

SUPREME COURT OF NIGERIA
7TH DECEMBER, 2012. SC. 242/2007
**CORAM:- M. MOHAMMED, M. S. MUNTAKA-
COOMASSIE, N. S. NGWUTA, C. B. OGUNBIYI,
S. S. ALAGOA, JJSC**

MR. HENRY CHUKWU APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL LAW & PROCEDURE - Self-defence - Conditions - Accused must establish that his own life was in danger - And that his action was intended to preserve his life (H1)

MURDER - Proof - Ingredients - Prosecution must prove that deceased died - And that the death was caused by act of accused - Which was intentional (H2)

CRIMINAL PROCEDURE - Manslaughter - Conviction - Since appellant's action was not intentional - He should be convicted for manslaughter (H3)

FACTS

The case for prosecution/respondent is that there was a scuffle between accused/appellant and the deceased. In the course of the said scuffle, appellant stabbed the deceased with a dagger whereupon the deceased was injured and subsequently died. Appellant was thus arraigned before the High Court of Imo State, Okigwe for murder contrary to section 319(1) of the Criminal Code Cap 30 Vol. 11 Laws of Eastern Nigeria 1963. At the trial, six witnesses testified for respondent. However, there was no eye witness who gave direct evidence as to what had happened between appellant and the deceased.

In his defence, appellant stated that what happened was not an intentional act, and that he did not murder the deceased. He therefore raised the defence of self-help. The trial court in its judgment however convicted appellant for murder and sentenced him to death

by hanging. Appellant was dissatisfied and thus appealed to the Court of Appeal Port-Harcourt Division. The court dismissed the appeal and affirmed the judgment of the trial court. Appellant was again dissatisfied. He has therefore filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

“(1) Whether the learned Justices of the court of Appeal were correct when they held that the circumstantial evidence proved the prosecution’s case beyond reasonable doubt.

(2) Whether the learned Justices of the Court of Appeal were correct where they held that the defence of accident did not avail the appellant.”

HELD (Unanimously allowing the appeal per
MUNTAKA-COOMASSIE JSC)

CRIMINAL LAW - Self-defence - Conditions

1. If truly the Appellant did not initiate what happened, he did not show he was in any danger whatsoever from the deceased when he “rushed” the former’s hand. For the defence of self-defence to be available to an accused person it has to be established by him that reasonable grounds existed for believing that his own life was in danger and to do what he did to preserve it. The belief of the accused person would be tested objectively and some factors for example the force used by accused person was same as that used by deceased. Part of the body hit in self preservation by accused, behaviour of the accused person immediately after incident, etc. The factors are not closed as each case would depend on its peculiarities.

(p. 3106 E)

MURDER - Proof - Ingredients

2. My lords, I have considered carefully and thoroughly too the submissions of the learned counsel to the parties, and I would hasten to state that in case of culpable homicide or murder, as popularly called, the following conditions, must be met for the prosecution to prove its case beyond reasonable doubt that is-

- i) that the deceased had died;**
 - ii) that the death of the deceased was caused by the accused; and**
 - iii) that the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence.**
- (p. 3110 D)

Manslaughter - Conviction

3. If the act of intention to murder the deceased is lacking or the mens rea, is death the correct sentence to be passed on the appellant? In my view the answer is in the negative. Having held that the appellant's action was not intentional, the lower court ought to have made a finding whether the appellant ought to have been convicted of murder or manslaughter. See *Garba v. The State* (1997) 3 SCNJ 68 at 78. In my view, and by reason of the evidence before the court, I hold that the appellant is guilty of manslaughter and not murder as held by the lower court under section 317 of the Criminal Code.

(p. 3112 B)

NOTABLE POINT OF INTEREST

OGUNBIYI JSC

1. Circumstantial evidence - Proof of

The law is well settled that for circumstantial evidence to sustain, the facts must be incompatible with the innocence of the accused and; also be incapable of any explanation upon any other reasonable hypothesis than that of his guilt. The evidence must in other words be so compelling that from the entire circumstance of the case, there can be no other but the accused/appellant who must have committed the offence. Proof of substantial evidence is in itself sufficient to secure the conviction and sentence of the accused. The circumstances of the death must point unequivocally to the acts of the appellant. Mere suspicion is therefore insufficient. The nature of a circumstantial evidence must also be indisputable, cogent, positive, irresistible and conclusively point to no other person but the accused as the culprit in the commission of the crime charged. (p. 3116 F)

