

SUPREME COURT OF NIGERIA
FRIDAY 21ST JUNE, 2013. SC. 225/2011
CORAM:- I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH,
S. GALADIMA, C. B. OGUNBIYI, S. S. ALAGOA, JJSC

CORPORAL BONNY AIKHADUEKI APPELLANT
V.
THE STATE RESPONDENT

MURDER - Ingredients - Proof - To secure conviction prosecution must prove - That deceased died - That the death was caused by accused - That the act or omission of accused was intentional (H1)

MURDER - Proof - Means of - Evidence relied upon to establish murder - May be direct or circumstantial - And must establish guilt of accused beyond reasonable doubt (H2)

MURDER - Circumstantial evidence - Weight - For such evidence to ground conviction - It must only lead to the guilt of appellant - Otherwise appellant cannot be convicted of the murder of deceased (H3)

EVIDENCE - Confession - Effect on co accused - Allegations made by accused against co accused - Will not constitute evidence against the co accused - Unless the co accused adopted the statement (H4)

MURDER - Proof - Common intention - Criminal Code ss. 7 & 8 - Is not applicable as no evidence exists - To justify decision of CA that appellant and others - Acted in concert to kill the deceased (H5)

CRIMINAL PROCEDURE - Proof - Reasonable doubt - Where such doubt exists in a criminal case - The same must be resolved in favour of accused (H6)

CRIMINAL PROCEDURE - Proof - Failure of - Conviction of appellant is set aside - As it was not properly affirmed by CA - Since prosecution failed to prove its case beyond reasonable doubt (H7)

FACTS

Before the High Court of Imo State Orlu Judicial Division, accused/appellant along with six others was arraigned for murder contrary to section 319(1) of the Criminal Code Laws of former Eastern Nigeria 1963 (as applicable to Imo State). The case as presented by prosecution/respondent is that PW2 and the deceased - Christian Owerreoma met a police check point while traveling in their car on a Federal high way in Imo State. Upon their departure from the check point, the police chased them and raised alarm that they were thieves. This prompted the first set of policemen and another team of mobile police officers at the next check point to open fire on PW2 and the deceased. PW2 was severely wounded but the deceased died in the process. The death was confirmed at a hospital by PW5 (medical doctor) who stated that the deceased was killed by a bullet shot.

At the trial, respondent called five witnesses while each accused person testified in his own defence. At the end of the trial, the court expressed the opinion that appellant and the other team of mobile policemen did not have common intention to kill the deceased. In any case, the court discharged and acquitted three of the accused persons. However, appellant and two others were convicted and sentenced to death. Following the unfavourable outcome of the judgment, separate appeals were filed by the convicts at the Court of Appeal Owerri Division. The court heard the appeal and held that there was common intention between appellant and the others to commit murder. It therefore dismissed the appeal and affirmed the conviction and sentence by the trial court. Not yet satisfied, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

“a. Whether the learned Justices of the Court of Appeal were right in law when they affirmed the conviction and sentence of the Appellant for murder when the prosecution did not prove their case beyond reasonable doubt.

b. Whether the learned Justices of the Court of Appeal were right in law when they affirmed the conviction and sentence of the Appellant for murder based on the uncorroborated evidence of co-accused persons only.

c. Whether the learned Justices were right in law when they held that the Appellants and other policemen who shot at the de-

ceased vehicle had a common intention to commit an unlawful purpose i.e. to kill the deceased person."

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

MURDER - Ingredients - Proof

1. From a long line of decisions of the court, it is settled beyond controversy that to secure a conviction on a charge of murder, the prosecution must prove:-

(i) That the deceased had died;

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

(iii) That the act or omission of the accused was intentional with the knowledge that death or grievous bodily harm was its probable consequence. (p. 3192 B)

MURDER - Proof - Means of

2. It follows therefore, that the evidence relied upon to establish a charge of murder may be direct or circumstantial. Whether the evidence is direct or circumstantial, it must establish the guilt of the accused person beyond reasonable doubt. In this connection, the onus which is on the prosecution, as a general rule never shifts and misdirection on the question of onus of proof is fatal unless it can be shown that on a proper direction the result would be the same.

(p. 3192 E)

MURDER - Circumstantial evidence - Weight

3. It is also the law that for circumstantial evidence to ground a conviction, it must lead only to one conclusion, that is, the guilt of the accused person. However, where there are other possibilities (as in the case at hand) that other person(s) than the accused had the opportunity of committing the offence with which he was charged, such an accused person cannot be convicted of murder.

From the above pieces of evidence so far it is clear that PW2

could not tell and did not know who actually shot the deceased. It was only during the investigation at Zone 9 Umuahia Police Headquarters that he was able to know those that shot at his Vehicle apparently because they were produced as those who were on duty at the scene of crime on the day of the incident.

B Here, there are other possibilities that someone other than the Appellant could have caused the death of the deceased. If so the Appellant cannot be convicted of murder.

The evidence of PW2, in no way, incriminates or exculpates the Appellant. He did not pin the death of the deceased to any of the accused persons especially the Appellant. PW3 the Investigating Police Officer tendered the statements of the accused persons including those of the Appellant. Those were Exhibits K, K1 and K2. The Appellant is the 6th accused person at the trial. He told the court that he did not fire a single shot on the day of the incident and that he returned all the ammunition given to him, which was checked, recorded and endorsed. (pp. 3192 G/3193 D)

E EVIDENCE - Confession - Effect on co accused

4. Also in his evidence DW3 failed to mention the Appellant at the earliest opportunity that he was responsible for the death of the deceased. In any case the court is wary of an allegation in a statement of one accused person against another. It is trite law that allegations in a statement made by one accused against a co-accused will not constitute evidence against the co-accused unless the said co-accused has adopted the statement. (p. 3195 D)

G MURDER - Proof - Common intention

5. Furthermore at page 204 lines 17-23 of the Records, the learned trial judge held that:

H “I am of the opinion that this is not a case for which there should be very strict application of the provisions of Section 8 of the Criminal Code. The 2nd, 3rd and 6th Accused persons acted independently and on their own volition used their firearms recklessly and killed an innocent person without justifiable reason.”

