

SUPREME COURT OF NIGERIA
FRIDAY 9TH MAY, 2014. SC. 95/2012
CORAM:- W. S. N. ONNOGHEN, S. GALADIMA,
B. RHODES-VIVOUR, K. B. AKA'AH,
J. I. OKORO, JJSC

BABAWURO USMAN APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Pending trial - Judicial precedent - Decision in Chime's case on continuation of pending suit - Is applicable to instant case - As there is no miscarriage of justice in the application of Decree No. 41 s. 6 (H1)

APPEALS - Fresh issue - Leave - Party wishing to raise fresh issue before appellate court - Must first obtain leave - Otherwise such issue is incompetent and liable to be struck out (H2)

EVIDENCE - Evaluation - Ascription of probative value to evidence - Remains within the province of trial Judge - Who heard and observed the demeanour of witnesses (H3)

CRIMINAL PROCEDURE - Conviction - Circumstantial evidence - Must be direct and unequivocally lead to the guilt of appellant - As to sustain conviction (H4)

MURDER - Sentence - Review - Correctness of - As appellant's intention to cause death - Can be inferred from established facts of the case - CA rightly substituted its own decision (H5)

FACTS

Before the High Court of Taraba (then Gongola) State Holden at Jalingo, accused/appellant was charged with one count of culpable homicide punishable with death under section 221(a) of the Penal Code. He pleaded not guilty to the charge. The case as presented by prosecution/respondent is that appellant killed and buried his wife in their residence in Jalingo. PW1 (i.e. appellant's house) gave uncon-

troverted evidence of what transpired on the day of the murder. PW1 stated how he saw the deceased corpse lying in pool of blood and how appellant had requested him to assist in burying the corpse in a shallow grave in the compound. He further stated that appellant warned him not to disclose the event to anyone else. However, the ugly event was exposed by appellant's dog which dug out the hand of the deceased. Appellant in self righteousness reported the matter to the police.

After a post mortem examination on the corpse by PW6 (medical doctor), it was discovered that the deceased died as a result of excessive blood loss due to injury caused by sharp object. Appellant who was arrested in connection with the murder gave no concrete evidence to contradict the statements of PW1 or PW6. He was therefore arraigned in connection with the murder. At the end of trial, judgment was adjourned to a later date. However, it was not delivered on the adjourned date as a result of the transfer of the learned trial Judge to Adamawa State following the new State creation. Judgment was eventually delivered by the same Judge. Appellant was found guilty of culpable homicide not punishable with death. He was convicted and sentenced to 11 years imprisonment. Respondent was not satisfied with the judgment. Hence, in appeal filed by respondent to the Court of Appeal Jos Division, a verdict of culpable homicide punishable with death was handed on appellant. Aggrieved, appellant appealed to Supreme Court contending inter alia that the learned trial Judge lacked jurisdiction to proceed and deliver judgment in the matter.

ISSUES FOR DETERMINATION

“(i) Whether the learned justices of the Court of Appeal were right in holding that Oluoti J, who had ceased to be a Judge of the High Court of Taraba State had jurisdiction to try the appellant and convict him.

“(iii) Whether the learned justices of the Court of Appeal were right in overturning the Judgment of the learned trial judge who had the opportunity of seeing, listening and ascribing probative value to the testimonies of the witnesses.”

HELD (Unanimously dismissing the appeal per ONNOGHEN JSC)

CRIMINAL PROCEDURE - Pending trial - Judicial precedent

1. It is clear and I hold the view that the relevant facts of the instant case are on all four with those of Chime Vs Chime, supra. In the instant case the charge was pending before the Gongola State High Court where Oluoti J presided prior to the creation of Adamawa and Taraba States therefrom (i.e. from Gongola State), like Enugu and Anambra States being created out of the old Anambra State which originally encompassed both (new) States. As at the time of creation of the new States Oluoti J, sat in Jalingo to hear the case, which, after the creation of States, became the capital of Taraba State. With the creation of the States, however, Oluoti J was deployed to Adamawa State, no longer being an indigene of Taraba State just like Ubaezeonu J, as he then was. It was from Adamawa State that the learned trial Judge returned to Jalingo to deliver the Judgment now on further appeal before us.

I therefore hold the strong view that the decision of this court in the case of Chime V. Chime supra applies to the facts and circumstances of this case and consequently relevant for the determination of the issue under consideration as same is in no way distinguishable. No miscarriage of justice has been alleged by appellant neither can one find any thread of same in this case resulting from the application of the provisions of the said Section 6 of Decree 41 of 1991 to make it necessary for this court to interfere with the finding and holding in that respect by the lower court.

The position of the law relevant to the facts of this case being as stated above, I have no hesitation, whatsoever, in finding no merit in the issue under consideration which is accordingly resolved against appellant. (p. 2197 H)

APPEALS - Fresh issue - Leave

2. It is settled law that when a party wishes to raise a fresh issue before an appellate court, he must first and foremost,

seek and obtain the leave of that court to raise and argue the point(s) intended to be so raised. Where no leave of the court is sought and obtained, the fresh point/issue so raised and argued is, in the eyes of the law, incompetent and liable to be struck out. Leave to raise and argue a fresh point/issue is therefore
 B **before a condition precedent to the competence of the issue and of the court concerned to entertain and determine same.**

I hold the considered view that by not reacting to the crucial submission of counsel for respondent on the need to
 C **seek and obtain the leave of this court to raise and argue the issue of contradictions on the evidence of prosecution witnesses, which is a fresh issue being raised and argued for the first time before this court, appellant is deemed to have conceded the point being made by the respondent. I therefore**
 D **hold that appellant's issue 2 being a fresh issue raised without the leave of this court is incompetent in law and is consequently liable to be struck out. (p. 2199 G)**

EVIDENCE - Evaluation

E **3. I agree with the submission of learned counsel for appellant that it is settled law that evaluation of evidence and ascription of probative value, thereto remains within the province of the trial Judge who saw, heard and observed the**
 F **demeanour of the witnesses. (p. 2202 C)**

Conviction - Circumstantial evidence

4. It is settled law that to sustain a conviction on the basis of circumstantial evidence, the circumstances relied upon by the
 G **prosecution must be direct and must lead unequivocally and indisputably to the guilt of the appellant; that the circumstantial evidence sufficient to support a conviction in criminal trial especially murder, must be cogent, complete and unequivocal. It must be compelling and must lead to the irresistible**
 H **conclusion that the prisoner and no one else, is the murderer. The facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. (p. 2204 A)**

MURDER - Sentence - Review - Correctness of

5. I hold the strong view that the intention of appellant to cause the death of his wife can easily be inferred from the established facts of the case as accepted by the lower courts and that the lower court was right in overturning the decision of the trial Judge and substituting thereto its own decision which I find and hold as very much in accord with the facts as established in evidence and the law applicable thereto. B

Where it is evident, as in the instant case, that the evaluation was defective the appellate court has a duty to examine the grounds on which the conclusions and inferences of the trial court were based and to re-evaluate the evidence and take a different view. (p. 2205 A) C

REPRESENTATION

DR. J. Y. MUSA with Messrs. E. E. Eko and J. O. Musa, for the Appellant D

A. Y. SHITTA ESQ, DPP Taraba State, with Messrs. M. S. UMARU Principal State Counsel 1 and U. D. UMAR State Counsel II, for the Respondent E

