

**SUPREME COURT OF NIGERIA**  
FRIDAY, 6<sup>TH</sup> JULY, 2012. SC. 95/2010 (CONS.)  
**CORAM:- W. S. N. ONNOGHEN, I. T. MUHAMMAD,**  
**M. S. MUNTAKA-COOMASSIE, J. A. FABIYI,**  
**N. S. NGWUTA, JJSC.**

1. ABIGAIL NJOKU  
2. QUEENNETH NJOKU ..... APPELLANTS  
3. EMMANUEL NJOKU  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Proof - Burden of - Onus is on prosecution to establish the guilt of accused - Beyond reasonable doubt (H1)

MURDER - Ingredients - Proof - By s. 316 Criminal Code - Prosecution must prove intent to kill - Or do some grievous harm to the person killed - Or to some other person (H2)

MURDER - Actus reus - Test - It is presumed that a man intends the natural consequence of his acts - And the applicable test is objective one - As opposed to subjective test (H3)

EVIDENCE - Hearsay evidence - Since PW1 PW3 & PW4 were not eyewitnesses to the event - Their testimonies are hearsay - Which is inadmissible in law (H4)

MURDER - Doctrine of last seen - Application - The principle is invoked where there is no explanation - As to the cause of death of deceased last seen with accused (H5)

**FACTS**

1<sup>st</sup> appellant asked the deceased (i.e. her husband) for the school fees of their children (i.e. 2<sup>nd</sup> and 3<sup>rd</sup> appellants). The deceased turned down the request and an argument ensued which later became violent. 2<sup>nd</sup> and 3<sup>rd</sup> appellants seeing that the deceased was overpowering 1<sup>st</sup> appellant, decided to join forces with 1<sup>st</sup> appellant. Eventually, the deceased was overpowered and locked with a

dog chain in his room. The deceased was said to be violent and drunk. He was left locked up in his room over night. The next morning when appellants went to check the deceased, he was found dead. Appellants were thus arrested and charged before the High Court of Abia State, Osisioma for the murder of the deceased contrary to section 319(1) of the Criminal Code.

At the trial, prosecution/respondent called several witnesses including PW1, 3 and 4 who were not eyewitnesses to the event. At the end of trial, the court held that knowledge that death would result from the acts of appellants was not established by respondent. Hence, it convicted appellants of manslaughter and sentenced them accordingly. Being dissatisfied, respondent appealed to the Court of Appeal Port Harcourt Division. The court allowed the appeal and set aside judgment of trial court by convicting appellants of murder. They were thus sentenced to death. Aggrieved, appellants filed appeal to Supreme Court.

### **ISSUE FOR DETERMINATION**

Whether the prosecution proved that the appellants committed the offence of murder as charged and found by the lower court or manslaughter as found by the trial court.

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

*CRIMINAL PROCEDURE - Proof - Burden of*

**1. It is however settled law that it is the duty of the prosecution to establish or prove the charge/case against an accused person. In other words, it is the prosecution that bears the burden of proving the guilt of the accused person. For the court to come to the conclusion that the prosecution has discharged the burden placed on it by law, it must be satisfied that the conclusion is beyond reasonable doubt as it is settled law that any doubt existing in such a case must be resolved in favour of the accused person. In other words, the standard of proof in criminal trials is that of proof beyond reasonable doubt.**

(p. 4528 A)

*MURDER - Ingredients - Proof*

**2. What then are the things that the prosecution must prove beyond reasonable doubt to establish the offence of murder as charged? The basic ingredients or elements relevant to the facts of this case are contained in section 316(1) & (2) *supra*, to wit**

**(a) intent to kill or**

**(b) do some grievous harm to the person killed or to some other person.**

**It is in recognition of the above requirements that we usually say that for there to exist criminal responsibility the prosecution must not only prove that it was the act of the accused that resulted or caused the death of the deceased but that the resultant death was intended by the accused. The above constitutes the explanation for the doctrine of *actus reus* and *mens rea* in criminal prosecutions. (p. 4528 D)**

*MURDER - Actus reus - Test*

**3. I do not agree with the lower court that there was any evidence of intention by the appellants to kill the deceased or cause him any grievous harm. I agree with the statement of the law to the effect that the law presumes that a man intends the natural and probable consequences of his acts and that the test to be applied to the circumstances is the objective as opposed to subjective test of what a reasonable man in the street would contemplate as the probable result of his acts.**

**In the instant case, would a reasonable man contemplate that the tying of the deceased, a drunken and violent man with an iron dog chain to a protector in his room would result in his death? In other words, can intention to kill the deceased be inferred from the facts and circumstances of the case? I do not think so. (p. 4530 A)**

*Hearsay evidence*

**4. It is not in dispute that the deceased was not only drunk but very violent. It must be borne in mind that only the appellants were eye witnesses to what happened that day to the total exclusion of PW.1, PW.3 and PW.4. Whatever PW.1, PW.3 and**

**PW.4 said regarding the incident other than what they saw or observed cannot be an eye witness account. If what they told the court is based on what they were allegedly told by the appellants or any of them, it is clearly a hearsay evidence which is inadmissible in law and cannot therefore be relied upon to**  
**B convict the appellants for an offence of murder. (p. 4530 F)**

