make him an accomplice in the killing of the deceased. Counsel relied on Akpan v. State (1992) 7 SC MLR 65, Counsel further submitted that the principle of law stated in Nwaeze v. The State (1996) 2 NWLR (pt. 428) 1 as to a person last seen with the deceased before death would not apply in a case as this where the cause of death was made clear in the evidence before the court, Counsel relied on Shodiya v. The State (1992) 3 NWLR (Part 230) 457 at 469 and Ahmed V State (1999) 7 NWLR (part. 612) 641 at 672 and submitted that common intention in the commission of a crime was one of fact and not law. On common intention in crime counsel finally referred to R v. Bada (1994) 10 WACA 249; Akanni V R (1959) WLR 153; Akogwu V State (2000) 12 NWLR (part 681) 245;

Edjekpa V Osia & 3 ors. (2007) 3 SC (Part 1) at 15 and Udesen V State (2007) 1-2 SC 27 at 39.

In her brief, Mrs. Sylvia Shinaba for the respondent stated the ingredients which the prosecution needed to prove on a murder charge - Igabele V State (2006) 6 NWLR (Pt.975) 100 and Onah V State (1985) 3 NWLR (Pt.12) 236. Counsel discussed the nature of proof beyond reasonable doubt and circumstantial evidence-Mohammed V State (2007) 11 NWLR (pt. 1045) 303 at 320; Chime Ejiofor V The State (2001) 9 NWLR (Pt.718) 371 at 385 and Emeka V State (2001) 14 NWLR (Pt.734) 666 at 683. On the nature of the meaning of common intention, in a criminal case counsel relied on Idika V R (1959) 4 FSC. 106 at 106 - 107; Offor V R (1955) 4 WACA 4. Counsel, finally urged me not to disturb the findings of the fact made by the two courts below: Ogedengbe V Balogun (2007) 9 NWLR (Pt.1037) 380 at 397; Mohammed V State (Supra).

The extracts from the judgment of the trial court and the court below amply show the basis of the conviction of the appellant and the evidence relied upon by the two courts below. Remarkably it was the view of the Court below, that the appellant was the person last seen with the deceased before he was killed. Reliance was placed on Nwaeze V State (Supra). In the Nwaeze case this court per Adio J.S.C. said at page 16.

“Circumstantial evidence may ground a conviction where it is unequivocal, positive and points irresistibly to the guilt of the accused person. See Oladejo V The State (1987) 3 NWLR (Pt.61) 419. The position then is that Mr. A was last seen alive with or in company of Mr. B. And the next thing that happened was the discovery of the corpse of Mr. A. The inevitable inference is that Mr. A was killed by Mr. B. The onus will then be on Mr. B to offer explanation for the purpose of showing that he was not the one who killed Mr. A. In Igbo V The State (1978) 3 SC.87, the deceased was last seen alive with the appellant who gave her a ride in the back of his bicycle. The corpse of the deceased was later found that night. The conviction of the appellant was upheld by the court. The same conclusion was reached in Amusan V State (1987) 4 SC 199; (1986) 3 NWLR (pt.30) 536 in which on 10/1/78 the appellant went out with the deceased and from that day no one saw the deceased alive until the corpse was discovered on the 21/1/78. The inference that was drawn was that

the appellant killed the deceased. The foregoing is the legal implication of the appellant being the person with whom the deceased was last with or seen alive with."

The inference that a person last seen alive with a person later found to have been murdered was the murderer could not be drawn in very case. It is an inference which may or may not be drawn depending on the ascertained evidence as to the manner the deceased met his death. Where there is undisputed evidence as to how the deceased met his death, the necessity to draw any inference that it was the person last seen with him alive who killed him would be irrelevant and unnecessary.