This is clear and unambiguous finding of fact by the trial court. There was no appeal by the prosecution against it. I cannot therefore fathom the reason why the learned Justices of the court below acceded to the submission of the prosecution in its brief of argument in the appeal by holding that the Appellant and others had a common intention to kill the deceased person. I agree with the learned counsel for the Appellant that the court below erroneously invoked the provisions of Sections 7 and 8 of the Criminal Code and held that the Appellant and the mobile policemen at the checkpoint who shot at the vehicle in which the deceased died were acting in concert and had a common intention to kill the deceased. A presumption of common intention should not be too easily applied to every case. There must be evidence before the court to justify the inference of common intention. (p. 3196 B) D

CRIMINAL PROCEDURE - Proof - Reasonable doubt

6. Where there is reasonable doubt in proving a crime in a criminal case, the doubt should be resolved in favour of the accused. (p. 3196 G) E

CRIMINAL PROCEDURE - Proof - Failure of

7. The two-fold aim of criminal justice is that the guilty shall not escape; on the other hand the innocent cannot be allowed to suffer injustice. It is in the light of the foregoing, I hold that the prosecution failed to prove its case beyond reasonable doubt to warrant the conviction of the Appellant and the appeal is allowed. Consequently, the conviction of the Appellant was not properly affirmed by lower court. It is set aside. The Appellant is discharged and acquitted. (p. 3197 E) F G

NOTABLE POINT OF INTEREST

MUHAMMAD JSC

1. Discharge of accused to affect a co-accused tried on similar evidence H

All the accused persons, including the appellant, were arraigned before the same court, on the same charge, on same evidence which

was interwoven, interrelated and inseparable. May I remind my lords of the golden principle of criminal law that where two or more persons are charged with the commission of an offence, and the evidence against all the accused persons is the same or similar, the discharge of one must, as a matter of law, affect the discharge of the others. This is because, if one or more of the accused persons is discharged for want of convincing evidence, that must automatically affect all the other accused persons in the light of the fact that the evidence against all the accused persons is tied or interwoven together. (p. 3198 A)

REPRESENTATION

L. M. Alozie, Esq. with Ukachukwu, Esq., for the Appellant
 S. A. Njoku, Esq. (Hon. A-G Imo State) with C. C. Dimkpa (Mrs.)
 Administrator-General Imo State M.O.J.), K. A. Leweanya (Principal
 State Counsel M.O.J. Imo State), for the Respondent

CASES REFERRED TO

Ajiboye v. State (1995) 8 NWLR (pt. 414) 408
 Gira v. State (1995) 3 NWLR (pt. 385) 617
 Oladimeji v. State (1998) 11 NWLR (pt. 573) 189
 State v. Onyeukwu (2004) 14 NWLR (pt. 893) 49
 State v. Azeez (2008) 14 NWLR (pt. 1108) 439
 Alarape v. State (2001) 5 NWLR (pt. 705) 79
 R. v. Bada (1954) 10 WACA 249
 Ekpenyong v. State (2009) 1 NWLR (pt. 1122) 354
 Abdullahi v. State (2008) 15 NWLR (pt. 1115) 203
 Idahosa v. Queen (1965) NWLR 85
 Okosi v. State (1989) 1 NWLR (pt. 100) 624
 Yahaya v. State (2005) 1 N.C.C. 120
 State v. Aibangbe (1988) 3 NWLR (pt. 84) 562
 Ogba v. State (1992) 2 NWLR (pt. 222) 164
 Nwaeze v. State (1996) 4 NWLR (pt. 443)

STATUTES REFERRED TO

Criminal Code Cap 30 vol. II Laws of Eastern Nigeria 1963, ss. 271, 319(1)
 Evidence Act, s. 178(2)

LEAD JUDGMENT BY GALADIMA JSC

This is an appeal against the judgment of the Court of Appeal Owerri Division delivered on the 24th March, 2011 confirming the conviction and sentence of the Appellant for murder while discharging the others. B

The facts which led to this appeal are as follows: At the commencement of trial at the High Court Orlu, seven accused persons were initially charged on information for the offence as follows:

“Murder: Contrary to section 319(1) of the Criminal Code Cap 30 vol. II Laws of Eastern Nigeria 1963 as applicable to Imo State.” C

PARTICULARS OF OFFENCE:

Inspector David Poli, Sgt. Lazarus Adiele, Cpl. Desmond Ononuju, Insp. Victor Chiaka, PC Augustine Ochiaga, Inspector Sunday Uwadiogwu, and Bonny Aikhadueki on the 15th day of August, 2001 along Orlu Road Junction by Mgbidi in Orlu Judicial Division murdered Christian Owerreoma”.