*MURDER - Doctrine of last seen - Application*

**5. Also the reliance on the principle of last seen by the lower court is not supported by the facts and applicable law. The principle is usually invoked where there is no explanation as to what happened to or caused the death of a deceased last seen in company of the accused except the accused explains to the satisfaction of the court what really happened or caused**  
**D the death of the said deceased. The principle does not apply to a case where the cause of death is known as in the instant case. It is not disputed that the acts of the appellants caused the death of the deceased but what is in contention is whether appellants intended by their admitted action, to kill the de-**  
**E ceased. The trial court found that there was no such intention and I agree with it having regards to the facts and circumstances of the case. (p. 4531 A)**

### **REPRESENTATION**

**F** N. D. Ojeh, Esq. - for the appellant in SC.95/2010  
 Wilcox Aberton, Esq. with E.S. Njoku, Esq., for the appellant in SC 95<sup>A</sup>/2010  
 Uche S. Awa, Esq. - for the Appellant in SC. 95<sup>B</sup>/2010  
**G** Kalu Umeh, Esq. A.-G Abia State with N. Akinola [Mrs.] A.D.C.L. and I.C. Onokwe (Mrs.) (C.S.C.), for the respondent in all the appeals

### **CASES REFERRED TO**

Uguru v. State (1964) 1 All NLR 21  
**H** Amayo v. State (2002) FWLR (Pt. 91) 1571  
 Garba v. The State (2000) 6 NWLR (Pt. 661) 378  
 D.P.P. v. Smith (1960) 3 All ER 161  
 Akinkunmi v. The State (1987) 3 SC 152  
 R. v. Ntah (1961) All NLR 500

COP v. Gomma (1965) NNLR 12

R. v. Nameri (1951) 20 NLR 6

Queen v. Eyo (1962) NSCC 331

Onoro v. (1961) 1 All NLR33 (1961) SCNLR 56

R. v. Steam (1947) 1 KB 997

Ogbuagu v. Police (1953) 20 NLR 139

B

### **STATUTE REFERRED TO**

Criminal Code Cap. 30 vol. 2 Laws of Eastern Nigeria 1963, ss. 8, 316(1)(2), 317, 319(1)

C

### **LEAD JUDGMENT BY ONNOGHEN JSC**

The three appeals giving rise to this judgment arose from the same judgment delivered by the Court of Appeal holden at Port Harcourt in Appeal No.CA/PH/260/2006 on the 23<sup>rd</sup> day of April 2009 in which the court set aside the judgment of the High Court of Abia State Holden at Osisioma in Charge No. HOS/7C/2003 delivered on the 28<sup>th</sup> day of July, 2004 in which the court convicted the appellants of the offence of manslaughter in a charge of murder and sentenced each of the said appellants to a term often year imprisonment with hard labour.

E

The appellants were arraigned before the trial court on a one count charge of murder of one Boniface Ibeabuchi Njoku on the 14<sup>th</sup> day of February, 2003 at No.37 World Bank Housing Estate, Abaiji, within the jurisdiction of the court contrary to the provisions of section 319(1) of the Criminal Code.

F

The facts of the case include the following: Appellant in SC/95/2010 was the first accused and 1<sup>st</sup> respondent at the trial court and Court of Appeal respectively and the wife of the deceased person, while the 2<sup>nd</sup> accused/respondent and 2<sup>nd</sup> appellant or appellant in SC/95<sup>B</sup>/2010 was the daughter of the appellant in SC795/2010 and the deceased. The appellant in SC/95<sup>B</sup>/2010 is the son of the appellant in SC/95/2010 and the deceased. The drama that led to the tragedy therefore involved members of the same immediate family.

H

The trouble started when appellant in SC/95/2010 asked her husband, the deceased for the school fees of the kids, the appellants in SC/95<sup>A</sup>/2010 and SC/95<sup>B</sup>/2010 on the 14<sup>th</sup> day of February, 2003 which request the deceased turned down on the ground of lack of

funds. The refusal to produce the money resulted in a quarrel between the couple which later degenerated to a serious fight in which the deceased had the upper hand. However, their children, the other two appellants seeing what their mother was going through joined their mother in overpowering the deceased who was then locked up in his room but he broke down the door and emerged armed with pestle etc., to continue the fight. He was eventually overpowered and restrained with a dog chain which they tied to the protectors in the room.

The deceased was said to have been very strong and violent and drunk. He was however left locked up in his room in the chain over night. By the following morning when the appellants went to check on the deceased, he was found dead, hence the charge of murder against the appellants.

The trial Judge held that knowledge that death or grievous harm would result from the act of the appellants in the circumstance of the case was not established by the prosecution and consequently convicted the appellant of the offence of manslaughter and sentenced them accordingly. The respondent, the State, was not satisfied with the judgment and consequently appealed to the lower court which set aside the judgment of the trial court and substituted thereto a verdict of guilty of murder and sentenced the appellants to death, hence this appeal.