In this appeal, the 1st accused made the statements exhibits B and C. In exhibit. 'C' reproduced above, the 1st accused admitted that he killed the deceased believing him to be another person. Indeed it was upon the said confessional statements that the two courts below relied to convict the appellant and the other accused persons. **From the statements of the 1st accused it is Clear that the two courts below knew who killed the deceased and in what circumstances. The need to draw any inference as to who killed the deceased did not arise such inference is only drawn when the full facts are not known.**

The two courts below also relied on common intention of the accused persons in the murder of the deceased. There was the evidence that the accused person ate human flesh. It is not known however whose flesh they ate. **In Ogbali & Anor V State (1983) N.S.C.C. 156 at pp.157 to 158, this court considered the implication of Section 8 of the criminal 'code dealing with common intentions.** Bello J.S.C. (as he then was) said:

"The only issue worthy of consideration on both appeals, in my view is the question as to whether the convictions can be sustained under section 8 of the Criminal Code which provides:

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another; and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

I may point out straightaway that to render two or more

persons liable for a murder by virtue of the provisions of the section, there must be evidence of the three elements that constitute the offence under the section. Firstly, there must be evidence showing that the accused persons had formed a common intention to prosecute an unlawful purpose together; B secondly, that in furtherance of the execution of the unlawful purpose a person was killed in circumstances amounting to murder; and thirdly that the death of that person was a probable consequence of the prosecution of the unlawful purpose.

C In the recent case of Yakubu Mohammed and Anor. V. The ‘ State (1980) 3-4 S.C.84 at pp. 96-97. I made these observations on section 8: “The provisions of the section have been considered in many cases. In Ofor and Another V. The Queen (1955) 15 W.A.C.A. 4 there was a dispute between the appellants on one side and the D deceased on the other side, The second appellant went and armed himself with a matchet and cut the deceased on his hand, while the first appellant took a stick and hit the deceased on the base of the head and the deceased died as a result of that hit. The West African Court of Appeal was of the view that on the evidence the intention of E each appellant was suddenly formed independently of each other and the second appellant was not liable for the murder of the deceased. The Court went on to observe:-

“Common intention may be inferred from circumstances dis- F closed in the evidence and need not be by express agreement but a presumption of a common intention should not be too readily applied. That proof of common intention is a condition precedent to conviction in this type of case is appreciated when it is remembered that if a combination of this kind is proved, a fatal blow though given G by one of the party, is deemed in the eye of the law to have been given by all those present and aiding. The person actually delivering the blow is no more than the hand by which the others all strike.”

H It has been held that where a number of persons join in an unlawful assault it is a question of fact in every case whether the death of the person assaulted is a probable consequence of that particular assault and, if a weapon is used by one of the persons, the test to be applied is whether his use of the weapon was a probable consequence of their joint purpose *Muonwem & 4 Others V. The Queen* (1963) 1 All N.L.R. 95 at 98 and *Digbehin & 2 Ors. V. The Queen*

(1963) 1 All N.L.R. 388 at 392.”

In this appeal, there was no evidence that the four appellants were engaged in a common purpose when the 1st accused killed the deceased Baba Okoi. Even if all of the accused relished the taste of human flesh there was no evidence that they had delegated the 1st accused to kill the deceased so that they could afterwards eat his flesh. There was evidence that the appellant and the other accused persons ate human flesh but it was not made clear whose flesh they ate. In the confessional statement of the 1st accused, he stated that he dumped the body of Baba Okoi in a river. This statement was never shown to be false. It seems to me that the prosecution could not eat its cake and still keep. Since the prosecution could not establish how Baba Okoi died by any other way other than the confessional statement of the 1st accused, its case stood to succeed or fail only upon the said confessional statement. **The 1st accused confessed that he alone killed the deceased. This statement true or false was never challenged. The appellant did not confess that he joined in the killing of the deceased. An accused making a confessional statement as to his participation in a crime is not confessing for his accomplices. A man's confession is only evidence against him and not against his accomplices and it is a misdirection which may lead to the quashing of the conviction to omit to warn a jury or assessor of this fact.** See R. V. Ajani & others (1936) 3 W.A.C. A. 3.