REPRESENTATION

Mrs. MIA Essien SAN, for the Appellant with Olufunke Aboyade (Ms),
I. A. Anumege, Esq., E. E. Ochogboju, for the Appellant
Mr. S. C. Imo (State Counsel M. O. J. Imo State), for the Respondent

B

CASES REFERRED TO

Apugo v. State (2006) 16 NWLR (pt.1002) 22
Queen v. Abayomi (1963), All NLR 50
C Daniels v. State (1991) 8 NWLR (Pt.212) 732
Ehibogwu v. State (2001) 4 NWLR (Pt.703) 267
Uguru v. State (2002) 9 NWLR (Pt.771) 90 at 111
Thomas V. State (1994) 4 NWLR (pt.337) 129
Oghor v. State (1990) 3 NWLR (pt.139) 484
D Akinyemi V. State (1999) 6 NWLR (pt.607) 449
Akale Z. v. State (1993) 2 NWLR (pt.273) 130.
Folarin v. State (1995) 1 NWLR (Pt.571) 313
Gira v. State (1995) 4 NWLR (Pt.443) 375.
R. v. Faulkner (1877) 13 COX CC 550
E Ochiba v. The State (2011) 12 SCNJ 5 26
Olaiya v. State (2010) MJSC (Pt.1) 73

STATUTES REFERRED TO

F Criminal Code Cap 30 Vol. 11 Laws of Eastern Nigeria 1963, ss.317
and 319(1)
Evidence Act, s.138(1)

LEAD JUDGMENT BY MUNTAKA-COOMASSIEJSC

G This is an appeal against the judgment of the Court of Appeal
Port-Harcourt Division delivered on 20th June, 2007. The appeal
actually arose from the decision of the High Court of Justice of Imo
state, hereinafter called trial court. The accused person Henry Chukwu
was arraigned to the High Court of Imo State holden at Okigwe Ju-
H dicial Division for the offence of murder contrary to Section 319 (1)
of the Criminal Code Cap. 30 Vol. 11 Laws of Eastern Nigeria 1963
applicable to the Imo State of Nigeria. The charge reads thus:

*“You Henry Chukwu (m) on the 6th day of May, 2001 at Low
Cost Housing Estate Ubaha in the Okigwe Judicial Division did mur-*

der one Onibuike Uhio after stabbing him with dagger and thereby committed an offence punishable under Section 319 (1) of the Criminal Code Cap. 30 Vol. 11 Laws of Eastern Nigeria 1963 as applicable to Imo State”.

Six prosecution witnesses testified for the prosecution. The prosecution’s case in a nutshell was that there was a scuffle between the accused person and the deceased. In the course of the said scuffle, the accused stabbed the deceased with a dagger whereupon the deceased was injured and, subsequently died. Although the police searched the Appellant’s room no weapon was found. i.e. no dagger of any sort was discovered. In this case, there was no eye witness who gave direct evidence as to what had happened. The appellant in his evidence stated that what happened was not an intentional act, and that he did not murder the deceased. The trial court in its judgment however found the accused person guilty and convicted him for murder and sentenced him to death. The trial court on page 99 found thus:-

“The defence counsel submitted that the intention of the accused was to (sic) dispose the deceased of the dagger and not to kill him. He relied on Thomas v. The State (supra) at page 158. The accused was alone in the room with the deceased. The evidential burden on him was to explain how the deceased got stabbed with a dagger. The accused said he did not know how the deceased got the injury. He did not stab the deceased. The submission of counsel, with due deference, is not based on the evidence before the court.

For all I have said above, I hold that the prosecution has proved, by circumstantial evidence, the charge against the accused as required by law, I find him guilty as charged”(sic) per Egole J.