The issues for determination, as identified by learned counsel for the appellants are as follows:

In SC/95/2010 N.D Ojeh, Esq. in the appellant brief filed on 19<sup>th</sup> April, 2010 identified a single issue for determination, to wit:

*“Whether based on the circumstances and documentary evidence before the court, the respondent did prove the charge of murder against the appellant to justify the upholding of the appeal by the court below.”*

*While Wilcox Abereton, Esq. of counsel for appellant in SC/95<sup>A</sup>/2010 identified the following two issues for determination:*

1. *Was the Court of Appeal not wrong to convict the 2<sup>nd</sup> appellant for murder when the evidence on record negated any intention to kill or cause grievous bodily harm under section 316(I) and (2) (sic) of the Criminal Code? (Ground 3).*

2. *From all the facts and circumstances of this case, was the*

*Court of Appeal right to substitute a verdict of guilty of murder against the 2<sup>nd</sup> appellant when the prosecution did not prove the essential elements of murder beyond reasonable doubt (Grounds 2, 4 and 5)”*

Finally, Uche S. Awa, Esq. of counsel for the appellant in SC/ 95 B/2010 formulated the same issue as counsel for appellant in SC/ B 95/2010.

On his part, learned counsel for the respondent in the appeals, Chief Umeh Kalu, Hon. Attorney-General of Abia State, formulated a single issue for the determination of the appeals. The issue C is as follows:

*“Whether from the facts and circumstances of this case, the Court of Appeal was not right in substituting the earlier conviction of manslaughter handed down by the learned trial Judge with a conviction of murder contrary to section 319(1) of the Criminal Code.” D*

In arguing the appeal, it is the submission of learned counsel for the appellants that in a charge of murder, it is not enough for the prosecution to prove that death resulted from the act of accused person(s) but must go further to prove that there was the intention E by the accused to kill or do grievous bodily harm or that the act was likely to endanger human life before the offence of murder can be said to have been established, relying on *Uguru v. State* (1964) 1 All NLR 21 and *Amayo v. State* (2002) FWLR (Pt. 91) 1571, (2001)18 NWLR (Pt. 745) 430 that the evidence on record does not disclose F any intention to kill or cause grievous harm to the deceased; that the act of tying the deceased with a dog chain was not an act likely to endanger human life.

It is the further submission of counsel that the evidence of PW. 1, PW.3 and PW4 were based on what they alleged DW1 told G them, which were denied by DW1 both in his statement to the police and evidence in court; that there was no direct evidence of intention by appellants to kill the deceased.

It is the further submission of counsel for appellants that the H evidence of the eye witness to the offence, the appellants, does not disclose the offence of murder, that the narration of the events of that day by appellants was not challenged by the prosecution; that there was no evidence of delivery of any blow on the deceased neither was any weapon produced which might have caused the death;

that the evidence of PW.2, the medical doctor who performed the post mortem examination on the body of the deceased indicated that the injuries on the deceased could have been caused by blows from a heavy blunt object which could also have been caused by falling on a hard object; that it is an open secret that the deceased  
B was very drunk on the day of incident and since there is no evidence of any blow by blunt object on the deceased, the alternative cause is very plausible; that the lower court was in error in not ruling out the possibility of the deceased falling on a hard object in his drunken  
C state. It is also the submission of counsel that the lower court erred in relying on the principle of last seen to convict appellants of murder when appellants-pave satisfactory explanation as to what happened to the deceased on the day in question.

Finally, counsel urged the court to allow the appeals, set aside  
D the judgment of the lower court and restore that of the trial court.

On his part, learned Attorney-General for Abia State, Chief Umeh Kalu submitted that the acts of the appellants in tying the death of the deceased; that a man intends the natural and probable consequences of an action and that the test of the probable consequences  
E of the action is objective, not subjective in that it is what the reasonable man on the street contemplates as the probable result of his act, relying on *Garba v. The State* (2000) 6 NWLR (Pt. 661) 378; that the appellants confessed to the crime while the circumstances point  
F irresistibly to the guilt of the appellants as applicants were the persons who last saw the deceased alive and have the duty to explain how the deceased met his death; that appellants had a common intention to prosecute an unlawful purpose, to wit: to cause the death of the deceased or at least do some grievous bodily harm to him and urged  
G the court to dismiss the appeals and affirm the decision of the lower court.

Learned counsel for 2<sup>nd</sup> appellant filed a reply brief on 27<sup>th</sup> April, 2012 in which he objects, rightly in my view, to the submission of learned counsel for respondent as it relates to the argument under  
H the provisions of section 8 of the Criminal Code, as the same was being raised for the first time in this court and without leave. However, learned counsel went further in the alternative to argue that the said section of the Criminal Code does not apply having regards to the facts of this case. He still urged the court to allow the appeal.



Appellants were charged with the offence of murder contrary to section 319(1) of the Criminal Code, which provides as follows: *“319(1) Subject to the provisions of this section any person who commits the offence of murder shall be sentenced to death”*.

It is very clear that the above provision concerns itself with the sentence to be imposed on any person tried and convicted of the offence of murder, it does not tell us of what constitutes the offence of murder, or the ingredients that the prosecution must establish to prove the offence of murder or the constituents of the offence of murder.