I shall recap that at the trial, PW2 Boniface Ozumba gave evidence that on the 15th August, 2002, he was traveling in his NISSAN SUNNY car with Registration No. CY 926AA with his brother-in-law, Christian Owerreoma who came to his home town to get married. On their way they encountered a check point along Orlu Road Junction by Mgbidi. After they left the checkpoint, they were chased by some police officers in their Algon Jeep. At next police checkpoint mounted by the mobile policemen, the most senior officer in the Algon Vehicle, one Inspector Uwadiogwu raised alarm that PW2 and Christian Owerreoma were thieves and he and other policemen in the Jeep started shooting at the vehicle. The Driver, PW2, seeing that policemen were shooting at the vehicle made a run for it, but stopped a few poles from the check point. PW2 and the deceased (Christian Owerreoma) were severely wounded and taken to a hospital called White Rose Hospital, Mgbidi where the deceased was pronounced dead. E F G H

During the trial, the two sets of policemen claimed that the deceased and PW2 were suspected to be armed robbers because the victims had refused to stop their vehicle at the regular checkpoint and that the search carried on by the regular policemen in their Algon

Jeep and at the mobile police checkpoint.(sic) They claimed that their behavior in refusing to stop caused the police to fire at the vehicle and its occupants in order to apprehend them.

All the policemen found directly involved in the incident were charged on information to the High Court with the offence of murder. At the trial court prosecution called 5 witnesses while each of the accused persons testified in his own defence but did not call any witness.

At the conclusion of the trial, the learned trial judge found the 1st 4th and 5th accused persons not guilty and acquitted them. However, the 2nd, 3rd and 6th Accused persons were found guilty as charged and were convicted and sentenced to death.

Dissatisfied with the verdict of the trial High Court, the Appellants filed separate Notices of Appeal and a file was opened for each Appellant at the Court of Appeal, Owerri Division which dismissed the Appellant's appeal in its judgment delivered on 24th March, 2011, and affirmed his conviction.

The Appellant being dissatisfied with the judgment of the court below has further appealed to this court seeking to set aside his conviction by the two lower courts; in his Notice of Appeal containing Four Grounds of Appeal.

Briefs of argument were led and exchanged by the parties.

On 27th March 2013, the appeal was heard by this court. Learned Counsel to the Appellants identified his brief filed on 28th July, 2011. He made no oral submissions but urged that the appeal be allowed. Learned Counsel for the Respondent also adopted and relied on the Respondent's brief of argument filed on 14th November, 2011 but deemed filed on 22nd November, 2011. He too made no oral submissions in amplification and urged that the appeal be dismissed. From the Four Grounds of Appeal filed by the Appellant four issues were formulated for determination as follows:

"a. Whether the learned Justices of the Court of Appeal were right in law when they affirmed the conviction and sentence of the Appellant for murder when the prosecution did not prove their case beyond reasonable doubt. (Ground 1 of the grounds of appeal)

b. Whether the learned Justices of the Court of Appeal were right in law when they affirmed the conviction and sentence of the Appellant for murder based on the uncorroborated evidence of co-

accused persons only. (Ground 2 of the grounds of appeal)

c. Whether the learned Justices were right in law when they held that the Appellants and other policemen who shot at the deceased vehicle had a common intention to commit an unlawful purpose i.e. to kill the deceased person. (Ground 3 of the grounds of appeal)

d. Whether the learned Justices were right in law when they held that the Appellant was not entitled to the statutory defences provided for by law especially under section 271 of the criminal code. (Ground 4 of the grounds of appeal)”

On the other hand the Respondent equally submits four issues for determination in this Appeal as follows:

“1. WHETHER the prosecution did not prove the case of murder contrary to section 319(1) of the criminal Code beyond reasonable doubt against the Appellant.

2. WHETHER the evidence of the co-accused persons were not corroborated.

3. WHETHER the Appellant and the other accused persons had common intention to commit an unlawful purpose when they shot at the vehicle conveying the deceased person.

4. WHETHER the defences provided in Section 271 of the Criminal Code availed the Appellant.”

However, issues 1, 2 and 3 formulated by the parties can be conveniently taken and argued together. Those issues relate to question of proof of the case of murder against the Appellant under Section 319 (1) of Criminal Code. The 4th issue as to whether the defences provided in Section 271 of the Criminal Code availed the Appellant at his trial shall be considered separately, if necessary. In arguing issues 1, 2 and 3 (which arose from grounds 1, 2, and 3 of the grounds of appeal) together, learned counsel for the appellant submitted that the prosecution did not prove the charge of murder against the Appellant as there was no evidence that the appellant shot the deceased. He has urged the court not to rely on the evidence of PW1, Tobias Nwaneri, as this is hearsay, because he did not witness the alleged crime against the appellant. That though PW2, the driver of the Nisan Sunny Car in which the deceased was killed, was investigated for armed robbery by the Police at Mgbidi Police Station, State C.I.D, Owerri, and Zone 9 Police Headquarters,

Umuahia and no evidence of robbery was established but it must be pointed out that the suspicion arose from his refusal to stop for the police to search him. That his conduct betrayed him and made him a suspect. The PW3, ASP Nathaniel Ononubi, the Investigating Police Officer (IPO) tendered the statements of the accused persons at the trial including those of the Appellant which were received in evidence as Exhibits K, K1 and K2, and nowhere was it stated in the said statements that the Appellant fired a gunshot on the day of the incident.

That since the evidence by PW5, the Medical Doctor indicated that it was only one bullet that killed the deceased the prosecution had a duty to find which of the Police Officer fired the fatal bullet and that this could only be established by a ballistics examination of the expended bullet or direct evidence linking the Appellant who gave evidence that he returned the ammunition given to him to his Divisional Armourer. That the appellant was only one of the officers who was alleged by his co-accused as firing at the Car. That there was no evidence as to who actually fired on the tyre of the Car.

