

SUPREME COURT OF NIGERIA
FRIDAY 19TH DECEMBER, 2014. SC. 250/2012
CORAM:- W. S. N. ONNOGHEN, S. GALADIMA,
M. U. PETER-ODILI, O. ARIWOOLA, K. B. AKA'AH, JJSC

MUKAILA SALAWU APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Conspiracy - Proof - The offence is rarely proved by direct evidence - But by circumstantial evidence and inference from certain proved acts (H1)

MURDER - Conspiracy - Aiding & abetting - The actual presence of appellant when the offence is committed - Together with prior abetment means his participation in the crime (H2)

CRIMINAL PROCEDURE - Conspiracy - Confession - Effect on co accused - Where charge is on conspiracy - Evidence by the accused should be examined - To see any link with admission of co accused (H3)

FACTS

Before the High Court of Oyo State sitting at Ogbomosho, accused/appellant was arraigned with three others for conspiracy to commit felony and murder contrary to sections 324 and 319 of the Criminal Code Cap.30 Vol. II Laws of Oyo State 1978 (now Cap.38 Vol. II Laws of Oyo State 2000). They pleaded not guilty to the charges. Appellants and the others are members of the Oodua Peoples Congress (OPC). The case against them is that they kidnapped and eventually killed one Raji Tiarniyu (a traffic warden) in revenge for the death of one of their colleagues, killed in a gun battle with the police. Thereafter, they went into hiding.

Information was however received regarding the master minder of the crime. 1st accused was arrested after some months. He made confessional statement and later led the Police to the crime scene. The confession led to the arrest of the others. At the trial, prosecution/respondent called several witness to support its case. Appellant

and his co-accused did not call any independent witnesses but individually testified to defend themselves of the charges against them individually and/or collectively. Appellant particularly claimed ignorance of the crime. After considering the evidence adduced in the matter and at the end of the hearing thereof, the court convicted appellant and sentenced him to death. Some of the others accused were ordered to be jailed. Aggrieved, appellant appealed to the Court of Appeal, Ibadan Division. The court dismissed the appeal and affirmed the trial court's judgment. Aggrieved further, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

“(a) Whether the Justices of the Court of Appeal were right when in affirming the conviction and sentence of the appellant by the trial court on the count of conspiracy, they stated that the appellant did not call the Okada men who took him and his co-accused to the scene to confirm the circumstances under which they went to the scene and oath administered on them?”

(b) Whether Justices of the Court of Appeal were right when they held that the appellant with his co-conspirators acted under circumstances through which it can undoubtedly be inferred that they conspired with one another to assassinate the late Raji Tihamiyu.

(c) Whether court of Appeal was right when it held that conduct of the appellant clearly implicated him and for not offering acceptable explanation as to why he was at the scene of crime.

(d) Whether circumstantial evidence against the appellant was cogent and compelling to warrant court of Appeal's conviction and sentence by the trial court.

(e) Was the court of Appeal right that prosecution proved the offence of murder beyond reasonable doubt?

HELD (Unanimously dismissing the appeal per

AKA'AH'S JSC)

CRIMINAL PROCEDURE - Conspiracy - Proof

1. Since it is conceded that the prosecution established the death of the deceased, the prosecution must go further to show that it was the appellant who killed him or conspired with an-

other person or persons to carry out the act. Because of the nature of conspiracy, it is rarely or seldom proved by direct evidence but by circumstantial evidence and inference from certain proved acts.

In a charge of conspiracy the actual commission of the offence is not necessary to ground a conviction for the offence. All that is necessary is a meeting of the minds to commit an offence and this meeting of the mind need not be physical. Once the Court arrives at a conclusion that the prosecution has established some community effort on the part of the accused persons aimed at committing a crime, it will be safe to convict them for conspiracy. The accused can be guilty of conspiracy even where the meeting of the minds is to carry out a lawful purpose in an unlawful way. (p. 3612 C)

MURDER - Conspiracy - Aiding & abetting

2. In a charge for an offence which is linked with conspiracy the actual presence of the accused where the offence is committed together with prior abetment means participation in the offence.

When any person aids the commission of an offence by being present at the scene not as a mere onlooker but with the purpose of aiding and assisting any other person or persons committing the offence, he is equally guilty of committing the offence as a principal.

The evidence revealed that the appellant and the other accused persons formed a common intention to commit a crime and since they agreed to conceal the kidnapping and the death of Tihamiyu Raji, whether it was one person that shot him or it was all of them that dealt the fatal blow becomes immaterial as regards their culpability in the commission of the crime.

The Lower Court was quite right to put the burden of calling the Okada men to testify since he introduced them to show that he was an innocent bystander and not a participes criminis. The learned trial Judge properly invoked section 8 of the Criminal Code Law of Oyo State to find that the 2nd and 3rd accused were equally guilty of the offence of murder as the 1st accused who fired the shot from the gun that killed the

deceased since they formed a common intention to kill the deceased and were actually present at the scene of the crime.
(pp. 3615 D/3619 E)

CRIMINAL PROCEDURE - Conspiracy - Confession

3. Although section 27 of the Evidence Act provides that each accused person can be damnified on the basis of his own confessional statement and not on the basis of what other accused persons had confessed to. Nevertheless since the charge is woven round conspiracy, the evidence given by an accused (appellant) should be examined to see if there is a linkage between the evidence of the appellant and the admission of the co-accused.