On the whole I am of the firm view that the two courts below were wrong to have convicted the appellant on the offence of murder. The conviction and sentence imposed on the appellant is set aside. The appellant is discharged and acquitted.

The revelation made before the trial Court during the hearing is unnerving. The accused persons, all from Cross-River State of Nigeria as at 1989 were freely eating human flesh as snacks. Cannibalism in Nigeria in 1989, this was a strange occurrence. It is directed that the proceedings and judgement in this case be sent to the Attorney-General of the Federation and Cross Rivers State to enable them take necessary steps to stop the continuation of this barbaric practice.

MOHAMMED JSC

This appeal is against the decision of the Court of Appeal, Calabar Division of 26th April 2006 affirming the conviction and sentence of death on the appellant for the offence of murder, having
 B cause the death of his friend Baba Okoi of the Nigerian Army. Although there is evidence that the appellant was seen with the deceased last alive, there is no evidence at all that the appellant took part in causing the death of the deceased.

C In this respect, I agree with my learned brother Oguntade JSC in his judgment that this appeal should be allowed. Accordingly the appeal is hereby allowed, the conviction and sentence of death of the appellant by the trial High Court and affirmed by the Court of Appeal is hereby set aside. In its place, there shall be entered a judgment
 D discharging and acquitting the appellant.

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal
 E Holden at Calabar in appeal NO. CA/C/83/2003 delivered on the 15th day of June, 2006 in which the court affirmed the decision of the High Court of Cross River State, Holden at Ugep Judicial, Division in which the court found the appellant, together with others
 F guilty of murder, convicted and sentenced them accordingly.

The appellant together with others, were charged to court for the murder of one Baba Okoi, a soldier on leave, at Nko Village on the 7th day of October, 1989. He was tried, found guilty as charged and sentenced to death. His appeal to the Court of Appeal was dismissed resulting in the instant further appeal. The facts of the case
 G have been stated in detail in the lead judgment of my learned brother *OGUNATADE, JSC* which I had the advantage of reading in draft. I therefore do not intend to reproduce them herein except as may be needed to emphasis the point being made.

H The facts of this case is however a sad commentary on our level of civilization with regard to the continued existence of the practice of cannibalism in modern day Nigeria. At first it may sound far fetched but as the truth of the situation sinks in one is left with his mouth agape. That is the reality of our situation despite the practice

of Christianity over the years.

However, cannibalism is not the subject of the charge but murder. The charge is not concerned with the purpose of the murder but the act and intension of committing murder.

The question is whether the prosecution did prove the charge against the appellant beyond reasonable doubt. The learned counsel for the appellant contends that they have not while that for the prosecution argues that they have. The lower courts, however, agreed with the prosecutor that appellant was one of those who murdered Baba Okoi on the date in question at Nko Village.

The main reason why the courts have so held appears to be that the appellant and the other accused persons belong to a society of warriors which practices cannibalism and that appellant was the last person to be seen with the deceased alive. It is on record that appellant went to where Baba Okoi was and invited him out but Baba Okoi was never seen again thereafter. There is also evidence on record that on the day in question appellant and other members of their society of cannibals butchered and shared the body of a dead man, which body, the prosecution alleged is that of Baba Okoi.

There is evidence on record that Baba Okoi was killed.

According to the statement of the 1st accused, OBETEN LEKO ESSIEN he was the only person who killed Baba Okoi and was emphatic that no one joined him in the killing. In his statement at page 138 of the record, he stated *inter alia*, as follows:-

“... As I return from latrin and cigar hungry me to smoke and I go to find cigar to buy at that time where be about midnight and everybody been long sleep and I see somebody wey sit for our market shed at Nko. The man wear one trouser and jumper. I go near the man and ask who are you the man no answer and use my hand and hit him on the neck and head and carry him and hit on the ground and then I carry stone and hit him on the head. When I see say the man don die, I turn him to see his face. Na then I know say the man be Baba Okoi. When I know say man be Baba Okoi, and my brother. I no know wetting I go do. I carry him put for my shoulder through Ebonoghnoti farm road to Lokpoi (River) beach and throw him inside the river. I no been cut his head or any part of his body because it was like accident to me..... Nobody follow me kill Baba Okoi.”