It is further submitted that during trial the appellant, in exonerating himself gave evidence that it was one Sgt. Ononuju and Sgt. Monsi who killed the deceased, the trial court ought to have consider this defence, particularly that the said Ononuju had turned round to accuse the appellant. That in a joint criminal trial where two or more accuse persons are being tried jointly, the evidence against each accused person must be considered separately and separate verdict returned. Refers *Ajiboye v. State* (1995) 8 NWLR (pt. 414) 408 at 414. *Gira v. State* (1995) 3 NWLR (pt. 385) 617 at 629; and *Oladimeji v. State* (1998) 11 NWLR (pt. 573) 189 at 198-199.

It is submitted on the authority of *State v. Onyeukwu* (2004) 14 NWLR (pt. 893) 49 that the evidence of an accused person in a criminal trial cannot be used as evidence either for or against another accused person the reason being that the accused person would be tempted to exculpate himself at the expense of his co-accused.

On the issue of whether the appellant and other Policemen who shot at the deceased vehicle had formed a common intention to prosecute an unlawful purpose, in concert with one another to kill the deceased, learned counsel for the Appellant submitted that there was no evidence to establish that there was common intention to kill the deceased. He relied on *State v. Azeez* (2008) 14 NWLR (pt. 1108)

439 at pp. 481 - 482. Alarape v. State (2001) 5 NWLR (pt. 705) 79 at 110 and R. v. Bada (1954) 10 WACA 249. It is submitted therefore that there was no evidence before the court to justify the inference of common intention. On this point it was further submitted that both the lower courts were wrong, when after examining the entire case of the prosecution and finding nothing against the Appellant and other accused persons to later turn round to accept the conflicting evidence of DW1, DW2, DW4, DW5 and DW6 each of whom accused the other of shooting at the PW2's vehicle. Submitted that where there is a mix up or contradiction which makes it unsafe to convict on the evidence of the prosecution the accused must be discharged and acquitted: See Ekpenyong v. The State (2009) 1 NWLR (pt. 1122) 354. B C

Relying on the case of Abdullahi v. State (2008) 15 NWLR (pt. 1115) p. 203 at page 216-217, learned Counsel has submitted that failure on the part of some of the co-accused persons to disclose the identity of the Appellant at the earliest opportunity, as one of those whose gun-shot killed the deceased was enough to vitiate the credibility of the evidence of the said witnesses. In view of the foregoing the learned counsel for the Appellant has urged the court to resolve issues 1, 2 and 3 in favour of the Appellant. D E

On the 4th issue learned counsel for the Appellant submitted that the learned Justices of the court below erred in law in not considering the statutory defences available to the Appellant though not conceding to his guilt, as provided for under Section 271 of the Criminal Code. That the deceased was not killed merely because he disobeyed the order of the policemen to stop at the checkpoint; the evidence before the court shows that both the mobile police officers and the regular police officers in ALGON JEEP and who were chasing the vehicle carrying the deceased person all reasonably suspected the occupants of the vehicle to be fleeing armed robbers and they shoot at one of the tyres. That the conduct of the police was justified in law under Section 271 of the Criminal Code (supra). F G

Learned Counsel for the Respondent has submitted that the prosecutor successfully proved all the ingredients of murder against the Appellant. Reliance was placed on the evidence PW2 Boniface Ozuoba, the driver at pp.78 -79 of the Records of Appeal, when he said that his deceased brother died as a result of the injury he sus- H

tained from the gun shot. Reliance was also placed on PW2's extra-judicial statement to the police made on 17/08/2002 and admitted as Exhibit B during the trial to the effect that it was lithe shooting of the ALGON policemen that attracted the mobile policemen and they too opened fire on my car as well.

B Learned Counsel further relied on the evidence of PW3, the Investigating Police Officer, and PW5, the Medical Doctor who performed the post mortem examination on the deceased, and came to the conclusion that the community reading of all the evidence of all the prosecution witnesses pointed irresistibly to the fact that the deceased had died unnatural death.

C On the second and third ingredients required to prove the charge of murder against the appellant, learned counsel submitted that it has been proved that it was the act of the Appellant that caused the death of the deceased. Referring to the evidence of PW2, PW3, D PW4, PW5 including Exhibit 'M' and the evidence of DW1, DW2, DW3, DW4 and DW5, learned counsel submitted that it has been proved that the appellant belonged to the group of Mobile Police-man who fired at the vehicle conveying the deceased and PW2. E Learned counsel submitted that the evidence of PW2, the driver an eye witness to the incident, PW3, the Investigating Police Officer, PW4, PW5, DW1, DW2, DW4 and DW5 are credible as to the culpability of the Appellant that he committed the offence and their evidence was never controverted, discredited or impugned during cross-examination. F It was submitted that contrary to the contention of the Appellant's counsel that PW2 refused to stop at a Police Checkpoint; PW2, in his evidence at page 18 of the Records at the trial told the Court that when the policemen ordered him to stop for a search, he G did and that his conduct at the trial did not raise any suspicion of his being an armed robber to justify the firing of gunshot at his car. It is submitted that, the evidence of the Appellant at the trial that he expended no ammunition and did not fire any shot at the scene of the incident as he returned all the bullets assigned to him to the armourer, H was punctuated by the evidence of P W3, ASP Nathaniel Ononubi, the IPO, that the Mobile Police at his squadron, had no system of identifying the handing and taking over of arms.

It is submitted by the learned counsel for the Respondent that where an accused person gives evidence against a co-accused, it is

admissible for all purposes against the co-accused, it does not require corroboration before it can be acted upon by the court against the co-accused. That the only requirement is that the trial judge should caution or warn himself before convicting on the uncorroborated evidence of a co-accused. That the court is not obliged to seek for corroborative evidence of an accomplice: He relied on Section 178(2) B of the Evidence Act and the case of *Idahosa v. Queen* (1965) NWLR 85. It is submitted that the evidence of an accomplice may require corroboration but that of accused against a co-accused does not See: *Okosi v. State* (1989) 1 NWLR (pt.100) 624; *Sanusi Yahaya v. State* C (2005) 1 N.C.C. 120 at 140.