For the definition of the offence of murder, we have to turn to section 316 of the Criminal Code which enacts as follows:

*“Except as herein after set forth, a person who unlawfully kills another under any of the following circumstances, that is to say:*

*(1) If the offender intends to cause the death of the person killed or that of some other person.*

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

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

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

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

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

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

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

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

Apart from murder, the other offence relevant to the facts of

this case as found by the trial court is manslaughter which is defined in section 317 of the said Criminal Code, as follows:

*“A person who unlawfully kills another in such circumstances as not to constitute murder is guilty of manslaughter.”*

**It is however settled law that it is the duty of the prosecution to establish or prove the charge/case against an accused person. In other words, it is the prosecution that bears the burden of proving the guilt of the accused person. For the court to come to the conclusion that the prosecution has discharged the burden placed on it by law, it must be satisfied that the conclusion is beyond reasonable doubt as it is settled law that any doubt existing in such a case must be resolved in favour of the accused person. In other words, the standard of proof in criminal trials is that of proof beyond reasonable doubt.**

**What then are the things that the prosecution must prove beyond reasonable doubt to establish the offence of murder as charged? The basic ingredients or elements relevant to the facts of this case are contained in section 316(1) & (2) *supra*, to wit**

**(a) intent to kill or**

**(b) do some grievous harm to the person killed or to some other person.**

**It is in recognition of the above requirements that we usually say that for there to exist a criminal responsibility the prosecution must not only prove that it was the act of the accused that resulted or caused the death of the deceased but that the resultant death was intended by the accused. The above constitutes the explanation for the doctrine of *actus reus* and *mens rea* in criminal prosecutions**

The simple issue calling for determination in the instant case is whether the prosecution proved that the appellants committed the offence of murder as charged and found by the lower court or manslaughter as found by the trial court.

There is no doubt that appellants chained the deceased with a dog chain to a protector in his room to prevent him from continuing with the fight against appellant in SC/95/2012. The relevant question is whether that act of the appellants includes an intention to kill

or cause the death of the deceased or could any reasonable man have foreseen that death would result from the act of the appellants?

The trial court found to the negative while the lower court found to the positive. The issue is which of the lower courts is correct having regards to the facts of the case.

At page 91 of the record, the trial Judge held as follows:

*"The evidence of PW1, PW3 and PW4 on what the 1<sup>st</sup> accused told them is denied. Proof of the truth of such denied evidence rested on the prosecution which failed to reach the requisite standard of proof required of it. The account of how the death of the deceased occurred left this court entirely out of those elements of knowledge of the consequences of the acts of the accused which might justify a verdict of murder but a verdict of manslaughter on the grounds of unlawful act."*

The reaction of the lower court to the above finding is as contained at page 171 as follows:

*"Undoubtedly, the above quoted passage represents a complete misdirection in law and miscomprehension of the evidence of the prosecution, most especially that of PW. 1, PW.3 and PW.4. I have no iota of doubt that the failure to tender the chain used by the three appellants in chaining the deceased, during the trial is rather inconsequential. The prosecution has established vide the evidence of PW.2 (the medical doctor) that the deceased died from multiple injuries inflicted on his head with a heavy blunt object and there was also proved a ruptured spleen and fracture of both wrists; that all these injuries could not in any way be regarded as self inflicted in the opinion of the PW.2. Thus it would be rather preposterous and highly misconceived, to say the least to assume that the injuries that led to the death of the deceased were self inflicted."*

*It is indeed trite principle that the law presumes that a man intends the natural and probable consequences of his acts. An that the test, to be applied in these circumstances, is the objective test; that is to say, the trite test of what a reasonable man in the street would contemplate as the probable result of his acts. See Garba v. State (2000) 6 NWLR (Pt. 661) 378 at 388 - 389, paragraphs H-B, per Katsina-Alu, JSC; DPP v. Smith (1960) 3 All ER 161; Akinkunmi & Ors v. State (1987) 3 SC 152, (1987) 1 NWLR (Pt. 52) 608 case.*

*In the instant case, it is so obvious that in view of the circum-*

*stances surrounding the evidence adduced on hold vides (sic) as a whole, the finding of the learned trial Judge that the prosecution had failed to prove intention to kill the deceased has amounted to a complete perversion of the evidence adduced at the trial ...”*

**I do not agree with the lower court that there was any evidence of intention by the appellants to kill the deceased or cause him any grievous harm. I agree with the statement of the law to the effect that the law presumes that a man intends the natural and probable consequences of his acts and that the test to be applied to the circumstances is the objective as opposed to subjective test of what a reasonable man in the street would contemplate as the probable result of his acts.**

**In the instant case, would a reasonable man contemplate that the tying of the deceased, a drunken and violent man with an iron dog chain to a protector in his room would result in his death? In other words, can intention to kill the deceased be inferred from the facts and circumstances of the case? I do not think so.**