The appellant was dissatisfied with this judgment and has thus appealed to the Court of Appeal Port-Harcourt Division, hereinafter called the lower court. The lower court in the lead judgment delivered by Garba JCA unanimously found as follows:-

“It may be recalled that the appellant had stated in the course of his evidence that it was the deceased who pulled out a dagger from his trouser. By these pieces of evidence the appellant mean (sic) to say that since it was the appellant who pulled out a dagger from his trousers, it was he who initiated or started “what happened” that led to the injury he sustained. I would like to point out that these

pieces of evidence couldn't be considered in isolation of the other part of the appellant's evidence as well as the evidence of the other witnesses as highlighted in this judgment. The relevant part of the Appellant's evidence on the point is where he said inter alia. "Immediately I saw the dagger I rushed his hands and we started struggling over it until both of us landed on the bed. The next thing I saw was Chibuike Uhio (deceased) started moving outside. I followed him and he fell down. It was then I noticed that he was injured. I stopped a Cyclist and told him to drop me at Okigwe Police Station".

The salient points to be noted in the above evidence include:

i) That the evidence did not show that even if the deceased had pulled a dagger out of his trouser he did not attack or even attempt to attack the Appellant with it.

ii) That it was the Appellant who upon sight of the dagger "rushed" the hands of the deceased (whatever that may mean).

iii) That even though both them "landed on the bed" it was the deceased that rushed out of the bed and room injured.

iv) That though the Appellant noticed that the deceased was injured, he stopped a Cyclist and rode away without even a look at the deceased to find out the nature and extent of the injury.

If truly the Appellant did not initiate what happened, he did not show he was in any danger whatsoever from the deceased when he "rushed" the former's hand. For the defence of self-defence to be available to an accused person it has to be established by him that reasonable grounds existed for believing that his own life was in danger and to do what he did to preserve it. The belief of the accused person would be tested objectively and some factors for example the force used by accused person was same as that used by deceased. Part of the body hit in self preservation by accused, behaviour of the accused person immediately after incident, etc. The factors are not closed as each case would depend on its peculiarities. See *Laoye v. State* (1985) 2 NWLR (Pt.10) 832; *Ajunwa v. State* (1988) 4 NWLR (89) 380. Since the evidence of the Appellant did not show that he was attacked by the deceased and that his life was in real and not imagined danger at the material time, he cannot succeed on the defence of self-defence. The Appellant's evidence did not satisfy any of the cardinal conditions for the plea of self-

defence as set out in the case of *Kwaghshir v. The State* (1995) 3 NWLR (651) 669 cited by the learned trial judge in his judgment. The four (4) conditions set out by the Supreme Court in that case are:

“(i) The accused might be free from fault in bringing about the encounters; B

(ii) There must be present an impending peril to life or great bodily harm; either real or so apparent to create honest belief of an existing necessity.

(iii) There must be no safe or reasonable mode of escape by retreat; and C

(iv) There must be the necessity for taking life or causing grievous bodily harm.”

He continues – *“For the above reasons, the, learned trial Judge was on firm ground when he found that the defence of self-defence did not avail the Appellant in the circumstance of the case”.* D

The lower court thereafter dismissed the appeal and affirmed the judgment of the trial court. The appellant was again dissatisfied with this judgment and has appealed to this court. Both parties filed and exchanged their respective briefs of argument. E

The appellant in his brief of argument formulated two issues for determination as follows:

(1) whether the learned Justices of the court of Appeal were correct when they held that the circumstantial evidence proved the prosecution’s case beyond reasonable doubt. F

(2) Whether the learned Justices of the Court of Appeal were correct where they held that the defence of accident did not avail the appellant.”

The respondent also formulated two (2) issues for determination in its brief of argument thus:- G

“(i) Whether the learned Justices of the Court of Appeal were right when they held at the prosecution proved beyond reasonable doubt the charge of murder by circumstantial evidence under Section 316 of the Criminal Code against the appellant. H

(ii) Whether the learned Justices of the Court of Appeal were right in holding that the defence of accident did not avail the appellant”.

At the hearing of this appeal, the learned counsel to the ap-

pellant adopted his brief of argument and urged this court to allow the appeal. On his issue No.1, learned counsel submitted that the standard of circumstantial evidence required by law to prove the appellant's guilt was insufficient to sustain a conviction for murder. He further submitted that the appellant was the only eye witness as to what happened that the prosecution admitted that there was a scuffle and a fight in the course of which the deceased got stabbed from which the deceased was injured and subsequently died. Learned counsel referred to the appellant's evidence to the effect that the deceased came to his house, pulled off his shirt, wrist watch and shoes, and when he saw him pulling out a knife from his trousers he rushed his hands, both of them fell on the bed only to discover that the deceased was groaning in pains, he followed him outside where he fell down, and then further submitted that the appellant rushed the deceased's hand as he was allowed to do by law to defend himself, he cited in support the case of *Apugo v. State* (2006) 16 NWLR (pt.1002) 227 at 252. The evidence of the appellant was uncontroverted. Learned counsel then submitted that it was clear that the appellant was believed when he said there was a fight but the learned Justices and the trial judge did not believe him when he said that he did not stab the deceased but that while struggling for the dagger they both fell on the bed. It was his contention that the evidence is capable of two interpretations both in favour of the appellant and against him and where evidence is capable of two interpretations the one favourable to the appellant should be chosen, he cited the case of *Queen v. Abayomi* (1963), All NLR 50 and *Daniels v. State* (1991) 8 NWLR (Pt.212) 732.