It was further submitted by the learned counsel for the Respondent that there was common intention by the other policeman in the commission of the act that resulted in the death of the deceased. That the learned trial judge, in the circumstances of this case, D painstakingly - considered all the defences available to the Appellant and properly reviewed and evaluated all the evidence before arriving at the decision.

This case in spite of its bizarre facts, features and surrounding circumstances should not have unnecessarily drawn the sympathy E and sentiments expressed in the judgment of the two courts below. In *State v. Aibangbe* (1988) 3 NWLR (pt. 84) at 562, Eso, JSC (of Blessed Memory) has reminded us of the role and function of Courts and Judges when he stated thus:

“...A court of law is a court of cold facts and law and not a F court of fiction. Fiction belongs to Alice in wonderland Facts belong to the court where the judge, almost visibly, sees in his mind a scale, hence it is called an imaginary scale. He feeds fact into either scale, depending on which side gives the evidence. In a criminal case until G the prosecution weighs right down the Judge does riot convict.

In a civil case the judge measures the delicacy of the tilting H scale at the time he assesses the evidence. The tilt may be slight yet he gives judgment for the side to whom it tilts. If there is no evidence fed into one of the scales, then it is for whom the bell tolls! It tells for the empty scale, for eminently, the slightly fed scale wins against the empty scale.”

The foregoing is more than mere “homily” on the role of Judges in administration of Justice. In sum, it urges that law should be ap-

plied to facts of case. It is not for a court to manufacture facts. The complaint of the appellant is that the prosecution did not prove the charge of murder contrary to Section 316 and punishable under Section 319 (1) of the Criminal Code, in the absence of any evidence that he shot the fatal gun that killed the deceased in the absence of common intention as found by the trial court. The charge against all the accused persons is that on 15th August, 2002 along Orlu Road junction Mgbidi, they murdered one Christian Owerreoma. The prosecution called 5 witnesses.

From a long line of decisions of the court, it is settled beyond controversy that to secure a conviction on a charge of murder, the prosecution must prove:-

(i) That the deceased had died;

(ii) That the death of the deceased was caused by the

accused; and

(iii) That the act or omission of the accused was intentional with the knowledge that death or grievous bodily harm was its probable consequence. See *Ogba v. The State* (1992) 2 NWLR (pt. 222) 164; *Monday Nwaeze v. The State* (1996) 4 NWLR (pt. 443).

It follows therefore, that the evidence relied upon to establish a charge of murder may be direct or circumstantial. Whether the evidence is direct or circumstantial, it must establish the guilt of the accused person beyond reasonable doubt. In this connection, the onus which is on the prosecution, as a general rule never shifts and misdirection on the question of onus of proof is fatal unless it can be shown that on a proper direction the result would be the same. See *Ozaki v. The State* (1990) 1 NWLR (pt. 124) 92.

It is also the law that for circumstantial evidence to ground a conviction, it must lead only to one conclusion, that is, the guilt of the accused person. However, where there are other possibilities (as in the case at hand) that other person(s) than the accused had the opportunity of committing the offence with which he was charged, such an accused person cannot be convicted of murder. See *Osai & 3 Ors. v. The State* (1976) 11 SC 39. PW1, Tobias Nwaneri, did not witness how the alleged crime took place. His evidence which are at pages 68 and 69

of the record, at best is hearsay. The only relevant thing he said at page 69 is that police officers refused to release PW2 who was suspected of being armed robber and was being investigated. The evidence of PW2, the driver of the Red Nissan Sunny Car conveying the deceased, at pages 78-94 of the records, shows that he (PW2) refused to stop at a Police Checkpoint, although he claimed one of the Policemen peeped into his car and signaled him to pass. All the Policemen who testified from DW1 to DW6 stated that the PW2 was running away from being searched by the Policemen who were on a stop and search duty. As a result the policemen in the ALGON jeep chased PW2 to a mobile police checkpoint where they jointly fired at his vehicle. At page 80 of the Records PW2 had this to say:

“At Zone 9 Umuahia, another investigation was carried out. During the investigation 7 policemen were invited for interview. It was then that I knew those who shot me. The investigation did not show anything for which I was shot. The accused persons are the policemen in the ALGON JEEP. The accused persons are those I recognized at Umuahia as those who shot at me...”

From the above pieces of evidence so far it is clear that PW2 could not tell and did not know who actually shot the deceased. It was only during the investigation at Zone 9 Umuahia Police Headquarters that he was able to know those that shot at his Vehicle apparently because they were produced as those who were on duty at the scene of crime on the day of the incident. Here, there are other possibilities that someone other than the Appellant could have caused the death of the deceased. If so the Appellant cannot be convicted of murder. See *Osai & 3 Ors v. The State* (Supra).