The statements made by the 1st accused gave an insight as to the role which was played by every accused person including the appellant. He was a member of the kidnap gang. It is clear beyond any doubt that the OPC members wanted to avenge the death of their member, Kasali Shittu having lost out the previous day in the gun battle with the Police; hence the hatching of the plot to carry out the kidnap of Tiamiyu Raji. The evidence revealed a common intention by members of the OPC to avenge the death of their member which they successfully executed the next day, 27/11/2002. Although the appellant feigned ignorance about the kidnapping of Tiamiyu Raji, his joining in the oath taking to conceal the kidnapping and subsequent murder of the deceased made him an active participant in the crime. (p. 3618 B)

NOTABLE POINT OF INTEREST

ARIWOOLA JSC

1. Ingredients of murder – Proof of

Generally, it is settled law that for there to be a valid conviction of an accused person for the offence of murder under Section 319(1) of the Criminal Code, it is imperative on the prosecution to establish or indeed prove the following ingredients beyond reasonable doubt.

- (a) That the deceased actually died;
- (b) That the death of the deceased resulted from the act of

the accused person(s) and;

(c) That the action of the accused that led to the deceased death was intentional with knowledge that death was its probable consequence. (p. 3629 A)

REPRESENTATION

B

A. A. Adedeji with O. A. Idowu and C. V. Aliogo, for the Appellant
M. O. Adebayo, Hon. Attorney-General of Oyo State with S. A. Aborisade, for the Respondents

CASES REFERRED TO

C

Obiakor v. State (2002) 10 NWLR (pt. 776) 612

Shodiya v. State (1992) 3 NWLR (pt. 230) 457

Buje v. State (1991) 4 NWLR (pt. 185) 287

Nyam v. State (1964) 1 All NLR 361

D

Enitan v. State (1986) 3 NWLR (pt. 30) 604

Salami v. State (1988) 3 NWLR (pt. 85) 670

Mbenu v. State (1988) 3 NWLR (pt. 84) 615

Onyenye v. State (2012) 15 NWLR (pt. 1324) 586

Bakare v. State (1987) 1 NWLR (pt. 52) 579

E

Amadi v. State (1993) 8 NWLR (pt. 314) 644

Ebba v. Ogodu (1984) 1 SCNL 372

Bunyan v. Akingboye (1999) 7 NWLR (pt. 609) 31

Okhuarobo v. Aigbe (2002) 9 NWLR (pt. 771) 29

F

Udedibia v. State (1976) 11 SC 133

Lori v. State (1980) 12 NSCC 269

STATUTES REFERRED TO

Criminal Code Cap. 30 Vol. II Laws of Oyo State 1978, ss. 324, 319
Evidence Act, s. 27

LEAD JUDGMENT BY AKA'AHs JSC

The appellant who was the 3rd accused was arraigned with three others before the Oyo State High Court, Ogbomoso Judicial Division in Charge No.HOG/3C/2004 for the offences of conspiracy to commit felony and murder of one Raji Tihamiyu, a traffic warden contrary to sections 324 and 319 of the Criminal Code Cap.30 Vol. II Laws of Oyo State 1978 (now Cap.38 Vol. II Laws of Oyo State

H

2000) respectively. They all pleaded not guilty to the charge. The prosecution in proof of its case called seven (7) witnesses and tendered exhibits which were marked Exhibits 1 - 158 while each of the four accused persons testified in his defence but called no other witness. At the end of the trial, the 1st, 2nd and 3rd accused were found guilty of the offences charged. Each of them was given 10 years imprisonment with hard labour on the count of conspiracy to murder and the three of them were sentenced to death for murder. The 4th accused was discharged and acquitted. They appealed by filing separate notices of appeal. On 24th May, 2012, the Court of Appeal, Ibadan dismissed their appeal in appeal No.CA/I/192/2007. The appellant has further appealed against that judgment to this Court. The Notice of Appeal dated 4th June, 2012 contained six grounds of appeal from which the following five issues were formulated:-

D “(a) *Whether the Justices of the Court of Appeal were right when in affirming the conviction and sentence of the appellant by the trial court on the count of conspiracy, they stated that the appellant did not call the Okada men who took him and his co-accused to the scene to confirm the circumstances under which they went to the scene and oath administered on them?* (Ground One)

E (b) *Whether Justices of the Court of Appeal were right when they held that the appellant with his co-conspirators acted under circumstances through which it can undoubtedly be inferred that they conspired with one another to assassinate the late Raji Tiamiyu.* (Ground Two)

F (c) *Whether court of Appeal was right when it held that conduct of the appellant clearly implicated him and for not offering acceptable explanation as to why he was at the scene of crime.* (Ground Three)

G (d) *Whether circumstantial evidence against the appellant was cogent and compelling to warrant court of Appeal’s conviction and sentence by the trial court.* (Ground Four)

H (e) *Was the court of Appeal right that prosecution proved the offence of murder beyond reasonable doubt?* (Ground Five)

The issues formulated by the appellant were adopted in the amended respondent’s brief filed on 27/5/2014 but deemed filed on 11/6/2014.