CASES REFERRED TO

Ndaeyo v. Ogunnaya (1977-1978) 11 NSCC 5

Chime v. Chime (2001) FWLR (pt. 39) 1457

Okeke v. A-G Bendel State (1986) 2 NWLR (pt. 24) 648 F

Onubogu v. Queen (1974) 1 SC 1

Sule v. State (2009) 171 LRCN 1

Ogbo v. State (1997) 2 NWLR (pt. 222) 164

Nwaeze v. State (1996) 2 NWLR (pt. 428) 1 G

Mafimisebi v. Ettuwa (2012) 411 FWLR (pt. 355) 562

C.D.C. Nig. Ltd. v. SCOA Nig. Ltd. (2007) All FWLR (pt. 363) 1

Onwugbufo v. Okoye (1996) SCNJ 1

Atolagbe v. Shorun (1985) 1 NWLR (pt. 2) 360

Onajobi v. Olanipekun (1985) 4 SC (pt. 2) 156 H

Ike v. Ugboaja (1993) 6 NWLR (pt. 301) 539

Buba v. State (1994) 7 NWLR (pt. 355) 195

Ebenehi v. State (2009) 6 NWLR (pt. 1138) 431 SC

STATUTES REFERRED TO

Penal Code, ss. 220(b), 221(a), 224

Constitution of the Federal Republic of Nigeria 1979, s. 234

States (Creation & Constitutional Provisions) Decree No. 41 of 1991, s. 6

B

LEAD JUDGMENT BY ONNOGHEN JSC

This appeal is against the Judgment of the Court of Appeal, Holden at Jos on appeal No. CA/J/127C/96 delivered on the 23rd day of March 2004 in which the court substituted a verdict of guilty of the offence of culpable homicide punishable with death under Section 221(a) of the Penal Code for that of the trial Court which on 23rd November, 1995 found appellant guilty of culpable homicide under Section 220(b) of the Penal Code and punishable under Section 224 of the same code and sentenced him to a term of 11 years imprisonment.

Appellant was charged on an information before the Gongola State High Court sitting at Jalingo with a count of culpable homicide punishable with death under Section 221(a) of the Penal Code to which appellant pleaded not guilty.

At the conclusion of trial, the matter was adjourned to 11th May, 1995 for Judgment which was, however, not delivered due to the fact that OLUOTI J. who heard the matter was transferred/deployed to Adamawa State following the creation of Adamawa and Taraba States out of Gongola State vide Decree No. 41 of 1991. The Judgment was therefore delivered on the 24th day of November, 1995.

The facts of the case include the following:

Appellant was married to Aminatu, his wife and lived with her in Jalingo in the then Gongola State, now capital of Taraba State. Sometime in 1990 Appellant killed his said wife, Aminatu. PW1, Abubakar Bakari was appellant's houseboy and gave uncontroverted evidence of what transpired on the day of the killing, a Saturday night in May, 1990. He told the court that on that night he heard Aminatu Babawuro (now late) crying for a while; that appellant later called PW1 and when PW1 got to the parlour where appellant was in response to the call, PW1 saw the body of Aminatu, appellant's wife lying there in a pool of blood. Appellant then requested PW1 to

assist him in carrying the dead body into a grave which had been dug in the compound of appellant, which he did. Appellant then warned PW1 not to tell anyone that he killed his wife and that if he did, he, PW1, would be responsible for whatever happens to him (PW1) and that he should tell any enquirer after his wife that she had gone to the hospital and was yet to return; that on 2/6/90 appellant left the house leaving his little dog behind which dog went to the grave and dug it exposing the hand of the deceased as at the time of the return of appellant to his compound. B

Appellant then went and reported the matter to the police in Jalingo who came and looked at the grave. On the following day policemen returned to the compound and dug the grave and found the body of the deceased which was identified by appellant as that of his wife, Aminatu. C

PW6 was a medical doctor who performed a post mortem examination on the body of the deceased after it was dug up and at the grave site. He found that the skin was broken at one point/spot on the neck where there was a straight wound of about 5cm deep and 3cm long and on the right side of the neck. The doctor gave the cause of death, in his opinion, as hemorrhage or excessive loss of blood, from the injury on the neck which might have been caused by a sharp object. D E

Appellant denied the charge and said nothing whatsoever to contradict the evidence of PW1 or PW6. He told the Court that sometime in May 1990 he reported to the police that his wife was missing from home when he returned from Dong.; that PW1, his houseboy told him that his wife went to buy some medicine from the town but had not returned, that he had also reported the matter to the relation of the wife but no one could tell of her where about; that sometime in June 1990 (01/6/1990) his attention was drawn by a woman who was in his compound to some digging by his little dog which he reported to the police who, upon investigation, dug out what turned out to be the body of his wife. F G

Learned counsel for appellant Dr. J.Y. Musa has submitted three issues in the appellant brief filed on 17/7/12, for the determination of the appeal. The issues are as follows:- H

“(i) Whether the learned justices of the Court of Appeal were right in holding that Oluoti J, who had ceased to be a Judge of the

High Court of Taraba State had jurisdiction to try the appellant and convict him. (Ground 1)

(ii) Whether the prosecution proved the case of culpable homicide punishable with death against the appellant against the material contradictions in the testimonies of the prosecution witnesses.

B *(Ground 2)*

(iii) Whether the learned justices of the Court of Appeal were right in overturning the Judgment of the learned trial judge who had the opportunity of seeing, listening and ascribing probative value to the testimonies of the witnesses. (Ground 3)”

C In arguing issue 1, learned counsel referred the Court to the provisions of Section 234 of the Constitution of the Federal Republic of Nigeria, 1979, being the then applicable Constitution, and submitted that the territorial jurisdiction of a Court of a State is limited to
D the territorial boundary of the State concerned; that the learned trial judge haven ceased to be a judge in Taraba State, had no jurisdiction to proceed with the hearing or continue with the hearing and determination of the charge thereby nullifying the judgment, relying on
E *Ndaeyo V. Ogunnaya* (1977 - 1978) 11 NSCC 5 at 10; that the provisions of Section 6 of Decree No. 41 of 1991 relied upon by the lower court do not support their position neither are they supported by the case of *Chime V. Chime* (2001) FWLR (Pt. 39) 1457 on which the court also relied; that “that court” in which the case was to be
F continued as mentioned in Section 6 of Decree 41 of 1991 is the High Court of Taraba State, not that of Adamawa State where the Judge was deployed to and urged the court to resolve the issue in favour of appellant.

On his part, learned counsel for respondent S. Harunna Esq.
G in the respondent brief filed on 17/8/12 submitted that the court below was correct when it dismissed the cross-appeal of appellant on the issue based on the provisions of Section 6 of Decree No. 41 of 1991 and the decision of this Court in the case of *Chime V. Chime* (2001) 1 S.C. (Pt. 11) 1 at 13 and that no miscarriage of justice has
H been occasioned to the appellant; that this case is not distinguishable from the case of *Chime Vs Chime*, supra and urged the court to apply same to the facts of this case and resolve the issue against appellant.

Section 6 of Decree No. 41 also known as States (Creation

and Constitutional Provisions) Decree, 1991 provides as follows:

“Any proceeding pending before any Court of a State immediately before the commencement of his Decree may after commencement be continued before that court and shall not adversely be affected by the provisions of this Decree”

The above provision has been interpreted and applied by this court in the case of Chime Vs Chime (2001) 3 NWLR (Pt. 701) 52 at 552 where appellants therein canvassed the point that the trial Judge had no jurisdiction to continue to entertain the case since the area where the land in dispute was situate had been carved out of the old State in which the State originated, the Judge not being an indigene of the new State.

In resolving the above issue (point) this court, per IGUH JSC at page 552 stated thus:

“In other words, Ubaezeonu J, as he then was, before whom the case was pending before the commencement of the relevant Decree was vested with ample jurisdiction to continue with the hearing of the suit in his court after the commencement of the Decree.

I entirely agree with the submission of learned counsel for the respondents, Chief Ugolo, that if it was the intendment of Section 6 of Decree No. 41 of 1991 that pending cases shall be tried de novo by another Judge of Enugu State origin, the expression that the trial of such cases may, after the commencement of the Decree, “be continued before that court and shall not be adversely affected by the provisions of the Decree” should not have been used.