Learned counsel further submitted that it was mere speculation for the Court of Appeal and the trial court to infer intention to kill or cause grievous bodily harm on the deceased. It was further contended that the lower court having accepted the evidence that he did not intend what happened, he ought not to have been convicted of murder. The learned counsel to the appellant then submitted that the prosecution did not discharge the burden placed on its shoulders under Section 138 (1) of the Evidence Act and the circumstances do not point unequivocally to the acts of the appellant, mere suspicion is insufficient. He relied on the following cases:

a. *Ehibogwu v. State* (2001) 4 NWLR (Pt.703) 267 at 275.

b. Uguru v. State (2002) 9 NWLR (Pt.771) 90 at 111.

On the issue No. 2, learned senior counsel submitted that from the record it was shown that the deceased was the aggressor. He referred to the evidence of the appellant and section 26 of the Criminal Code and contended that the death of the deceased occurred independently of the exercise of the appellant's will. The mens rea to sustain a murder conviction was therefore lacking, the case of Thomas V. State (1994) 4 NWLR (pt.337) 129 at 141 and Oghor v. State (1990) 3 NWLR (pt.139) 484 were cited. The respondent also adopted his brief of argument at hearing of this appeal and urged this court to dismiss the appeal.

On issue No. 1, learned counsel submitted that given the totality of circumstantial evidence before the court, the lower court was right in holding that the prosecution proved beyond reasonable doubt the charge of murder against the appellant, he relies on Section 138 (1) of the Evidence Act and the case of Akinyemi V. State (1999) 6 NWLR (pt.607) 449 at 468. He then contended that proof beyond reasonable doubt does not mean proof beyond all shadows of doubt. See Akale Z. v. State (1993) 2 NWLR (pt.273) 130. That the evidence of PW1, shows strong probability that the appellant stabbed the deceased on the chest with a dagger. The evidence of PW2, the medical Doctor, strengthened the prosecution's case. The evidence of PW1, PW2 and PW5 on the issue of stabbing remained uncontroverted and in fact consistent with the holding of the trial court. The evidence of PW1, PW2 and PW5 relate to what happened after the fight in the appellant's room since neither of them saw what transpired immediately before and in the course of the fight between the deceased and the appellant.

On the issue of mens rea, learned counsel contended that intention can properly be inferred from the facts, evidence and circumstances of a given case, since it was very rarely disclosed or made manifest by the accused person; he cited the case of Folarin v. State (1995) 1 NWLR (Pt.571) 313; Gira v. State (1995) 4 NWLR (Pt.443) 375.

On issue No. 2, learned counsel to the respondent submitted that the degree of accident is provided for in Section 24 of the Criminal Code. An event can be described as accidental if it is either unintended or unforeseeable. The law imputes to a person who willfully

commits a criminal act an intention to do the very thing which is punishable consequence of the act which constitutes the Corpus delict which acutely ensures. See *R. v. Faulkner* (1877) 13 COX CC 550 at 561. In the case at hand, the defence raised by the appellant in his evidence was to the effect that what happened was not an intentional act and not initiated by him. In other words the appellant in his evidence is that causing the injury on the deceased by the stab with a dagger was not intended or started by him. However the appellant did not offer explanations on how the deceased sustained the injury on the chest from which the reasonable inference that he did not intend the injury on the deceased can be inferred. Therefore the absence of these explanations from the appellant on how the deceased sustained the injury makes his defence weak, an after-thought and legally untenable.