The above forms part of the evidence of the prosecution in proving the charge against the appellant. The appellant and other accused persons except, of course, the 1st accused, denied killing the deceased or participating in his killing. The clear evidence of the 1st accused person as to how Baba Okoi met his death and the person responsible for the killing makes the principle or doctrine of the last man to have seen the deceased alive and therefore circumstantially responsible for his death irrelevant and inapplicable to the facts of the instant case where there is graphic evidence of the actual killing and the person responsible for it. It is clear, therefore, that the lower courts were in error when they applied that principle to the facts of this case; it is like trying to fix a square peg into a round hole, which is impossible.

Another ground on which the courts relied in convicting and sentencing the appellant and in confirming that conviction and sentence respectively is the principle of common intention, which is also not supported by the evidence on record. Apart from the 1st accused who admitted killing the deceased, the other three co-accused persons, including the appellant, denied the charge; they denied killing the deceased nor participating in the killing. The final nail on the coffin of that principle was again driven-in by the statement of the 1st accused - Exhibit C - where he stated emphatically "... *Nobody follow me kill Baba Okoi*"

The above being the hard facts of the case, it is my view that the lower courts were in error in holding the appellant liable for the death of Baba Okoi and their judgment ought not to be allowed to stand.

As stated earlier in this judgment, it is unfortunate that in the present century acts of cannibalism usually associated with our barbaric past still rears its ugly head in some communities. However sordid or nauseating the facts of this case are, the point remains that appellant and his co-accused persons were not charged with an offence of cannibalism, which they admitted, but murder.

In conclusion, I have no hesitation whatsoever, in agreeing with the reasoning and conclusion of my learned brother *OGUNTADE, JSC*, in the lead judgment just delivered that the appeal has merit and should be allowed.

I therefore order accordingly.

The concurrent judgments of the lower courts are hereby set aside. The appellant is hereby discharged and acquitted of the charge against him.

CHUKWUMA-ENEH JSC

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I have had before now a preview, in draft of the judgment of my learned brother Oguntade JSC just delivered and I agree with his reasoning and conclusions. I also adopt same as mine and so I have nothing useful to add to it. I allow the appeal and abide by the orders contained therein.

MUNTAKA-COOMASSIE JSC

I have had a preview of the lead judgment just rendered by my learned Lord Oguntade JSC. I have perused the facts as recorded in the record of proceeding and beautifully stated in the lead judgment. The reasons and conclusions reached by my learned brother are well articulated. There is a lot of wisdom and common sense in those reasons which accord with the law on the subject.

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The offence of murder was the central issue throughout the courts of trial and the court below and not of cannibalism. According to the evidence before both lower court and trial court the 1st accused actually killed the deceased. The appellant was never alleged that he participated in the killing of the deceased. There may be accusation of eating human flesh against the appellant. It was never proved by evidence that the appellant actually partook in killing the deceased. From the record there is no iota of evidence to show that the appellant herein participated so to speak, in the killing of the deceased.

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That being the case and for the fact that the appellant was not found to join in murdering the deceased I shall, out of necessity, agree with the conclusion of my learned brother Oguntade JSC that the two courts below were wrong to have convicted the appellant on the offence of murder. I wish however to add, that the appellants counsel, Nnamonso Ekanem Esq., had done an honourable and well researched job in his brief leading us to discover the truth in this important Criminal matter. I allow the appeal and quash the conviction.

H

tion of the Appellant. The sentence imposed by the trial court and affirmed by the court below is hereby set aside. The Appellant is discharged and acquitted.

I share the concern and views of my learned brother Ogun-
tade JSC vis-a-vis the practice of cannibalism by some mis-guided
B citizens of this country.

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