This is because, the hearing of a part - heard case taken over by another Judge is not ‘continued before the new Judge’ but shall be started de novo by such new Judge in accordance with the basic principles of our law. It is my view, therefore, that the hearing of the present suit which was pending before Ubaezeonu J, as he then was, immediately before the commencement of Decree No. 41 of 1991 may after such commencement be continued before that court, quite rightly, pursuant to the provisions of Section 6 of that Decree”.

It is clear and I hold the view that the relevant facts of the instant case are on all four with those of Chime Vs Chime, supra. In the instant case the charge was pending before the Gongola State High Court where Oluoti J presided prior to the creation of Adamawa and Taraba States therefrom (i.e.

from Gongola State), like Enugu and Anambra States being created out of the old Anambra State which originally encompassed both (new) States. As at the time of creation of the new States Oluoti J, sat in Jalingo to hear the case, which, after the creation of States, became the capital of Taraba State.

B With the creation of the States, however, Oluoti J was deployed to Adamawa State, no longer being an indigene of Taraba State just like Ubazeonu J, as he then was. It was from Adamawa State that the learned trial Judge returned to Jalingo to deliver the Judgment now on further appeal before us.

C I therefore hold the strong view that the decision of this court in the case of Chime V. Chime supra applies to the facts and circumstances of this case and consequently relevant for the determination of the issue under consideration as same is D in no way distinguishable. No miscarriage of justice has been alleged by appellant neither can one find any thread of same in this case resulting from the application of the provisions of the said Section 6 of Decree 41 of 1991 to make it necessary for this court to interfere with the finding and holding in that E respect by the lower court.

The position of the law relevant to the facts of this case being as stated above, I have no hesitation, whatsoever, in finding no merit in the issue under consideration which is accordingly resolved against appellant.

F On issue 2, it is the submission of learned counsel that the prosecution failed to prove the charge against appellant beyond reasonable doubt, particularly, as the case of the prosecution is full of contradictions; that the contradictions are material and include the G following:-

H That PW1 gave evidence that appellant killed his wife in June while PW1 and (PW3 claimed that it was on 1st June 1990 that they saw something and went with appellant to the house of DCO; that PW4 said they saw a mattress stained with blood at the backyard of appellant in May 1990, but PW5 said he was assigned a case of missing person by his DCO on 13/5/90 while at the same time he testified that on 2/6/1990 he was in the company of the DCO and other police men who investigated and dug up the dead body of the deceased in the compound of the appellant, that the date of 2/6/1990

was what PW6 said he performed the post mortem examination on the dead body of the deceased; that the charge said the deceased was killed on or about the 12th day of May, 1990; that PW1 cannot be telling the truth as to what he saw or the role he played in the death of the deceased which, he claimed, occurred in June 1990, which raises doubts to be resolved in favour of the appellant, relying on Okeke V. Attorney-General Bendel State (1986) 2 NWLR (Pt. 24) 648, Onubogu V. Queen (1974) 1 S.C. 1. Learned counsel then urged the court to resolve the issue in favour of appellant. B

On his part, learned counsel for respondent stated that the lower courts never found any material contradiction in the evidence of the prosecution witnesses; that the respondent proved the charge against appellant beyond reasonable doubt and that his conviction and sentence were thus justified in law; that the prosecution proved the death of the deceased; that it was appellant that caused the death and that the appellant intended to kill the deceased, relying on Sule V. The State (2009) 171 LRCN 1 at 1. Ogbo V. The State (1997) 2 NWLR (Pt. 222) 164: Nwaeze V. The State (1996) 2 NWLR (Pt. 428) 1 at 11 etc; that the evidence of PW1 to the effect that he saw the dead body in the month of June was rejected by the trial Judge at pp. 43 - 44 of the record and the court accepted the version that the incident took place in May, 1990 which was also agreed upon by the appellant in his statement, exhibit 'A', that appellant is raising the issue of contradiction for the first time in this court and without the requisite leave of the court, which, makes the issue incompetent. C D E F

It is note worthy that learned counsel for appellant did not file a reply brief in reaction to the argument of counsel for respondent that the issue of contradiction in the evidence of prosecution witnesses, to wit, the date the crime was allegedly committed, was a fresh issue which is being raised for the first time before this court and for which the leave of this court must be sought and obtained. This submission by learned counsel for respondent is very crucial and needed to be reacted to, one way or the other. ***It is settled law that when a party wishes to raise a fresh issue before an appellate court, he must first and foremost, seek and obtain the leave of that court to raise and argue the point(s) intended to be so raised. Where no leave of the court is sought and obtained, the fresh point/issue so raised and argued is, in the eyes of the*** G H

law, incompetent and liable to be struck out. Leave to raise and argue a fresh point/issue is therefore a condition precedent to the competence of the issue and of the court concerned to entertain and determine same.

I hold the considered view that by not reacting to the crucial submission of counsel for respondent on the need to seek and obtain the leave of this court to raise and argue the issue of contradictions on the evidence of prosecution witnesses, which is a fresh issue being raised and argued for the first time before this court, appellant is deemed to have conceded the point being made by the respondent. I therefore hold that appellant's issue 2 being a fresh issue raised without the leave of this court is incompetent in law and is consequently liable to be struck out.

The above notwithstanding, the issue of contradiction in the evidence of the witnesses, as regards the date of the offence, was adequately considered and resolved by the learned trial Judge at pages 43 - 44 of the record inter alia as follows:

"(i) The next matter for consideration is the day or date the alleged offence took place. The charge reads in part "BABAWURO USMAN on or about the 12th day of May, 1990."

(ii) That date was a Saturday. PW1 testified that he saw the dead body on one Saturday in the month of June. Under cross-examination he repeated the month of June. I have above rejected this piece of evidence. PW2, Alhaji Buba Usman, spoke of 1st June 1990 when the accused informed him of his finding in his house relating to the grave. PW3, Alhaji Aiti Umaru, spoke in the same vein.

(iii) PW4 is Joshua Idrisu. He testified in part that: thus: "I know the accused... I also know one David Bako. I knew him because in May 1990 he came to me at the said lodge and informed me that he has seen one mattress in between the compound of the accused and our lodge... we went and I saw the mattress and found it was stained with blood..."

Accused testified in part thus:

"There was a neighbor who told me that he saw a mattress that was thrown there."

(iv) In his cautionary statement to the Police Exhibit 'A', English translation, Exhibit 'A1' the accused said in part thus:

“On the 13/5/90 at about 0900 hrs I left to Dong market...and leave my wife in the house and when I came back I did not meet my wife ... I continue searching for her up to night time, then I came back home, then one of my neighbor called me and told me that whether the Dunlop that was lying in my backyards, belong to me? I did not take notice because some thing is worrying and in small time I went out to continue searching for her and when I returned at about 2100 hrs I discovered that my Dunlop mattress and my wife properties were scattered and thrown to my backyards”.

(v) Both the accused and PW4 agree on a certain day in May 1990. That I believe was the month the accused’s wife died. The accused testified and mentioned 1989. I think he made a mistake. Considering other pieces of evidence, I disbelieve that portion of his evidence viz 1989. I accept the date in the cautionary statement viz 13th May 1990.”

From the above, it is very clear that the issue of contradiction as to the date of the commission of the offence was perfectly resolved by the learned trial Judge and it never came up to be dealt with by the lower court. I am very much satisfied with the way the trial Judge dealt with the issue. In the circumstance, issue two is hereby struck out for being grossly incompetent and a complete waste of time of this court.