To support its conclusion that the death of the deceased was intended by the appellants, the lower court relied on the testimony of PW.2 the medical doctor to the effect that the deceased died of multiple injuries inflicted on his head with a heavy blunt object etc but unfortunately there is no record of any heavy blunt object being in evidence before the court neither is there any satisfactory evidence of the use of any such object on the deceased by the appellants. At page 54 of the record. PW.2 agreed that though the injuries were not self inflicted they *“could be consistent with falling on a hard object”* under cross examination. **It is not in dispute that the deceased was not only drunk but very violent. It must be borne in mind that only the appellants were eye witnesses to what happened that day to the total exclusion of PW.1, PW.3 and PW.4. Whatever PW.1, PW.3 and PW.4 said regarding the incident other than what they saw or observed cannot be an eye witness account. If what they told the court is based on what they were allegedly told by the appellants or any of them, it is clearly a hearsay evidence which is inadmissible in law and cannot therefore be relied upon to convict the appellants for an offence of murder.**

***Also the reliance on the principle of last seen by the lower court is not supported by the facts and applicable law. The principle is usually invoked where there is no explanation as to what happened to or caused the death of a deceased last seen in company of the accused except the accused explains to the satisfaction of the court what really happened or caused the death of the said deceased. The principle does not apply to a case where the cause of death is known as in the instant case. It is not disputed that the acts of the appellants caused the death of the deceased but what is in contention is whether appellants intended by their admitted action, to kill the deceased. The trial court found that there was no such intention and I agree with it having regards to the facts and circumstances of the case.***

The death of the deceased is very unfortunate and could have been avoided if all those involved had been more careful and reasonable in their actions but I do not think that the unfortunate death must attract more deaths from the same immediate family having regards to the facts of this case.

I agree with the trial court that the death of the deceased in the circumstances in which it occurred is a result of the unlawful acts of the appellants without the requisite intent to kill the deceased and that the said death is clearly manslaughter.

In the circumstance, I find merit in the appeals and consequently allow same and set aside the judgment of the lower court delivered on 23<sup>rd</sup> April, 2009. It is further ordered that the judgment of the trial court delivered on the 25<sup>th</sup> day of July, 2005, be and is hereby restored and affirmed by me. Appeal allowed.

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### **MUHAMMAD JSC**

This is a judgment on consolidated appeals; SC.95/2010, SC.95A/2010 and SC.95B/2010 which has just been delivered by my learned brother, Onnoghen, JSC. The appellants were all members of the same family. Appellant in SC.95/2010 was wife to the deceased. The appellant in SC.95A/2010 was a daughter to the deceased. The appellant in SC.95B/2010 was a son to the deceased. Appellant in SC.95/2010 is mother to appellants in SC.95A/2010

and SC.95B/2010. The deceased was the children's father.

From the facts contained in the printed record of appeal before this court, a one count information was preferred against the appellants (as 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> accused persons at the trial court), charging them with the murder of Boniface Ibeabuchi Njoku (the deceased B for short). On the 14<sup>th</sup> day of February, 2003, at No.37 World Bank Housing Estate, Abayi, within the Osisioma Judicial Division of the High Court of Justice of Abia State, contrary to section 319(1) of the Criminal Code, Cap.30, Vol. 2, Laws of Eastern Nigeria, 1963, applicable in Abia State. Each of the appellants (accused) pleaded not C guilty to the offence charged.

It is pertinent to state the genesis of the problem giving rise to this appeal from the outset. Both the deceased and the accused persons as a family were living under the same roof at No.37, World D Bank Housing Estate, Abayi. The premises was said to have been fenced round with one big iron gate and it was only that family that lived there.

In the morning of 15<sup>th</sup> of February, 2003, the 1<sup>st</sup> accused sent the 2<sup>nd</sup> accused to go and call the PW 3 and 4 for her. Both of E them were surprised to see 2<sup>nd</sup> accused that early morning. On inquiry, the 2<sup>nd</sup> accused told them separately that her father had died. PW 3 and 4 met the 1<sup>st</sup> accused who told them that her husband was dead and she requested PW 3 to go and deposit the dead body in a mortuary. PW1, a younger brother of the deceased was informed of F the death of his brother and he went to the scene of crime to witness the dead body. He subsequently reported the incidence to the police.

It was stated that earlier to the 15<sup>th</sup> of February, 2003, exactly on the 14<sup>th</sup> of February, 2003, the 1<sup>st</sup> accused had a quarrel G with the deceased as a result of the deceased's refusal to make available money to buy provisions for the 2<sup>nd</sup> accused who was a student at the Federal Government College, Ohafia. The deceased had informed the 1<sup>st</sup> accused that he had no money. The 1<sup>st</sup> accused then H blocked his way and prevented him from going out. She held him by his shirt's collar and a fight thereby ensued. The children (2<sup>nd</sup> and 3<sup>rd</sup> accused) who were in their different rooms were attracted by the noise of the fight and they came out to the scene. They observed that their deceased father was having an upper hand in the fight and they

decided to separate them. They pulled their deceased father from the top of their mother. They noticed that their mother was bleeding from one of her fingers. They took side with their mother. When they saw that they could not prevail on their deceased father to stop the fight, they both held the father while the mother rushed and brought an iron dog chain with which the three used in tying the deceased to an iron window protector of the house. That was about 5 pm on the 14<sup>th</sup> day of February, 2003. By 5: am on the 15<sup>th</sup> day of February, 2003, when they went to check on the husband/father, they found that he was dead. 2<sup>nd</sup> accused was sent by her mother (1<sup>st</sup> accused) to go and call the relations of the deceased. When the relations came, they saw the 1<sup>st</sup> accused sitting with her legs crossed over a centre table reading a magazine with dark glasses. The said relations of the deceased were said to be reprimanded by the 1<sup>st</sup> accused for not answering her call timeously. She took them to the room where the deceased lay. She asked them to remove the deceased to the mortuary. The relations went and reported the incidence at the police station.