The evidence of PW2, in no way, incriminates or exculpates the Appellant. He did not pin the death of the deceased to any of the accused persons especially the Appellant. PW3 the Investigating Police Officer tendered the statements of the accused persons including those of the Appellant. Those were Exhibits K, K1 and K2. The Appellant is the 6th accused person at the trial. He told the court that he did not fire a single shot on the day of the incident and that he returned all the ammunition given to him, which was checked, recorded and endorsed. In respect of the arms used on the day of the incident by

regular patrol (2nd accused and others) and the mobile policemen 3rd, 4th, 5th and 6th -Appellant herein, who were the accused persons at the trial, PW3 at pp 109 - 110 of Records had this to say respectively:-

B *“At Mgbidi Police Station, I checked from the Armoury Section to find out the caliber of arms and ammunition the 2nd accused Sunday Uwadiogwu and one Sergeant Kingsley were issued (sic). I discovered that the 2nd accused was issued Lar Rifle with 20 rounds of ammunition. Inspector Sunday Uwadiogwu was issued with one barreta pistol with six rounds of Ammunition and Sergeant Kingsley*
C *Ohiengbonu was issued with A.K. 47 Rifle with 20 rounds of ammunition. I observed that the late Inspector Sunday Uwadiogwu, expended one ammunition and I collected the arms and registered them at Zonal C.I.D. Umuahia.”*

D In respect of the arms allegedly used by the mobile policemen (the 3rd, 5th and 6th accused persons) PW3 stated thus:

“My investigation took me to Mgbidi Road Block mounted by the mobile men to check the state of arms. The mobile men were 3rd accused, 4th accused, 5th accused and 6th accused. I discover that the
E *mobile men had no system of identifying the handing and taking over of arms. I discovered that there were marks of gun shot at the workshop of the mechanic opposite the Mgbidi road block mounted by the mobile policemen...”*

F I must mention and I so note that the prosecutor applied to tender only the “Lar Rifle” issued to 2nd Accused person and this was admitted in evidence and marked Exhibit “L”. All other arms and ammunition “collected” and registered by the PW3 at the Umuahia Zonal C.I.D. were not tendered in evidence. It is for this reason and
G by PW3 own showing that no proper investigation was conducted in this case. I agree with the learned counsel for the Appellant that it is quite inconceivable that a police station, with an armoury has no means of or method of stock taking of arms. PW3 did not bother to call the Armourer in charge of the mobile police squadron 18, Owerri
H Imo State to testify how pistols and raffles were distributed on the day of the incident and how they were strictly accounted for at the end of the official duty by the officers.

The prosecutor had a duty to find which of the police officers fired the fatal bullet, since the evidence of PW5, the Medical Doctor,

Dr. J. N. Osuji, who performed the autopsy on the accused, stated that only one bullet from a gun resulted in the death of the deceased. There is no evidence to show who fired the fatal bullet. There was no ballistics examination to indicate who amongst the accused persons fired the “missile” as they had different types of guns and ammunition. The Appellant gave evidence in court consistent with his statement to the police that he did not expend any ammunition given to him. That he returned all that was issued to him intact. B

I have as well gone through the evidence of PW4, one Victor Egbeka who was in his workshop on 15/8/2002, the day of the incident. He gave an account of how an Inspector of Police in an ALGON JEEP drove pass his workshop shouting “thief, thief, thief.” He would not say who fired the PW2’s vehicle which resulted in the death of the deceased. He had to run for his dear life as he went into hiding. Evidence of PW4 therefore does not help to resolve the issue of who killed the deceased. This has remained an unresolved mystery! C

Also in his evidence DW3 failed to mention the Appellant at the earliest opportunity that he was responsible for the death of the deceased. In any case the court is wary of an allegation in a statement of one accused person against another. It is trite law that allegations in a statement made by one accused against a co-accused will not constitute evidence against the co-accused unless the said co-accused has adopted the statement. See Ozaki v. State (1990) 1 NWLR (pt. 124) 92; Kasa v. State (1994) 5 NWLR (pt. 344) 269 at 288; Waziri v. State (1997) 3 NWLR (pt. 496) 689 at 724 -725, Shodiya v. State (1992) 2 NWLR (pt. 230) 457 and State v. Onyeukwu (2004) 14 NWLR (pt. 893) 378-379. E

Another intriguing dimension to this case is the Respondent’s contention that the Appellant and the other accused persons had common intention to kill the deceased. The learned trial judge on page 200 of the Records had held that there was no common intention by the policemen to prosecute an unlawful purpose. It held thus: G

“I am of the opinion and I so hold that at the time the vehicle of PW2 drove pass the police stop and check at Mgbidi Eziala road and was subsequently pursued by the policemen in the ALGON JEEP that there was no common intention by the policemen to prosecute an unlawful purpose. I find as a fact that the policemen in the ALGON H

JEEP pursued the vehicle so as to arrest the occupants. I therefore find as a fact that the 1st accused and the other policemen in the ALGON JEEP were obeying lawful order when their leader Inspector Sunday Uwadiogwu ordered them to enter the ALGON JEEP being driven by the 1st accused in pursuit of the vehicle driven by PW2”.

Furthermore at page 204 lines 17-23 of the Records, the learned trial judge held that:

“I am of the opinion that this is not a case for which there should be very strict application of the provisions of Section 8 of the Criminal Code. The 2nd, 3rd and 6th Accused persons acted independently and on their own volition used their firearms recklessly and killed an innocent person without justifiable reason.”

This is clear and unambiguous finding of fact by the trial court. There was no appeal by the prosecution against it. I cannot therefore fathom the reason why the learned Justices of the court below acceded to the submission of the prosecution in its brief of argument in the appeal by holding that the Appellant and others had a common intention to kill the deceased person. I agree with the learned counsel for the Appellant that the court below erroneously invoked the provisions of Sections 7 and 8 of the Criminal Code and held that the Appellant and the mobile policemen at the checkpoint who shot at the vehicle in which the deceased died were acting in concert and had a common intention to kill the deceased. A presumption of common intention should not be too easily applied to every case. There must be evidence before the court to justify the inference of common intention. In this case there was no such inference as enunciated in the case of *Osmond Onuoha & Anor v. The State* (1998) 55 NWLR (pt. 548) 118.