On issue 3, it is the contention of learned counsel for appellant that the lower court was in error in overturning the Judgment of the trial court having regard to the principle of law that evaluation of evidence and the ascription of probative value thereto reside within the province of the trial court that saw, heard and assessed the witnesses, relying on *Mafimisebi Vs Ettuwa* (2012) 411 FWLR (Pt. 355) 562 at 605, *C.D.C. Nig. Ltd. Vs. SCOA (Nig.) Ltd:* (2007) All FWLR (Pt.363) 1 at 41 - 42; that the trial court found that intention to kill the deceased was not proved though he agreed that the deceased was stabbed on the neck; that the lower court ought not to have interfered with the findings of the trial Judge and urged the court to resolve the issue in favour of appellant and allow the appeal.

In his reaction to the submission of learned counsel for appellant on the issue under consideration, learned counsel for the respondent submitted that the lower court was right in overturning the decision of the learned trial Judge who failed to make proper use of

the opportunity of seeing, hearing and observing the witnesses at the trial and to exercise his discretion properly, and, that the judge drew wrong conclusions from accepted evidence resulting in a miscarriage of justice, relying on Onwugbufor V. Okoye (1996) SCNJ 1 at 33; that the issue before the lower court was not on the demeanour of the witnesses or the trial Judges impression of them but on drawing of correct inferences from the accepted evidence on the record; that the evidence of PW1 and PW6, which the trial Judge accepted as being truthful, was enough for that court to have drawn correct inferences and conclusions to hold that the charge as laid had been proved beyond reasonable doubt and urged the court to resolve the issue against appellant and dismiss the appeal.

I agree with the submission of learned counsel for appellant that it is settled law that evaluation of evidence and ascription of probative value, thereto remains within the province of the trial Judge who saw, heard and observed the demeanour of the witnesses.

The question is, what is the finding of the trial Judge in relation to intention to kill the deceased by the appellant having regards to the facts and circumstances of the case? At pages 48 - 50 of the record, the learned trial Judge came to the following conclusion, inter alia-

“In the case before me, death was caused instantaneously by a stabbing on the neck. The weapon whether formidable or not was not produced. The wind pipe, veins and arteries were not reported by the medical officer. In the circumstances of this case, I hold that intention to cause death has not been proved;

If a weapon is used the question will generally resolve itself by a consideration of the weapon used, the part of the deceased’s body where it was struck and the amount of force used. As I have observed earlier the weapon was not produced, the stab injury was on the neck and the amount of force used cannot be determined. I have to decide that on the evidence I cannot be certain with the degree of certainty demanded by a criminal charge of such seriousness that death was the probable result of the stabbing.”

What is the reaction of the lower court to the above conclusion by the learned trial Judge? It can be found at pages 176 - 177 of the record where the court had this to say:

"In the case before us there can be no doubt that these matters when taken into account clearly reveal the intent to kill, manifest in cutting the neck of this 20 years old pregnant girl. With the pool of blood in which the deceased was seen by PW1 and loss of blood identified and sharp instrument used highlighted by the doctor PW6 as the cause of death, the amount of force applied is easily identified. It is so much as caused instant death of the victim whose crying PW1 was hearing and about 30 minutes after the crying stopped, he was invited by the accused to come and help him carry to a waiting grave in his enclosed compound, the body of the deceased then lying in a pool of her own blood."

In summary, the intention to kill her or the mens rea, of the killer is, without doubt, clearly proved so also is the cause and her death. One thing I must state firmly is that the evidence before the court below and on record support and warrant a conviction under Section 221(1) of the Penal Code.

There is no evidence to support the trial court's finding. It is indeed an error in law which calls for interference from this court. See Rabiun V. The State (1980) 8 - 11 S.C. 130 at 172: Agbeyegbe Vs. Inspector-General of Police 15 WACA 37.

The law is that where there was evidence before the trial Judge from which he could, reasonably, have come to the conclusion to which he did, the verdict must stand R v. Onusade (1964) NWLR 67 also in (1964) All NLR 233,

If it is a verdict which no reasonable jury could have come to, and I believe taking into account the evidences before the trial court, the Court of Appeal may reverse it - See R V. Olagunju (1961) All NLR 21. It is my view that that is the case, in this matter.

I see nothing obviously or even inherently improbable about the evidence of PW1, to warrant the speculation gone into by the trial court. In taking it upon himself to raise points which could cause doubts as to the credibility of the witness and proceed to use them, the trial court has only given cause for a miscarriage of justice fatal to the prosecution.

Although it is not the function of the Court of Appeal to retry the case based on the record of proceedings before it, yet it has a duty not to allow a verdict which is entirely unwarranted, as herein, to stand"

From the passages reproduced from the respective Judgments of the lower courts the question is, which of them is correct in law?

The facts of the case clearly shows that the case is based solely on circumstantial evidence.

It is settled law that to sustain a conviction on the basis of circumstantial evidence, the circumstances relied upon by the prosecution must be direct and must lead unequivocally and indisputably to the guilt of the appellant; that the circumstantial evidence sufficient to support a conviction in criminal trial especially murder, must be cogent, complete and unequivocal. It must be compelling and must lead to the irresistible conclusion that the prisoner and no one else, is the murderer. The facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

In the instant case, it is not in dispute that it was the act of appellant that resulted in the death of his ‘dear’ wife. What the trial Judge used in reducing the punishment of culpable homicide punishable with death under Section 221 (a) of the Penal Code, as charged, to culpable homicide under Section 220(b) of the Penal Code and punishable under Section 224 of the said Code, is that the court did not see or find any mens rea in the act of the appellant which resulted in the death of the deceased because:

“...The weapon whether formidable or not was not produced. The wind pipe, vein and the arteries were not reported upon by the medical officer. In the circumstances of this case I hold that intention to cause death has not been proved”

despite the fact that the Judge had immediately before the above, found as a fact that:

“In the case before me the death was caused instantaneously by a stabbing on the neck” - See pages 48 - 49 of the record.

Haven found that the death of the deceased was caused by the stabbing on the neck by the appellant which resulted in instantaneous death of the deceased, one wonders how else the intention of appellant to kill the deceased in the circumstances as found by the learned trial Judge can be best demonstrated. Does a man who stabs a person on the neck resulting in instantaneous death wish the deceased to live or die? Does the amount of force used in the stabbing

on the neck matter when the probable result of such stabbing on the neck is death?

I hold the strong view that the intention of appellant to cause the death of his wife can easily be inferred from the established facts of the case as accepted by the lower courts and that the lower court was right in overturning the decision of the trial Judge and substituting thereto its own decision which I find and hold as very much in accord with the facts as established in evidence and the law applicable thereto.

Where it is evident, as in the instant case, that the evaluation was defective the appellate court has a duty to examine the grounds on which the conclusions and inferences of the trial court were based and to re-evaluate the evidence and take a different view. See Atolagbe V. Shorun (1985) 1 NWLR (Pt. 2) 360; (1985) 4 S.C. (Pt. 1) 250.

I therefore resolve issue 3 against the appellant and accordingly dismiss the appeal for lack of merit. Appeal dismissed.

GALADIMA JSC

Appellant was married to Aminatu and they both lived in Jalingo in the then Gongola State. Jalingo became capital of Taraba State when it was created vide Decree No. 41 of 1991.

Sometime in 1990 appellant killed Aminatu and was charged on an information before the Gongola State High court sitting at Jalingo on one court charge of culpable homicide under S. 221 (a) of the Penal Code punishable with death. He pleaded not guilty to the charge.

At the conclusion of trial, the case was adjourned to 11/5/1995 for judgment. Due to the fact that OLUOTI [J] who heard the matter was deployed to Adamawa State following the creation of that State, the judgment could not be delivered until 24/11/1995.

At the trial, one Abubakar Bakari, who was appellant's houseboy, gave vivid account of what transpired on the day of the unfortunate incident. The evidence that the appellant killed his wife was uncontroverted.