My lords, I have considered carefully and thoroughly too the submissions of the learned counsel to the parties, and I would hasten to state that in case of culpable homicide or murder, as popularly called, the following conditions, must be met for the prosecution to prove its case beyond reasonable doubt that is-

i) that the deceased had died;

ii) that the death of the deceased was caused by the accused; and

iii) that the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence.

See *Ochiba v. The State* (2011) 12 SCNJ 5 26 at 537; *Olaiya v. State* (2010) MJSC (Pt.1) 73 at 88; and *Mbang v. The State* (2012) 6 SCNJ 395.

In the instant appeal there was no doubt that the deceased had died, and that the death of the deceased was caused by the appellant. This ingredients Nos.1 and 2 have been proved. However from the evidence on the record can the act that led to the death of the deceased be said to be intentional? PW7 in its evidence did not actually know what transpired between the appellant and the deceased. He only saw the deceased with wounds. PW2, a medical Doctor carried out autopsy on the deceased after his death, hence he did not witness how the deceased was injured. PW3 did not also

witness the scuffle between the appellant and the deceased and what actually led to the scuffle. PW4 and PW5's account of what they saw was the events that happened after the scuffle. The DW1 account of what actually transpired between him and deceased is as follows:-

"It was not up to ten minutes, that I entered my room the deceased came and I offered him a handshake he rejected it and asked me of his money. The next thing I saw was that he started pulling out his shirt, watch and shoes. Immediately a fight ensued between two of us. The deceased pulled out a dagger from his trousers. Immediately I saw the dagger I rushed his hands and we started struggling over it until both of us landed on the bed. The next thing I saw was Chibuike (deceased) started moving outside. I followed him and he fell down. It was then I noticed that he was injured. I stopped a cyclist and told him to drop me at Okigwe Police Station".

The appellant was not cross-examined on this evidence that gave the details of what happened. Thus the evidence remained unchallenged and uncontroverted and the court ought to have acted on it. See *Dennis Iviemagbor v. Henry Bazuaye* (1999) 6 SCNJ 235. From the evidence of the DW1 on record the following facts are not in dispute:

"i.) the appellant was in his house when the deceased came to meet him.

ii) On entry, the appellant offered him handshake which the deceased rejected.

iii) Instead, the deceased pulled off his shirt, watch and shoes and started fighting the appellant.

iv) In the process the deceased pulled out a dagger from his pocket which the appellant rushed his hands and both of them fell on the bed.

v.) It was in the process that the deceased was injured in the chest".

What remains unclear to me is - did the appellant collect the dagger from the deceased and stabbed him or did the deceased fall on the dagger when the two of them fell of the bed? There was no evidence on the record to explain these points. It is my position that the appellant took the correct action by trying to snatch the dagger from the deceased before the unfortunate event happened. The lower court on this point held thus:-

“From the evidence of the Appellant, he was at the material time twenty-three (23) years of age. He had said in his evidence that what happened was not an intentional act and not initiated by him. I am prepared to accept this evidence to mean and as proof that the appellant did not intend to cause the death or murder the deceased by what happened. However the nature of the injury, the part of the body it was inflicted on and the instrument or object used to inflict leave no doubt that grievous bodily harm was the only probable consequence and result of that act”.

If the act of intention to murder the deceased is lacking or the mens rea, is death the correct sentence to be passed on the appellant? In my view the answer is in the negative. Having held that the appellant’s action was not intentional, the lower court ought to have made a finding whether the appellant ought to have been convicted of murder or manslaughter. See Garba v. The State (1997) 3 SCNJ 68 at 78. **In my view, and by reason of the evidence before the court, I hold that the appellant is guilty of manslaughter and not murder as held by the lower court under section 317 of the Criminal Code.**

Finally, I hold that this appeal has merit. Same is allowed. The sentence of death by hanging passed on the appellant is hereby set aside and substituted with a conviction for the offence of manslaughter for which the appellant shall serve a term of imprisonment of fifteen (15) years. Imprisonment to commence from the 6th day of May, 2001, the date he was taken into custody.

MOHAMMED JSC

This appeal arose from the judgment of the High Court of Justice of Imo State convicting the Appellant of the offence of murder, Appellant was sentenced to death. The conviction of the Appellant together with the sentence were affirmed on appeal by the Court of Appeal Port-Harcourt Division in its judgment delivered on 20th June, 2007 which is now on appeal in this Court. The circumstantial evidence in support of the conviction of the Appellant truly pointed to no one else other than the Appellant as the person who caused the injury sustained in the course of a fight between him and the Appellant, in the Appellant’s room where the deceased went to col-

lect his own share of money realized from joint business from the Appellant. The Injury sustained by the deceased in the course of the fight, resulted in the death of the deceased.