Statements of the three (3) accused persons were taken by the police. They were tendered and admitted in evidence. After hearing, the trial court delivered its judgment on the 26<sup>th</sup> of July, 2005 in which the learned trial Judge reduced the charge of murder to manslaughter and sentenced the accused to ten (10) years imprisonment with hard labour.

On the appeal to the court below, the court below reversed the verdict and substituted it with that of death by hanging. That is why each of the accused/appellants appealed to this court.

My learned brother, Onnoghen, JSC, has done appreciable work on the issues formulated by the parties with which, I am satisfied. It is only for the sake of emphasis that I would want to add that it is elementary in criminal trial that before an accused person is asked to undergo any sort of sentence, there must be a finding by the trial court on the concurrence of the two main elements of any crime that is the *actus reus* and the *mens rea*. *Actus reus* is taken to be the wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea*. *Mens rea* is the criminal intent or guilty mind of the accused. For the prosecution to establish a criminal act against an accused person, it must go beyond

establishing the commission of the unlawful criminal act by the accused but must establish that the accused has the correct legal (criminal) mind of committing the act.

The two must co-exist whether explicitly or by necessary implication. In their interplay of words/phrases reflected in their book: B 'Criminal Law 831', 3<sup>rd</sup> edition 1982, Rollin M. Perkins and Ronald N. Boyce, stated that:

C *"The actus reus is essential to crime but is not sufficient for this purpose without the necessary mens rea, just as mens rea is essential to crime but is insufficient without the necessary actus reus".*

It is the finding of the trial court that:

D *"knowledge that death or serious bodily harm would result from the act of an accused was one of the elements of murder. See section 316(1) and (2) of the Criminal Code. In the present case such knowledge was not established by the prosecution. The purpose of the accused tying the deceased was to keep him away from fighting".*

In its judgment, the court below held inter alia:

E *"The learned trial Judge has in the judgment thereof held that knowledge that death or grievous harm would result from the act of the respondents was not established by the prosecution. Ironically however, he tied his hands when he stated in his findings as follows:*

F *"Their acts were however callous, reckless without knowing the consequence of their acts. The marks of violence confirmed that the deceased was unlawfully killed".*

One of the necessary ingredients of the offence of murder as provided by section 316 of the Criminal Code Act, (the Act) is intention to commit murder. Intention referred to in section 316 of the G Code and as is generally referred to in Criminal law is the willingness to bring about something planned or foreseen. From the statements of the appellants and the evidence before the trial court, can it safely be said that the appellants *intended* to kill the deceased who was a husband and a father to the appellants. Several statements were taken H from each of the accused. There was the first statement from the 1<sup>st</sup> accused which was taken on the 16<sup>th</sup> of February, 2003. An additional information (statement) was taken on the 27<sup>th</sup> of February, 2003. Further information (statement) was taken on the 13<sup>th</sup> of March, 2003. The 2<sup>nd</sup> accused made her first statement on the 16<sup>th</sup> of Febru-



ary, 2003. Further information (statement) was taken from her on the 27<sup>th</sup> of February, 2003. She made additional information (statement) on the 13<sup>th</sup> of March, 2003. The 3<sup>rd</sup> accused made his first statement on the 16<sup>th</sup> of February, 2003. He gave additional information on the 27<sup>th</sup> of February, 2003.

Further information (statement) was taken from him on the 14<sup>th</sup> of March, 2003. Each of the three (3) accused persons made three different statements on three different dates, making a total of nine different statements. What appears to be a recurring decimal by each of the accused/appellant in all the statements is the negation of intention to kill the deceased. For instance, the first accused stated in her first statement of the 16<sup>th</sup> of February 2003:

*"Their intention was not to kill him but the following morning at about 5.am of 15/2/2003, I went to check my husband to reconciled (sic) with him I saw him dead on his bed. ... Since I know it was not intentional my husband was deeply drunk on the date of the incident. How can I kill my husband whom we have married for the past 23 years now. We have five children."*

The 2<sup>nd</sup> accused stated, *inter alia*:

*"It was not intentional to kill my father. I do not have previous quarrel with him. Our arm (sic) (aim) of tying my father was to prevent him from killing our mother"*.

The 3<sup>rd</sup> accused stated in his first statement of 16/2/03:

*"My father was totally drunk on the 14/2/2003. I am very much surprised seeing my father dead. On the 14/2/2003 his death is not intentional. I did not deliberately kill my beloved father"*.

The finding of the trial court on knowledge that death would result reads as follows:

*"Knowledge that death or grievous harm would result from the act of an accused was one of the elements of murder see S. 316(1)(2) of the Criminal Code, Oladipupo v. The State (1993) 6 NWLR (Pt. 298) 131 at page 134; Ubani v. The State (2004) FWLR (Pt. 191) 1533 at page 1536, (2003) 18 NWLR (Pt. 851) 224."*

*In the present case such knowledge was not established by the prosecution. The purpose of the accused tying the deceased was to keep him away from fighting. Their acts were however, callous, reckless without knowing the consequences of their acts. The marks of violence confirmed that the deceased was unlawfully killed"*.