He told the court that on the night of the killing he heard the deceased crying and when the appellant called him to the parlour, he

saw the body of the deceased lying in a pool of her blood. At the request of the appellant he assisted him to bury Aminatu in a shallow grave dug in the compound of the appellant. Pw1 was warned to keep the episode in secrecy.

On 2/6/90 appellant relocated from his house and that gave
 B his little dog he left behind to dig the grave thereby exposing the
 hand of the deceased. The appellant who later returned to his com-
 pound reported the matter to the Police. The policemen came to his
 compound and found the body of the deceased in the grave. PW6,
 C the Medical Doctor who performed a postmortem examination on
 the body of the deceased gave the cause of death in his opinion, as
 hemorrhage, as a result of direct wound about 5cm deep and 3cm
 long on the right side of the neck of the deceased caused by a sharp
 object. As I have stated, upon his arraignment at the High Court, the
 D appellant denied the charge and said nothing to contradict evidence
 of PW1 and PW6. He only told the court that sometime in May,
 1990 he reported to the police that his wife was missing from home;
 that PW1 his house boy, told him that the deceased went out to buy
 some medicine from the town but never returned and that he re-
 E ported the incident to the police and the relation of the deceased.
 That his attention was only drawn by a woman in his compound that
 his little dog dug a portion of his house from where the police on
 investigation found out the body of his wife.

F The trial High Court on 23/11/95 found the appellant guilty of
 culpable homicide under S. 220 (b) of the Penal Code and punish-
 able under Section 224 of the said code; and sentenced him to a
 term of 11 years imprisonment.

This appeal is against the judgment of the Court of Appeal Jos
 G Division delivered on 23/3/2004 in which the Court substituted a
 verdict of guilty of the offence of culpable homicide punishable with
 death under Section 221 (a) of the Penal Code for that of the trial
 Court.

H Of the three issues posited by the learned counsel for the ap-
 pellant the first is crucial to the determination of the appeal. This
 excites my attention and I shall make little contribution. The issue is:

*“Whether the learned Justice of the Court of Appeal were right
 in holding that OLUOTI J, who had ceased to be a judge of the High
 Court of Taraba State had jurisdiction to try the appellant and convict*

him.”

The learned counsel for the appellant has argued, making reference to the provisions of Section 234 of the 1979 Constitution then applicable, that the territorial jurisdiction of a State Court is limited to the territorial boundary of the State concerned. That since the learned trial judge had ceased to be a judge in Taraba State High Court, he had no jurisdiction to try the appellant and convict him and for this reason the judgment was a nullity. Reliance was placed on the case of *NDAEYO v. OGUNNAYA* (1977-1978) 11 NSCC 5 at 10. That the provisions of Section 6 of Decree No. 41 of 1991 relied upon by the lower court do not support their position neither are they supported by the case of *CHIME v. CHIME* (2001) FWLR (pt 39) 1457 also relied upon by the lower court. It is argued that the phrase “*that court*” in which the case was to be continued, as mentioned, is the High Court of Taraba State not of Adamawa State where the Judge was deployed to.

Learned counsel for respondent, on his part, in respondent’s brief, submitted that the court below was right when it dismissed the cross-appeal on the issue based on the provisions of Section 6 of Decree No. 41 of 1991 and the decision of this Court in *CHIME v. CHIME* (supra), but that no miscarriage of justice has been occasioned to the appellant, and that this case is on all fours with Chime’s case.

How is Section 6 of Decree No. 41, also known as States (Creation and Constitutional Provisions) Decree, 1991 couched? It provides as follows:

“Any proceeding pending before any Court of a State immediately before the commencement of this Decree may after commencement be continued before that court and shall not adversely be affected by the provisions of this Decree.”

In interpreting the above provision this court has this to say in the case of *CHIME v. CHIME* (2001) 3 NWLR (pt 701) 527 at 552. In that case the appellant has canvassed the point that the trial Judge had no jurisdiction to continue to entertain the case since the area where the land in dispute was situate had been carved out of the old State in which the State originated, the Judge not being an indigene of the new State.

The issue was impressively resolved by this Court, per IGUH

JSC; at page 552 of the above case, in the context of Section 6 of Decree (supra) thus:

“It is thus crystal clear that the hearing of the present proceeding which was part-heard and pending before the said trial Judge in the Enugu Judicial Division of the High Court of Justice of the old Anambra State immediately before the commencement of the said Decree No. 41 of 1997 could therefore be continued with and the case determined before the same court. In other words, Ubaezonu, J., as he then was, before whom the case was pending before the commencement of the relevant Decree was vested with ample jurisdiction to continue with the hearing of the suit in his court after the commencement of the Decree. I entirely agree with the submission of learned counsel for the respondents, Chief Ugolo, that if it was the intendment of Section 6 of Decree No. 41 of 1997 that pending cases shall be tried de novo by another Judge of Enugu State origin, the expression that the trial of such cases may, after the commencement of the Decree, “be continued before that court and shall not be adversely affected by the provisions of this Decree” should not have been used. This is because, the hearing of a part-heard case taken over by another Judge is not “continued before the new Judge” but shall be started de novo by such new Judge in accordance with the basic principles of our law. It is my view, therefore, that the hearing of the present suit which was pending before Ubaezonu, J., as he then was, immediately before the commencement of Decree No. 41 of 1991 may after such commencement be continued before that court, quite rightly, pursuant to the provisions of Section 6 of that Decree.”

The relevant facts of this case are on all fours with those of CHIME v. CHIME [supra]. In the case at hand it is not in dispute that the charge against the appellant was still pending before OLUOTI (J) at the Gongola State High Court. He presided over the case before Adamawa State was created. Indeed, like Enugu and Anambra States were created out of the old Anambra State OLUOTI (J) sat in Jalingo the new State Capital to hear the case. On the creation of the States OLUOTI (J) was deployed to Adamawa State. Like Ubaezonu (J), as he then was, ceased to be an indigene of Taraba State. The learned trial judge then returned to Jalingo to deliver the Judgment now the subject of further appeal before this court.

I completely endorse the view and conclusions reached in

CHIME v. CHIME (supra), by this court. The facts and circumstances of that case are applicable to the case at hand, which is not distinguishable. It seems to me that in the circumstances of this case no question of any miscarriage of justice could possibly arise from the application of the provisions of Section 6 of Decree No. 41 of 1991. It is only when the appellant has shown that miscarriage of Justice has occasioned that this court is bound to interfere. See *ONAJOBI v. OLANIPEKUN* (1985) 4 SC (pt 2) 156 at 163, *UKEJIANYA v. UCHENDU* 13 WACA 45 at 46, *AZUETONMA IKE v. UGBOAJA* (1993) 6 NWLR (pt 301) 539 at 556.

On the remaining two issues, upon the close study of the evidence of the prosecution witnesses, I am of the view that the prosecution proved the case of culpable homicide punishable with death against the appellant beyond reasonable doubt. The two lower courts did not find any material contradictions in the evidence of the witnesses. Assuming there were such contradictions, which is not conceded, the appellant is raising the issue for the first time before this court and no leave is sought and obtained. The issue is therefore incompetent and is liable to be struck out.

Having found that the death of the appellant's wife "was caused instantaneously by stabbing on the neck" the learned trial Judge could not turn around and hold that he did not see or find any mens rea in the act of the appellant, which resulted in the death of the deceased. Appellant did intend and indeed caused the death of his wife. This can easily be inferred from the established facts of the case as accepted by the lower courts. I am of the strong view that the Court of Appeal was right in overturning the decision of the trial Judge and substituting its own decision.

Having resolved all the issues in favour of the respondent, I agree with my learned brother ONNOGHEN, JSC, that the appeal lacks merit. I too dismiss the appeal.