However it is quite clear from the findings of the trial Court and the Court below on the circumstantial evidence that although evidence had clearly established that it was the Appellant that caused the death of the deceased, that evidence was deficient in showing that the act committed by the Appellant was carried out with clear intention of causing the death of the deceased. The findings of the Court below in this respect at pages 185 - 191 of the record of this appeal is quite instructive where the court said:-

“Similarly, the Appellant had stated that he and the deceased struggled with a dagger in the course of a fight between the two of them. That they fell on the bed from where the deceased then went out and slumped down with an injury. The only reasonable presumption and inference that arise from the sequence of events as narrated by the Appellant himself; the only eye witness, is that the deceased sustained the injury from the dagger over which they struggled, in the course of the fight. This inference is compelling and irresistible in the case because no other reasonable possibility exists that the injury was not sustained in the course of fight between the two combatants. Nowhere in the evidence of the Appellant did he suggest let alone state that the injury sustained by the deceased was self inflicted. Rather, the Appellant’s evidence as seen above, is that what happened was not an intentional act and not initiated by him.”

Although the appellant had claimed in his evidence in chief that he did not know how the deceased was injured and flatly denied stabbing the deceased, strong and irresistible circumstantial evidence pointed to no one else other than the Appellant as the person who inflicted the injury or stab wound found on the deceased and which by medical evidence, was cause of the death of the deceased. In a murder case like the one at hand, the prosecution has a duty to establish the cause of death with certainty and show that it was the act of the accused person that caused the death of the deceased. However, cause of death can be inferred from the circumstances of the case. For a Court to convict an accused person of murder the prosecution must prove that the accused person did something or omitted to do something he had a duty to do by law, and that the

said act or omission resulted in harm to the deceased:. See Adekunle v. State (1989) 5 N.W.L.R. (Pt.123) 505; Onyenanke v. State (1964) NWLR 34 and State v. Aibangbee (1988) 3 N.W.L.R. (pt. 84) 548.

In the present case where the act that resulted in the death of the deceased, the stab wound found on the deceased, was not inflicted by the Appellant with the intention of causing the death of the deceased, the evidence on record has to be closely examined to see if the offence of manslaughter had been disclosed against the Appellant. An accused person may be found guilty of manslaughter under Section 317 of the Criminal Code if it is proved that he intentionally did an act which was unlawful, and that that act inadvertently caused death. It is the duty of the prosecution to adduce sufficient evidence in proof of the offence of manslaughter. See Amayo v. State (2001) 18 N.W.L.R. (Pt.745) 251. In the present case where the Appellant had engaged the deceased in an unlawful act of fighting which resulted in the death of the deceased, I am of the view that sufficient evidence had been disclosed to convict the Appellant of the offence of manslaughter under Section 317 of the Criminal Code instead of the offence of murder for which he was convicted and sentenced to death.

It is for the foregoing reasons that I entirely agree with my learned brother Commassie JSC in his leading judgment that this appeal has merit. Accordingly I also allow the appeal, set aside the judgment of the Court below affirming conviction and sentence of the Appellant of the offence of murder and substitute therefore a conviction for the offence of manslaughter for which the Appellant shall serve the term of imprisonment of fifteen years commencing from 6th May, 2001, the date the Appellant was taken into custody.

NGWUTA JSC

I read in draft the lead judgment just delivered by my learned brother Muntaka-Coomassie, JSC and I agree with the reasoning and conclusions therein.

Other than the evidence of the appellant there was no eye witness account to what happened in the room wherein the appellant and the deceased had a scuffle. The only eye witness account of the incident is that given by the appellant in his defence, including his

extra-judicial statement to the Police. His evidence in chief and in cross examination runs from pages 48 to 52 of the record. The only material challenge to his testimony appears on page 52 where it was recorded:

“Put: You stabbed the deceased with a dagger which you brought from your pocket.” B

Ans: It is not true.”