Now, this is from the court that saw, heard and watched the demeanour of the accused persons. The court below while reviewing the evidence on record, found it difficult to agree with the trial court. It made the following observations:

B *“As narrated by the 1<sup>st</sup> respondent in exhibit P3, she did not only blocked (sic) the door of the room preventing the deceased from getting out, but only held collar (sic) (collar) of his shirt, thereby precipitating the fight that ensued between them. The learned trial Judge has in the judgment thereof held that knowledge that death or grievous harm would result from the act of the respondents was not established by the prosecution. Ironically, however, he tied his hands when he stated in his findings as follows:*

D *‘Their acts were however callous, reckless without knowing the consequences of their acts. The marks of violence confirmed that the deceased was unlawfully killed.’*

E *Undoubtedly, the above findings coupled with the unequivocal conclusions of the evidence of PW2 the Medical Doctor who performed the postmortem examination on the deceased, exhibit ‘P1’ (the post-mortem examination report) have rendered perverse the verdict of manslaughter entered by the learned trial Judge, instead of murder.”*

F The court below relied as well on the principle of law that the law presumes that a man intends the natural and probable consequences of his acts. The cases of Garba v. The State (2000) 6 NWLR (Pt. 661) 378; D.P.P. v. Smith (1960) 3 All ER 161; Akinkunmi v. The State (1987) 3 SC 152, (1986) 1 NWLR (Pt. 52) 608. The cases cited above, are quite distinguishable from the present case. In Garba’s case, there was evidence that the appellant hit the deceased with a stick which caused the death of the deceased through hemorrhage due to fracture of the skull. It is not so in the present case. There is no evidence of a direct act of hitting by the appellants. Even in the English case of *D.P.P. v. Smith (supra)* the presumptive position that an accused person intends the natural and probable consequences of his act has been reversed by the Criminal Justice Act of 1967. Section 8 thereof re-enacts the law that:

*“A court or jury, in determining whether a person has committed an offence:*

*(a) Shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural*

*and probable consequences of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence following such inferences from the evidence as appear proper in the circumstances."*

It is to be noted that there is no finding by the trial court of direct act of hitting or cutting or breaking of any limb or part of the body of the deceased through the use of any object, material or weapon, used by any of the appellants. Thus, the presumption that the appellants intended the natural and probable consequences of their acts has been rebutted as negated by each of the appellants as shown above as each of them stated that the act of chaining the deceased was to restrain him from continuing the fight with his wife. The case of *R. v. Ntah* (1961) All NLR 500; though slightly different appears to have been decided on same principles with the present case. The accused in that case, while struggling with the deceased for the possession of some fruits, pushed the deceased down and *struck her twice in the stomach with a stick*. Her spleen was enlarged as a result of chronic malaria which ruptured it and she died almost at once. The court found the accused did not intend to cause grievous harm which as the court found was not an objectively enforceable consequence of the blows he inflicted on the deceased. The Supreme Court set aside a verdict of murder and substituted a verdict of manslaughter. In another case, *COP v. Gomma* (1965) NNLR 12 where there was no finding that any of the four accused persons carried or used a lethal weapon on the deceased, nor that there was an intention to kill the deceased, nor that the accused persons thought that deceased's death was probable, but though, the accused persons intended to beat the deceased only, they were not held guilty of culpable homicide punishable by death but of culpable homicide not punishable with death. See also: *R. v. Dago* 12 WACA 519; *R. v. Nameri* (1951) 20 NLR 6.

In the light of the above, I find it difficult to agree with the court below that in view of the circumstances surrounding the evidence adduced on both sides, the finding of the learned trial Judge that the prosecution had failed to prove intention to kill the deceased has amounted to a complete perversion of the evidence adduced at the trial.

It is my ardent belief that there is no right thinking son or daugh-

ter or right thinking wife or husband for that matter, that would ordinarily intend to kill his father or mother; husband or wife. Situations do arise where things or relationship within a family may sour up. Misunderstandings and sometime, scuffle do ensue. But, certainly, it is always difficult and unusual to intend to exterminate one of such family members. I commend the trial court for a STOPPED diligent and comprehensive consideration of the totality of the case and coming up with a lesser degree of punishments: meted to the appellants. There are authorities suggesting that severe punishments can be reduced where the court finds substantial; evidence of mitigating circumstances in favour of the accused. The Queen v. Eyo & Ors. (1962) NSCC 331, (1962) 2 SCNLR 262.

For the fuller reasons of my learned brother, Onnoghen, JSC, in his leading judgment, I, too, find merit in the appeals which I allow. I set aside the judgment of the court below. In its place, I restore the trial court's judgment.