RHODES-VIVOUR JSC

I have had the advantage of reading in draft the judgment of my learned brother, Onnoghen, JSC. So completely do I agree with it that I have hesitated for sometime before finally deciding to add a few paragraphs on jurisdiction, circumstantial evidence, and the sen-

tence passed by the learned trial judge on the appellant. From time to time countries find the need to restructure the Country. Nigeria is no exception. At independence in 1960 the country was divided into Regions. North, West and East, and the territorial jurisdiction of the High Courts were confined to the Regions in which the courts were situated. This was also the case when the country was divided in 19 States and now 36 States. The territorial jurisdiction of a High Court of a State is limited to the territorial boundaries of the State. In 1991 Decree No. 41 was promulgated. It is the States (Creation and Constitutional Provisions) Decree, 1991. This is one of the situations for which Decree 41 of 1991 was promulgated.

Once a State is created usually out of an existing State a Judge may suddenly find that he no longer has jurisdiction in the former State, but in an entirely new State. That explains why Section 6 of Decree No. 41 (supra) states that:

“6. Any proceeding pending before any Court of a State immediately before the commencement of this Decree may after commencement be continued before that Court and shall not adversely be affected by the provisions of the Decree.”

Now, Oluoti J, presided as a High Court Judge in Jalingo, the Capital of Gongola State. His lordship presided over this case and before judgment was delivered on the 11th of May 1995 Adamawa and Taraba States were created out of Gongola State. There was no longer a Gongola State. After the creation of the two States, Jalingo became the Capital of Taraba State. Oluoti, J who sat in Jalingo in the defunct Gongola State was deployed to Adamawa State as High Court Judge Oluoti J, assumed duties as a Judge of Adamawa State, but as a Judge of Adamawa State, had to go to Jalingo in Taraba State to deliver judgment on 11/5/95. The jurisdiction issue is territorial. The question is can a judge of the Adamawa State High Court sit in Taraba State High Court? As a matter of fact, the facts in this case are not unlike the facts in Chime v. Chime 2001 3 NWLR pt. 701 p.52

In that case Enugu and Anambra States were created out of the old Anambra State. It was argued that the trial judge Ubazeonu, J had no jurisdiction to continue to hear the case since where the RES (land) in dispute was situate had been carved out of the old Anambra State in which the suit originated, the judge not being an

indigene of the new State.

This Court per Iguh JSC dismissed the argument, Ruling that the judge had jurisdiction to continue with the hearing of the suit in his court after the commencement of Decree 41 of 1991. Oluoti J, before whom this case was pending as the trial judge was vested with jurisdiction to continue hearing the case after the commencement of the Decree (supra) by virtue of Section 6 of Decree No.41 of 1991. B

Circumstantial Evidence and Sentencing

The appellant was arraigned on a one count charge of culpable homicide punishable with death under section 221(a) of the Penal Code. Evidence revealed that the appellant was convicted of culpable homicide. He killed his wife by stabbing her on the neck. He buried her in a shallow grave behind the house he shared with his dead wife. The case was heard, and concluded on circumstantial evidence. Circumstantial evidence is evidence of surrounding circumstances connected with the Murder in question. Before such evidence can be relied on for a conviction of Murder, it must be cogent, unequivocal and compelling as to lead to only one conclusion. That it was the accused person who killed the deceased. C
D

After the appellant stabbed his wife (the deceased) with a sharp object on her neck, she collapsed and died. It was PW1, the appellant's houseboy that assisted the appellant to bury the deceased in a shallow grave at the back of the appellant's house, it was the ever alert appellant's dog that unearthed the grave and exposed the hand of the deceased. E
F

PW6 performed post mortem on the body of the deceased and concluded that death was as a result of excessive loss of blood from a wound on her neck caused by a sharp object. The appellant denied the charge but did not contradict the evidence of PW1 and PW6. The unchallenged evidence of PW1 and PW6 is one way. It is cogent and compelling evidence that it was the appellant who killed his wife. No reasonable reason was given for his wife's death except to deny the charge. The appellant was convicted on circumstantial evidence that is cogent, unequivocal, and compelling leading to only one conclusion. The appellant killed his wife. G
H

The findings of the learned trial judge runs thus:

"In the case before me the death was caused instantaneously by a stabbing on the neck."

The learned trial judge proceeded to find the appellant guilty of culpable homicide under Section 220(b) of the Penal Code and punishable under Section 224 of the Penal Code. The appellant was sentenced to 11 years imprisonment. The Court of Appeal had no hesitation whatsoever setting aside the sentence and in its place a
B death sentence under Section 221(a) of the Penal Code.

My lords, the appellant was charged with culpable homicide punishable with death under Section 221 (a) of the Penal Code. The learned trial judge found that death was caused by a stabbing on the
C neck of the deceased by the appellant. This is proof beyond reasonable doubt that the appellant caused the death of his wife by stabbing her on her neck.

The charge under Section 221(a) of the Penal Code was in the circumstances proved. Once the charge under Section 221(a) of the
D Penal Code is established to the satisfaction of the court, i.e. proof beyond reasonable doubt the judge does not have a discretion when pronouncing sentence. The ONLY sentence that can be passed for a finding of guilt under Section 221(a) of the Penal Code is death.

The court is not a love court or one where a judge should
E allow his emotions override his better judgment. Sentiments have no place in court proceedings.

For this, and the comprehensive reasoning in the leading judgment, the appeal is dismissed.

F

AKA'HS JSC

My learned brother, Onnoghen, JSC made available to me in draft the leading judgment he has just delivered. I totally agree with
G him that the appeal lacks merit; hence the resolution of the issues raised against the appellant.

In Charge No. GGSJ/10C/90 which was preferred in the session holden in Jalingo in the then Gongola State, the accused was charged with Culpable Homicide punishable with death contrary to
H Section 221 (a) of the Penal Code. The case was presided over by Oluoti J. and the charge read as follows:

CHARGE

AT THE SESSION HOLDEN AT JALINGO ON THE:.....DAY
OF.....1990, the Court is informed by the Attorney - General of

the Gongola State on behalf of the State that BABAWURO USMAN is charged with the following offence:

STATEMENT OF OFFENCE:

Culpable Homicide Punishable with death under Section 221 (a) of the Penal Code.

PARTICULARS OF OFFENCE:

“BABAWURO USMAN on or about the 12th day of May, 1990 at Jalingo within the Jalingo Division caused the death of one Amina Babawuro by cutting her on the neck with a sharp object with the intention of causing her death”

To prove its case, the prosecution called 6 witnesses out of the 14 it had listed would testify at the trial. It also tendered a number of exhibits namely the accused's statement in Hausa which was admitted as Exhibit A and the English version as Exhibit A1. The accused gave evidence on his own behalf. He said that on a Sunday in 1989 he left home by 9am for a village market in Numan Local Government Area of Adamawa State called Dong and did not return until around 7pm but did not meet his wife at home and so he asked Abubakar who was staying with him her whereabouts and he told him that she had gone to the hospital. He then left to the General Hospital in search of her. On the way he met a friend Tijani who was a staff of the hospital who followed him to look for the wife but she was nowhere to be found. That night he went to bed and in the morning of the following day he contemplated going to Mutum Biyu where her parents lived when he saw her uncle and he informed him about the disappearance of his wife. His uncle asked him to hold on promising to check for her among other relations. He said that on the third day the uncle informed him he had received no information about her whereabouts. He then went to the Police and Radio Stations all in Jalingo to report on his missing wife. After about 19 days a small dog he was keeping started to dig a certain location in the house. He informed the Police about this development. He was assigned three Policemen who accompanied an ASP to go to his house. After this, he was asked to take one of the Policemen back to the station. He stayed in the Police Station until the other Policemen who were left in the house informed him that they had found the dead body of his wife inside his compound. Abubakar Babari who testified as PW1 was the one living in the house with the accused and his wife.