Looking at the charge itself, could it be said that the deceased died of the stab wounds even if it could be proved that the appellant stabbed him? The charge is murder contrary to Section 319(1) of the Criminal Code Cap. 30 Vol.II Laws of Eastern Nigeria 1963 applicable to Imo State of Nigeria. The particulars read: C

“Henry Chukwu ‘M’ on the day of 6th May 2001 at Low Cow Housing Estate in the Okigwe Judicial Division did murder one Chibuike Uhio after stabbing him with dagger and thereby committed an offence punishable under s.319 (1) of the Criminal Code Cap.30 Vol. II Laws of Eastern Nigeria 1963 as applicable in Imo State.” D

If the appellant murdered the deceased after he had stabbed him it means that the appellant did something after the alleged stabbing to kill the deceased. No one gave evidence of what the appellant did to murder the deceased after stabbing him. The entire evidence upon which the trial court convicted, and sentenced, and the lower court affirmed the conviction and sentence of the appellant, for murder is at variance with the charge. Moreover at page 190 the record showed: E F

“I am prepared to accept this evidence to mean and as proof that the appellant did not intend to cause the death or murder of the deceased by ‘what happened’. His Lordship who wrote the lead judgment was referring to the testimony of the appellant that ‘what happened’ was not an intentional act and not initiated by me.” (See page 190 of the record). G

His Lordship could not have relied on the nature of the wound, the part of the body on which the wound was inflicted and the object used to inflict the wound to deny what he had accepted. In any case, the instrument or object which caused the wound or injury was not tendered and so His Lordship could not have seen it. It must be borne in mind always that the burden of proof of murder is on H

the prosecution, not on the accused even if the facts are matters within his knowledge. See *R. v. Adamu* (1944) 10 WACA 161. Based on the above and the fuller reasons in the lead judgment, I also allow the appeal and set aside the conviction of, and sentence of death passed on the appellant. I adopt the consequential order in the lead judgment.

OGUNBIYI JSC

The appeal at hand is against the judgment of the Court of Appeal sitting at Port Harcourt dated 20th June, 2007 wherein the appellant's appeal was dismissed and affirming his conviction for murder and sentence of death, by hanging. There was therefore a concurrent findings of both the lower court and the trial High Court. In the absence of an eye witness to the commission of the offence, the conviction of the appellant was squarely based on circumstantial evidence.

The main issue before us therefore is to determine whether the learned justices of the Court of Appeal were correct when they held that the circumstantial evidence proved the prosecution's case beyond reasonable doubt. The other ancillary issue is whether on the totality of the case, the defence of accident did avail the appellant. While the learned appellant's counsel was resolute in his submission that the proof of circumstantial evidence required by law was insufficient to sustain a conviction for murder, the respondent's learned counsel argued the contrary.

The law is well settled that for circumstantial evidence to sustain, the facts must be incompatible with the innocence of the accused and; also be incapable of any explanation upon any other reasonable hypothesis than that of his guilt. This was the principle propounded by this court in the case of *Orji v. State* 2008 10 NWLR (Pt.1094) p. 31 at 61. The evidence must in other words be so compelling that from the entire circumstance of the case, there can be no other but the accused/appellant who must have committed the offence. Proof of substantial evidence is in itself sufficient to secure the conviction and sentence of the accused. The circumstances of the death must point unequivocally to the acts of the appellant. Mere suspicion is therefore insufficient. see the case of *Obiakor v. State*

2002 10 NWLR (Pt.776) p.612 at 633. The nature of a circumstantial evidence must also be indisputable, cogent, positive, irresistible and conclusively point to no other person but the accused as the culprit in the commission of the crime charged. See also the case of Adekunle v. State (2006) 6 SC. 218.

It is on record that P.W.2 performed the post mortem examination on the deceased. There is also the revelation that the part of the body attacked was the stabbing of the chest with a dagger. It therefore needed no explanation to any reasonable person that a stab with a dagger in the chest would be grievous, very dangerous, also life threatening and could be a probable cause of death. The death of the deceased soon after sustaining the injury goes to supports this position. The part of the body attacked as well as the instrument used would certainly be the determinant factors revealing the intention of the accused/appellant.

With reference to Exhibit C the accused's statement, his story was centred around a struggle between himself and the accused. That it was the outcome therefore that resulted in the injury caused the deceased. The dagger in question was never recovered. The relevant and pertinent questions to pose therefore are, could the wound on the deceased have been self inflicted? And if it was, where was the weapon since the claim was that the deceased died almost immediately and near the scene. The accused also admitted that only himself and the deceased were in the room. It was only the accused/appellant therefore who was in a position to explain how the wound was inflicted on the deceased. This, for instance was part of the appellant's statement.