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### **MUNTAKA-COOMASSIE JSC**

There are three appeals in this appeal which have been effectively and neatly consolidated by the court. I have read in advance the lead judgment of Hon. Justice Onnoghen, JSC just delivered, and I agree with the conclusions reached thereat. I have nothing more useful to add. Based on the reasons and conclusions adumbrated in the lead judgment I hold that this appeal is pregnant with a lot of merit. Consequently, appeal is allowed. The judgment of the lower court is misconceived same is hereby set aside. The trial court has done a good job. The judgment therefore of the trial court is restored and affirmed.

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### **FABIYI JSC**

I have read before now the judgment just delivered by my learned brother - Onnoghen, JSC. I am at one with the reasons therein advanced to arrive at the conclusion that the appeal is meritorious and should be allowed.

The three consolidated appeals are against the judgment of the Court of Appeal, Port Harcourt Division (the court below) handed

out on 23<sup>rd</sup> day of April, 2009. Therein, the judgment of the High Court which convicted the appellants for the offence of manslaughter and sentenced each of them to a term of ten (10) years imprisonment with hard labour was converted to a conviction for murder and a sentence to death by hanging

The facts of the matter sound incredible and pathetic. The appellants were charged for the murder of one Boniface Ibeabuchi Njoku contrary to section 319(1) of the Criminal Code. B

The 1<sup>st</sup> appellant, the wife of the deceased asked for the school fees of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants - their children. The deceased turned down the request and a bitter fight ensued. The deceased who was said to be drunk made the fight become rather violent to the extent that he gave a bite to the finger of his wife and cut it off. To stop the violent fight, the trio looked for a dog chain with which they tied the deceased to a window protector in his room over night. When the woman went to call on the deceased the next morning, she found that 'the man died'. She there and then raised an alarm. The rest is now history. C

Learned counsel for the appellants submitted that it is not enough for the prosecution to prove that death resulted from the act of accused person(s) but it must be further proved that there was intention by the accused persons to kill or cause grievous bodily harm or that the act was likely to endanger human life before the offence of murder can be said to have been established. Reliance was placed on the decision in *Uguru v. The State* (1964) 1 All NLR 2 *Amayo v. The State* (2002) 1 FWLR (Pt. 91) 1571, (2001) 18 NWLR (Pt. 745) 430. D

There is mettle in this submission. This is because the evidence on record does not disclose any intention to kill or cause grievous harm to the deceased. The act of the appellants in tying the deceased with a dog chain was reckless and demeaning and so reprehensible. But *stricto sensu* it was not an act likely to endanger human life or to terminate life all things being equal. The *mens rea* of the appellants did not equate with, or let me say was not in tandem with the ultimate *actus reus*. E

Apart from the above, P.W.2 the medical officer at page 54 of the record agreed that though the injuries on the deceased were not self inflicted they "could be consistent with falling on a hard object". F

The issue is whether the prosecution proved the case that the appellant committed the offence of murder as charged and found by the court below or manslaughter as found by the trial court.

The act of the appellants was rash, reckless and unconscionable in the extreme, I repeat. But in the whole scenario presented, I cannot surmise or let me say pinpoint their intention to kill the deceased -their bread winner. After all intention means will, purpose or design to do a thing. It was an unfortunate episode which in my humble view should not lead to the extinction of the entire family. This makes me to cast my lot with the stance posed by the trial court. And may the soul of the deceased rest in perfect peace.

For the above reasons and those adumbrated in the lead judgment, I too find merit in the appeals. I allow the appeals as well and set aside the judgment of the court below while the judgment of the trial court delivered on 25<sup>th</sup> July, 2005 is hereby restored and affirmed by me also.

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### **NGWUTA JSC**

I read in draft the lead judgment delivered by my Lord, Onnoghen, JSC and I agree with the reasoning and conclusion reached.

From evidence at the trial court, the deceased died from the act or omission of the appellants. Be that as it may, essential ingredients of the charge of murder are: (a) Intent to kill, or (b) to do some grievous harm to the person killed or to some other person. See S. 316(1) and (2) of the Criminal Code.

Intention is specifically provided for as an ingredient of the offence of murder and it must be specifically proved. See *Onoro v. (1961) 1 All NLR 33*, *(1961) SCNLR 56 R. v Steam (1947) 1 KB 997*; *Ogbuagu v. Police (1953) 20 NLR 139*. The facts show that the appellants restrained the deceased who was drunk and violent from harming other people.

The intention to kill the deceased was not proved nor could it be inferred from the facts proved. The *actus reus* and *mens rea* must be established before there can be a conviction for murder under S. 319(1) of the Criminal Code. Further, there is evidence from the Medical Doctor, PW2, who performed the post-mortem

examination on the body of the deceased that the injuries on the deceased could have been caused by blows with a heavy blunt object and that the injuries are also consistent with a fall on a hard object.

There is therefore no proof beyond reasonable doubt of the cause of the injuries on the body of the deceased and *ipso facto* it cannot be said that the case against the appellants was proved beyond reasonable doubt as provided by S. 138 of the Evidence Act. Without proof that the appellants caused injuries on the body of the deceased or that they caused the deceased to fall on a hard object, thereby causing the injuries from which the deceased died, the case against the appellants remains speculative.

For the above and the fuller reasons in the lead judgment, I agree that the charge of murder was not proved. I also allow the appeal, set aside the judgment of the court below and restore the judgment of the trial court. Appeal allowed.

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