He said that on the Sunday when the accused returned home and asked for the wife who was not at home, she later returned by 9pm. On the following Saturday, he was sleeping in the night when he heard the deceased crying. Later the cry stopped and the accused called him. When he entered the room where the accused was he
B saw the dead body of the deceased wife lying in the parlour. At that time the accused had already dug a grave inside the compound so he asked him to help him to carry the corpse where they buried it in the grave the accused had dug. The accused warned him not to tell
C anybody that he (the accused) had killed his wife and that if anybody should enquire about her whereabouts he should inform the person that she had gone to the hospital and was yet to return home. It was later that the dog started digging the location where the deceased was buried and this led to the exposure of the hand of a human
D being.

PW2, Alhaji Buba Usman testified that it was the accused who invited him to his house to see the place where the dog was digging. He PW2 took a shovel and dug at a point and he noticed something heavy in the ground. He said the accused informed him he had re-
E ported the incident to the Divisional Crime Officer (DCO). PW6 was the Medical Officer who performed the post - mortem examination on the exhumed body of the deceased who was identified by one Umaru Manu, a member of the deceased's family. He found that the
F skin was broken at one spot on the neck. He said there was a lineal or straight wound which was about 5 (five) centimetres deep and 3cm of length. In his opinion the death was caused by severe blood loss (hemorrhage) from the said injury.

Learned counsel for the accused declined to address the Court.
G The learned trial Judge evaluated the evidence adduced by the prosecution and found that it was only PW1 who knew about the death of the deceased. He considered the evidence of PW6 where he stated that the injury might have been caused by a sharp object or instrument. He believed and accepted the evidence of PW6 and found
H that the deceased died from a neck injury notwithstanding that no knife or object or instrument was tendered. He found from the evidence of PW1 that the injury was caused by the accused since there was no other person in the room beside the accused and the deceased. He said it was the injury inflicted by the accused to the neck

of the deceased that caused the death of the deceased. He then considered Section 220 of the Penal Code and found that the death of a human being had taken place. He said that although PW1 did not witness the actual killing, he helped the accused in burying the deceased and this went to show that the accused had something to do with the death of the deceased. The third element of the offence on whether the act was done with the intention of causing death, or that it was done with the intention of causing such bodily injury as:

(i) the accused knew or had reason to know that death would be the probable and not only the likely consequence of his act; or

(ii) That the accused knew or had reason to know that death would be the probable and not only the likely consequence of any bodily injury which the act was intended to cause he examined the evidence of PW1 regarding the accused having dug the grave prior to killing his wife and disbelieved PW1 on that score. It was this vital consideration as to when the grave was dug that influenced the learned trial Judge in finding that the accused was guilty of culpable homicide not punishable with death and thereby sentenced him under Section 224 Penal Code to 11 years imprisonment. It is to be noted that as at 24/11/95 when the accused was convicted and sentenced, Gongola State had been broken into two States namely Adamawa and Taraba State respectively and the trial Judge was now a Judge of Adamawa State.

The State felt aggrieved and sought extension of time to appeal. The applicant was granted 30 days extension of time to appeal on 4/6/96 and the Notice of Appeal was filed on 17/6/96.

The reliefs sought were:-

(i) To set aside the conviction (sentence under Section 220 (b) of the Penal Code punishable under Section 224 of the Penal Code.

(ii) To substitute a conviction under Section 221 (a) of the Penal Code and direct the trial Judge to properly sentence the accused person.

The respondent cross - appealed urging the Court of Appeal to set aside the conviction and sentence of the accused person as contained in the judgment dated 24/11/95 and to acquit and discharge the accused.

The cross - appeal was dismissed and the main appeal allowed. The conviction and sentence of the respondent / Cross appellant was

set aside. He was found guilty of Culpable homicide punishable with death under Section 221 (a) of the Penal Code and sentenced to death by hanging. The appellant appealed to this Court against the decision of the Court of Appeal Jos in CA/J/127/96.

My learned brother, Onnoghen, JSC exhaustively dealt with the issues raised in the appeal. What I will say is a matter of emphasis. As there was no eye witness account as to how the deceased was killed, the conviction is based on circumstantial evidence; moreso since the appellant made a clear brest of the commission of the offence both in his statement to the Police and in his evidence in court.

To sustain a conviction on the basis of circumstantial evidence, such evidence must be direct and must lead unequivocally and indisputably to the guilt of the appellant. See: Buba v. State (1994) 7 NWLR (Pt. 355) 195 SC; Ebenehi v. State (2009) 6 NWLR (Pt. 1138) 431 SC; Shehu v. State (2010) 8 NWLR (Pt. 1195) 112 SC. The evidence must be so cogent, unequivocal and compelling as to lead to only one conclusion and it is that it was the accused who killed the deceased.

The learned trial Judge had no difficulty whatsoever in believing PW1 when he stated that he had the cry of the deceased and after sometime she stopped crying. The appellant later invited him to the room where he and deceased were and he saw the deceased lying lifeless on the floor. The appellant did not invite him to help him ward off an attack but rather to help him dispose of the corpse of the deceased in a grave which he had already dug in the compound. Under cross-examination PW1 said at page 16 of the records:-

"I saw blood in the parlour together with the body of the accused's wife on that Saturday night. The accused did not tell the cause of the wife (sic) death. The time interval the cry of the wife stopped and the time the accused called me would be about 30 (thirty) minutes. The deceased was buried at a point in the house which a person can see if he entered the compound".

The evidence adduced by PW1 pointed directly to the appellant as the only one who inflicted the fatal injury on the neck from which the deceased bled to death. But for the misdirection by the learned trial Judge on whether the grave was dug before or after the killing of the deceased, it was clear as daylight that the accused was the only one who could tell who killed his wife beside him. After

committing the heinous crime the appellant set about to cover it up by first threatening to deal with PW1 if he revealed to anyone that it was he (the appellant) who had killed his wife. He even went further to feign ignorance of his wife's whereabouts and to concoct the story that she was missing. The stench from the decomposing corpse led the dog to start burrowing the shallow grave where the deceased was buried. The blood of the deceased was crying for vengeance and justice was done when the lower court set aside the conviction and sentence of the appellant to an 11 years term of imprisonment instead of at least imposing a life sentence. My learned brother, Onnoghen, JSC was quite right in endorsing the stand by the lower court that the prosecution proved the case of culpable homicide punishable with death against the appellant and any contradictions which appeared in the testimonies of witnesses were not material at all. It was not a case of the credibility of witnesses that was in issue but the rationality of believing part of the evidence of PW1 not believing another portion of the same witness. The proper inference which could be drawn from the evidence of PW1 is that of fright of a person who was dependent on the perpetrator of a crime and who went about to threaten him if he should spill the beans.

The next issue is whether Oluoti J. had ceased to be a Judge of Taraba State at the time he delivered his judgment on 24/11/95 following the splitting of Gongola State into Adamawa and Taraba States. Section 6 of the States (Creation and Transitional) Provisions Decree No. 41 of 1991 has settled any doubt that could have resulted in resolving the issue. The section states as follows:

“Any proceedings pending before any Court of a State immediately before the commencement of this Decree may after commencement be continued before that court and shall not adversely be affected by the Provisions of this Decree”

This provision came for interpretation in *Chime v. Chime* (2001) 3 NWLR (Pt. 701) 527 at 552. The facts which are quite apposite to this case are briefly stated as follows:

A matter was pending at the High Court of the then Anambra State in Enugu and presided over by Ubaezuonu J. (as he then was). After Anambra State had been split into two States namely Anambra and Enugu with headquarters at Awka and Enugu respectively in 1991, the learned trial Judge was deployed to the new Anambra

State. He then proceeded to determine the suit which had been pending before the creation of the new States. The appellants took the position that the trial Judge had no jurisdiction to continue to entertain the case since the area where the land in dispute was situate had been carved out of the old State in which the suit originated, the Judge not being an indigene of the new State. In resolving the issue Iguh, JSC stated as follows at page 552:-

“In other words, Ubaezuonu J. as he then was, before whom the case was pending before the relevant Decree was vested with ample jurisdiction to continue with the hearing of the suit in his court after the commencement of the Decree...”