Where there is reasonable doubt in proving a crime in a criminal case, the doubt should be resolved in favour of the accused. The principle of law enunciated in *Alarape v. The State* (2001) 2 SCNJ, 162, is not applicable to this case. It has not been shown by evidence that the Appellant acted in concert with other accused persons to prosecute an unlawful purpose.

The prosecution has a burden of proving by evidence the ac-

tual act done or committed by the appellant during the occurrence of the incident.

Having conclusively held that there was no iota of evidence linking the Appellant with the fatal gunshot that snuffed the deceased's life, I do not deem it necessary to go into a discourse on issue 4 as to whether there could have been statutory defences open to the Appellant under Section 271 of the Criminal Code. To embark on that exercise will presuppose that the Appellant committed the crime but that he could find justification for that under section 271 particularly section 272 of the criminal code. This is futile. All the Appellant is saying is that he and his colleagues were lawfully armed, but that he fired no gun shot on the PW2's red Nissan car, but that Copl. Desmond Ononuju (3rd Accused) Sgt. Godwin Monsi (5th Accused) and Inspector Sunday Uwadiogwu (7th Accused) did the firing. The PW3, the I.P.O said only one bullet was expended by the Accused. PW5, the Medical Doctor gave evidence that one bullet actually killed the deceased. With respect to the use of arms by the mobile policemen the station had no system of identifying the movement of arms. He did not find out which of the policemen actually shot the deceased. There was no such direct evidence.

The two-fold aim of criminal justice is that the guilty shall not escape; on the other hand the innocent cannot be allowed to suffer injustice. It is in the light of the foregoing, I hold that the prosecution failed to prove its case beyond reasonable doubt to warrant the conviction of the Appellant and the appeal is allowed. Consequently, the conviction of the Appellant was not properly affirmed by lower court. It is set aside. The Appellant is discharged and acquitted.

MUHAMMAD JSC

The facts of this case have been clearly set out by my learned brother, Galadima, JSC. In agreeing with him in his reasoning and conclusion, I would like to observe that as it is clear from the lead judgment of my learned brother, Galadima, JSC, and as contained in the Record of this appeal, five other persons along with the appellant were arraigned and tried by the trial court. The 1st, 4th and 5th accused persons were not found guilty. They were discharged and

acquitted. The 2nd, 3rd and 6th accused persons were found guilty, convicted and sentenced to death by hanging. Their appeal to the court below was unsuccessful as it was dismissed. It is to be noted that it was a joint trial. All the accused persons, including the appellant, were arraigned before the same court, on the same charge, on same evidence which was interwoven, interrelated and inseparable. May I remind my lords of the golden principle of criminal law that where two or more persons are charged with the commission of an offence, and the evidence against all the accused persons is the same or similar, the discharge of one must, as a matter of law, affect the discharge of the others. This is because, if one or more of the accused persons is discharged for want of convincing evidence, that must automatically affect all the other accused persons in the light of the fact that the evidence against all the accused persons is tied or interwoven together. See: *Kalu v. State* (1988) 4 NWLR (pt. 90) 503; *Adele v. State* (1995) 2 NWLR (pt. 377) 269; *Ebiri v. State* (2004) 11 NWLR (pt. 885) 589 and *Okoro v. The State* (2012) Vol. 207 LRCN 503.

It is to be noted as well that at the court below, one Sgt Lazarus Adele, one of the convicts and 1st appellant in that court, was discharged and acquitted while the appellant and one other convict had their conviction and sentence affirmed.

My lords, this is certainly strange! It is a derogation from our Criminal Justice System in that the learned trial judge gave benefit of doubt to the 1st, 4th and 5th accused persons by discharging and acquitting them while convicting and sentencing the remaining accused persons to death, albeit, on same or similar facts and evidence. The court below, as well, committed same error by quashing the conviction and setting aside the sentence of one of the convicts/appellant (Sgt. Lazarus Adele) while affirming the conviction and death sentence of the current appellant and one another, when all the accused persons/convicts/appellants were charged and tried together for the same offence and on similar facts and evidence. Certainly, if one of the accused persons is to enjoy any benefit of doubt, such benefit must be extended to all the accused persons in such a joint trial of same or similar facts and evidence. My learned brother Mohammed JSC in *Ebiri v. The State* (supra) observed that:

“The Evidence which the Court of Appeal relied upon to discharge the two co-accused of the appellant was inextricably interwo-

ven with the defence put up by the appellant in trying to exculpate himself from the charge of murder of Egoma Odem Obla. It is not safe to discharge the two co-accused and affirm the conviction of the appellant when there is no separate evidence incriminating him for the offence charged”

The conviction and sentence of the appellant certainly caused a miscarriage of justice as the two lower courts decided to shut their eyes to the obvious, thereby making a departure from the known rules which permeate all judicial processes. Such conviction and sentence cannot be allowed to stand. See: *The State v. Dr. Muhtari Kura* (1975) 2 SC 83.

For this and the fuller reasons given by my learned brother, Galadima, JSC, I, too, allow the appeal. I set aside hereby, the judgment of the lower court. The appellant is accordingly discharged and acquitted.

OGUNBIYI JSC

I read in draft the lead judgment just delivered by my learned brother, Suleiman Galadima, JSC and I agree that the appeal has merit and should be allowed.

The detailed facts of this case have been well spelt out in the lead judgment. The learned trial judge at the conclusion of the proceedings found the 1st, 4th and 5th accused persons not guilty and they were duly acquitted; the 2nd, 3rd and 6th accused were however found guilty as charged and accordingly sentenced to death.

On an appeal to the Court of Appeal, Owerri Division, same was dismissed and the appellant's conviction and sentence were affirmed; hence the notice of appeal now before us.

From the four grounds of appeal the appellant also raised four issues for determination; the issues and those of the respondent are all reproduced in the lead judgment.