"To the best of any knowledge what happened was not an intentional act and was not initiated by me."

The poser question again is, what was it that happened and which the appellant claimed was not intentional?

Circumstantially, the allegation was very irresistible against the accused/appellant especially where the dagger he mentioned was not at the scene. P.W.5 testified that he was woken up from sleep and he saw deceased running out and did not answer. Thereafter he collapsed and died. The prosecution had therefore introduced positive and unequivocal circumstantial evidence beyond reasonable doubt against appellant. The appellant was to explain that he did not inflict

the injury.

However and despite the totality of that which transpired, the appellant in his evidence insisted that the incident that took place resulted from a scuffle and fight. He was not cross examined on this piece of evidence. If the appellant's story was true he had a right to defend himself against any attack from the adversary. There was also no independent eye witness to the encounter. The only explanation was that by the appellant. It must be taken as unchallenged and acted upon. The law allows such defence as a mitigating factor even in the face of the prosecution proving its case beyond reasonable doubt. As a consequence therefore, the benefit of the doubt will have to avail the appellant in this case. With this conclusion arrived thereat, I will seek to align myself with the lead judgment of my learned brother Muntaka-Coomassie JSC that the appeal has merit and is allowed in part. The sentence of death by hanging passed on the appellant is hereby set aside and I therefore substitute same with a verdict of conviction for the offence of manslaughter. I therefore also make an order that the appellant shall serve a term of fifteen (15) years imprisonment in like term as the lead judgment.

ALAGOA JSC

I read before now in draft the leading judgment of my learned brother Muntaka-Coomassie, JSC and I agree with the reason and conclusion reached. I however wish to chip in this little bit of mine by way of contribution. The Appellant Henry Chukwu was charged before the High Court Okigwe, Imo State of Nigeria with the murder of one Chibuike Uhio contrary to section 319(1) of the Criminal Code Cap. 30 Vol. II Laws of Eastern Nigeria 1963 applicable to Imo state. Evidence adduced is to the effect that on the fateful day the deceased had gone to the Appellant's house. Prior to the visit there had been no love lost between the Appellant and the deceased. A scuffle had ensued between the Appellant and the deceased which led to the deceased being stabbed in the stomach. Circumstances leading to the stabbing of the deceased were not very clear because there were no eye witnesses. The Appellant's version which were not easily verifiable was that the deceased had pulled out a dagger from his trousers in an apparent attempt to stab the Appellant and the Appel-

lant went for him and in a life and death struggle on the Appellant's bed the Appellant noticed that the deceased had been stabbed. In IGAGO v. THE STATE (1999) 14 NWLR (Part 637) 1; (1999) 10 - 12 S.C. 84, the Supreme Court per Karibi Whyte, JSC stated the conditions under which an accused person could be found guilty of murder thus,

"In a prosecution on a charge of murder under section 319(1) of the Criminal Code (whose provisions are similar to the instant case on appeal) the prosecution is required to prove beyond doubt -

i) that the deceased had died;

ii) that the death of the deceased resulted from the act of the Appellant;

iii) that the act of the Appellant was intentional with knowledge that death or grievous bodily harm was its probable consequence."

In the present case now on appeal the first two requirements would appear to have been satisfied by the prosecution. With respect to the second requirement, how else could the deceased have died if he was not stabbed by the Appellant? It is the third requirement that is somewhat dicey and difficult to prove beyond doubt. What was the intention of the Appellant? Did he act with the knowledge that death or grievous bodily harm would be the end result? This has not been proved by the prosecution beyond reasonable doubt. It should not also be forgotten that it was the deceased that had gone to the Appellant's house. In OMINI v. STATE (1999) 12 NWLR (PART 630) 168; (1999) 9 S.C.1, the Supreme Court held that an unlawful killing which does not constitute murder is in accordance with section 317 of the criminal Code, manslaughter. See also UDO v. QUEEN (1964) 1 ALL NLR 21.

It is for these reasons and the fuller reasons contained in the lead judgment of my brother Muntaka-Coomassie, JSC that I too allow the appeal and substitute a verdict of manslaughter. I abide by all other order/s contained in the lead judgment.