Since the matter was pending before Oluoti J. before Adamawa and Taraba States were created, notwithstanding the fact that he was deployed to Adamawa State, he had jurisdiction to continue with the case which was now before the Taraba State High Court and deliver judgment as a Judge of Taraba State. Oluotu J., therefore did not cease to be a Judge of the High Court of Taraba State and so had jurisdiction to hear the case up to conclusion and delivery of judgment.

For the above reasons and the more detailed reasons contained in the judgment of my learned brother, Onnoghen, JSC. I find that the appeal lacks merit and it is accordingly dismissed.

F

OKORO JSC

I have had the privilege of reading before now the judgment just delivered by my learned brother W. S. N. Onnoghen, JSC with which I agree with the reasons adduced and the conclusion that this appeal lacks merit and ought to be dismissed. My Noble Lord has quite admirably resolved all the salient issues distilled for the determination of this appeal. I however propose to make a few comments in support of the judgment.

A synopsis of the facts will suffice. The Appellant had a quarrel with his late wife on the fateful day. PW1 (their houseboy) heard her crying that night. Thirty minutes after, the Appellant called the PW1. When he went, he saw the dead body of the deceased wife of the Appellant in the “*palour*.” According to PW1, the Appellant dug a portion of his compound where he buried the wife. The PW1 had

assisted the Appellant to carry the body of the woman into the shallow grave. The Appellant threatened the PW1 with death should he tell anybody what he has seen. Thereafter, the Appellant faked that his wife could not be found. He reported to the police. A dog later dug the shallow grave and the decomposing body of his wife was revealed. He was arrested and after investigation arraigned before the High Court of Gongola State, Jalingo Judicial Division upon a charge of Culpable Homicide punishable with death under Section 221 (a) of the Penal Code. B

On the 23rd of November, 1995, the learned trial judge found the Accused/Appellant guilty of culpable homicide under Section 220 (b) of the Penal Code and punishable under Section 224 thereof and sentenced him to eleven (11) years imprisonment. C

The State appealed against that decision. The Court of Appeal found the Appellant guilty of culpable Homicide punishable with death and thereupon sentenced the Appellant to death. The appeal was allowed. The Appellant has now appealed to this Court against the sentence of death imposed on him. Three issues are distilled by his counsel as follows:- D

“(i) Whether the learned Justices of the Court of Appeal were right in holding that Oluoti, J, who had ceased to be a judge of the High Court of Taraba State had jurisdiction to try the Appellant and convict him. E

(ii) Whether the prosecution proved the case of culpable homicide punishable with death against the Appellant amidst the material contradictions in the testimonies of the prosecution witnesses. F

(iii) Whether the learned justices of the Court of Appeal were right in overturning the judgment of the learned trial judge who had the opportunity of seeing, listening and ascribing probative value to the testimonies of the witnesses. G

The learned counsel for the Respondent has also formulated three similar issues for the determination of this appeal. They are couched differently as follows:

“A - Whether or not the Learned Justices of the Court of Appeal having regard to the intendant of Section 6 of the States (Creation and Transitional) Provisions Decree No. 41 of 1991 were correct in holding that (Oluoti, J.) the Trial Judge who heard all the evidence for the prosecution and the defence and adjourned for judg- H

ment before he was transferred from the Jalingo Judicial Division of the High Court of Gongola State now in Taraba State to Adamawa State High Court (still part of the former Gongola State) had the jurisdiction to try and convict the Appellant.

B. Whether or not the prosecution proved its case against the Appellant beyond reasonable doubt to warrant his conviction for the offence of culpable homicide punishable with death under Section 221 (a) of the Penal Code as charged.

C. Whether in a case on appeal such as this where the issue on appeal is a question of inference to be drawn from established facts or evidence on record which does not depend on credibility of witnesses and on their demeanour in the trial court or that court's impression of them, the court below and in fact the Supreme Court usually would regard itself as in as good position as the trial court to evaluate and draw relevant inferences from the proved facts on record."

I think the main plank of this appeal relates to issue one in both briefs. The learned counsel for the Appellant submitted on this issue that by virtue of Section 234 of the 1979 Constitution of the Federal Republic of Nigeria which was the applicable constitution at the time of the hearing of this case at the High Court, the territorial jurisdiction of a Court of a State is limited to the territorial boundary of the state concerned. That the trial judge having admitted in his judgment that he was transferred or deployed from Taraba to Adamawa State, the learned trial judge had no jurisdiction to proceed with the hearing or to continue with the hearing and determination of the case and the effect of this is that the judgment is a nullity. He cited the case of *ADAEYO V. OGUNNAYA* (1977-78) 11 NSCC 5.

On the reliance by the lower courts on Section 6 of Decree 41 of 1991 and the case of *CHIME V. CHIME* (2001) FWLR (pt. 39) 1457, he submitted that by the wordings of the said Section and particularly the words "*that court*" means "the court where the case was originally being tried. He also submitted that this case is distinguishable from the case of *CHIME V. CHIME* (supra).

In response, the learned counsel for the Respondent submitted that by Section 6 of the States (Creation and Transitional) Provisions Decree No. 41 of 1991 and the case of *CHIME V. CHIME*

(supra) the learned trial judge had jurisdiction in this case in spite of the fact that he had been transferred to Adamawa State.

There is no doubt that every court is endowed with jurisdiction by statute or the Constitution and where a court exercises jurisdiction in a matter which it does not possess, the decision from such an exercise is a nullity. B

Therefore every court must assure itself that it has the requisite jurisdiction before embarking on the hearing of the matter to avoid a waste of precious judicial time. See PETROJESSICA ENTERPRISES LTD & ANOR V. LEVENTIS TECHNICAL COY. LTD (1992) 5 NWLR (pt 244) 675, OSADEBAY V. A-G. BENDEL STATE (1991) 1 NWLR (pt. 169) 525, OWONIBOYS TECH. SERVICES LTD V. JOHN HOLT LTD. (1991) 6 NWLR (pt. 199) 550. C

Section 6 of Decree No. 41 of 1991 known as The States (Creation and Transitional) provisions Decree provides: D

“Any proceedings pending before any Court of a State immediately before the commencement of this Decree may after commencement be continued before that court and shall not adversely be affected by the provisions of this Decree.”

In my view, the above provision was made to preserve, continue and conclude matters which had been commenced by a judge who by the creation of States had to move from the venue where the matter was being heard. That is why the Decree provides that such cases *“shall not adversely be affected by the provisions of this Decree.”* E
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To make the matter clearer, this court had taken a position in the matter. In CHIME V. CHIME (supra), a matter was pending in a court presided over by Ubaezuonu, J. in the old Anambra State with its capital at Enugu. From Anambra State, two states i.e. Enugu and Anambra States were created in 1991. The learned trial judge was deployed to new Anambra State with capital at Awka. He then proceeded to determine the suit which had been pending before him before the creation of the new States. The question whether he could do so was answered in the affirmative. The facts of that case are very similar with the present appeal. It is my view that the Court of Appeal was right to uphold the jurisdiction of the learned trial Judge in this case to deliver judgment in a case he had adjourned for judgment before the splitting of Gongola into Adamawa and Taraba States. H

Based on the above and the fuller reasons in the lead judgment, I agree that this appeal is devoid of merit. I also dismiss this appeal.

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