The central governing legislation in this appeal is section 319 (1) of the Criminal Code which relates to whether the prosecution had proved the charge of murder against the appellant so as to show that it was the bullet from his gun that shot and caused the death of Christian Owerreoma. In other words, the question that begs for an answer is who shot and killed the deceased? While the prosecution

affirmatively submitted that the appellant was culpable and responsible, the appellant vehemently hold the contrary.

The law is trite and well settled that for the prosecution to secure the conviction of the appellant, the proof must be beyond reasonable doubt. In other words, the fact of the deceased's death must
B be supported affirmatively by evidence that it resulted from an intentional act by the accused to cause such death.

It is paramount to restate that the motivational cause resulting in the shooting spree of the deceased's vehicle was the suspicion which
C arose from the alleged refusal of the driver to stop at the police check point.

It is also intriguing to note that while six accused persons were arraigned for the murder of the deceased, the medical report tendered at the trial revealed that the deceased died from a shot of only
D one bullet. In the absence of certainty and proof that the appellant's bullet was responsible for the deceased's death, the question raised earlier still remains unanswered. This is more so especially in the face of the appellant's extra judicial statement under caution at page 59 of the record where he said:-

E *"I was on duty with AR 70 rifle with twenty rounds of live ammunition and I returned it completely."*

The said appellant gave evidence in his defence in chief at the trial court as DW6 at pages 147 -149 and was cross examined by the
F prosecution at pages 149-150 of the record. The prosecution did not deem it relevant to have taken the witness on his statement relating the 20 rounds of live ammunition which he said he returned.

There was also no evidence on the part of the prosecution contradicting the appellant's statement that he was in fact given so many
G live ammunitions and which he failed to return. The failure of the prosecution to debunk such a very important statement is detrimental to them especially where they have the onus to prove the appellant guilty.

I am mindful of the evidence given by the co-accused persons
H wherein they testified that the appellant was one of the officers who was alleged to have fired at the deceased's car. That notwithstanding, the pertinent question which still calls for an answer is - whose bullet shot at the deceased? The appellant's bullet could not have shot at the deceased and only for him to have returned all his live ammuni-

tion intact. The prosecution as I said earlier did not take up the appellant on this point and it should not be held against him. It is also natural that every other accused was expected to guard his own interest and therefore wanting to shift the blame. It is very unsafe to convict on such evidence.

P. W. 2 Boniface Ozuoba gave evidence at pages 78 - 79 of the record as an eye witness to the incident. He testified that the deceased died from the gun shot injury he sustained. This piece of evidence, though confirmed by the medical report, still did not answer the question as to who shot at the deceased. The law is well settled that evidence of an accomplice requires corroboration and it is very unsafe to convict thereon.

The circumstance of this case appears to have focus all attention on the appellant as the culprit of the act leading to the deceased's death. This to my mind is very unfortunate because on a careful perusal of the entire record of appeal, especially that of the trial court, the major lacuna created had not been unraveled by the prosecution. In other words, the fact that the appellant returned all the live ammunitions given to him to his Divisional Armourer, the claim that the system is not well equipped to identify the handing and taking over of arms should not operate against the appellant; rather the doubt created should be resolved in favour of the appellant.

On the totality of this appeal and with the few words of mine and more particularly on the comprehensive reasoning and conclusion arrived at by my learned brother in the lead judgment, I also allow this appeal in the same terms.

ALAGOA JSC

I read before now in draft form the lead judgment just delivered by my learned brother, Suleiman Galadima, JSC and I wish to chip in this little bit of mine by way of elaboration as my contribution. The investigating Police Officer who gave evidence as PW3 Assistant Superintendent Police Nathaniel Ononobi at pages 109 - 110 of the Records said as follows,

“At Mgbidi police station I checked from the Armoury section to find out the caliber of arms and ammunition the 2nd accused Sunday Uwadiogwu and one Sergeant Kingsley were issued with. I dis-

covered that the 2nd accused was issued with Lar Riffle with 20 rounds of ammunition. Inspector Sunday Uwadiogwu was issued with six rounds of ammunition and Sergeant Kingsley was issued with AK47 Riffle with 20 rounds of ammunition. I observed that the late Inspector Sunday Uwadiogwu expended one ammunition and I collected
 B the arms and registered them at Zonal C.I.D. Umuahia.”

Did PW 3 carry out the same investigation with respect to the arm and ammunition issued out to the Appellant? What kind of arms were the Appellant issued with and much more importantly what was the extent of ammunition expended by the Appellant? PW3 did
 C not know. When this fact is placed side by side on an imaginary scale against the uncontradictory evidence of the Appellant that he returned the arms and the entirety of the ammunition of 20 rounds supplied to him in tact in whose favour should the scale tilt? And this
 D evidence is vital to conviction or acquittal because if the evidence of the Appellant that he did not expend any of the 20 rounds of ammunition supplied to him but returned everything intact, then he wouldn't have been proved to have had a hand in the shooting of the red Nissan car in which the deceased Christian Owerreoma met his death.
 E Serious doubts would then have been created about the Appellant's guilt which should be resolved in his favour. There are numerous authorities of this court on this subject matter. In *Olusola Adepetu v. The State* (1998) 9 NWLR (pt. 565) 185 this court held that, “In a
 F criminal case the burden is always on the prosecution to prove the guilt of the accused beyond all reasonable doubt”

What this simply translates to is that where there is any doubt as to the guilt of the accused, such doubt must be resolved in favour of the accused in this case the Appellant. It is for this reason and the
 G fuller reasons advanced in the lead judgment of my learned brother which I entirely agree with that I too dismiss (sic, allow) the appeal.

H