The crux of this appeal is centered on whether the prosecu-

tion proved the offence of murder beyond reasonable doubt against the appellant. Although Learned counsel conceded that the prosecution established the death of the deceased, he submitted that there is no evidence to show that it was the appellant who killed the deceased or conspired with anyone else to kill him and that most of the findings made by the learned trial Judge to find the appellant guilty of conspiracy and murder which was affirmed by the Lower Court were not based on or supported by credible evidence led by the prosecution.

The evidence given by the prosecution which led to the conviction of the appellant and the others for conspiracy and murder is as follows:-

On 27th November, 2002, the accused who stood trial and others at large who are members of the Oodua People's Congress (OPC) kidnapped one Raji Tihamiyu, a traffic warden from around D Takie area in Ogbomoso town and took him in a taxi cab to Odo-Oba area in the outskirts of Ogbomoso town where he was killed after which he was set on fire. This was in retaliation for the death of Kasali Shittu, one of their members during a gun battle with the Police which occurred the previous day i.e. 26th November, 2002. After the death of Raji Tihamiyu, the accused swore to an oath of secrecy not to reveal the identity of those who carried out the kidnap and murder of the deceased. All the accused went into hiding. The Police however received information regarding the kingpin of the dastardly act and it took them over five months to arrest the 1st accused on 19th April, 2003. He made a statement on 25th April, 2003 and later led the Police to the spot where Raji Tihamiyu was shot and his body set on fire. Some pieces of burnt flesh and bones were taken to Laduntan Hospital, Oke Obadare, Ogbomoso where PW3, Dr. Wilfred Olubolade Ladoye performed a post mortem and found that the bones recovered were those of a male. The statement of the 1st accused led to the arrest of the other accused persons who stood trial with him. The 3rd accused made a statement on 27/4/2003 in Yoruba which was translated into English. The statement was admitted as Exhibit 8 while the English translation was marked Exhibit 8A. He also made a statement on 6/5/2003 and another additional statement on 8/5/2003. The statements which were recorded on 6/5/2003 and 8/5/2003 were marked Exhibits 14 and 14A respectively.

The appellant who testified as DW3 said he knew the 1st and 2nd accused persons as leaders of the Oodua People's Congress (OPC). He stated that on 26th November, 2002 he learnt that the member of the Oodua People's congress had a battle with the Police in Ogbomoso. That same day he learnt that Alfa Kasali, a member of the Alliance for Democracy (AD) the Political Party to which he belonged died and he went to pay a condolence visit to the family and while he was waiting for the arrival of the corpse from the mortuary, he saw 1st and 2nd accused. While they were at the deceased's house he saw some motor cycle riders popularly known as "Okada men" who were escorting the corpse of the deceased for burial. It was at that point he got to know that the deceased was also a member of the O.P.C.

Since it is conceded that the prosecution established the death of the deceased, the prosecution must go further to show that it was the appellant who killed him or conspired with another person or persons to carry out the act. Because of the nature of conspiracy, it is rarely or seldom proved by direct evidence but by circumstantial evidence and inference from certain proved acts. See: *Obiakor v State* (2002) 10 NWLR (Pt.776) 612. **In a charge of conspiracy the actual commission of the offence is not necessary to ground a conviction for the offence. All that is necessary is a meeting of the minds to commit an offence and this meeting of the mind need not be physical. Once the Court arrives at a conclusion that the prosecution has established some community effort on the part of the accused persons aimed at committing a crime, it will be safe to convict them for conspiracy. The accused can be guilty of conspiracy even where the meeting of the minds is to carry out a lawful purpose in an unlawful way.** See: *Shodiya v. State* (1992) 3 NWLR (Pt.230) 457 at 471.

The learned trial Judge considered the English version of Exhibits 2, 4, 4A, 7, 8A and 9A which were the statements made by the 1st 2nd and 3rd accused to the Police at Ogbomoso giving account of how the kidnapping and eventual killing of the deceased Tiamiyu Raji was carried out.

In reviewing the evidence adduced, the learned trial Judge made the following crucial findings of fact affecting the accused as

follows:-

1. There was a bloody gun battle between the Police and the members of the Oodua People's Congress (OPC) in Ogbomoso town on the evening of 26th November, 2002.

2. The four accused persons and other persons whose names were mentioned in this case (e.g. Dauda Azeez, Oluwole and Co.)^B but who are now at large are members of the Oodua People's Congress (OPC).

3. In the course of the gun battle between the Police and the OPC on the 26th November 2002, one Alfa Kasali Shittu who was a^C member of OPC lost his life.

4. The members of the Oodua People's Congress (OPC) in Ogbomoso which include 1st, 2nd, 3rd and 4th accused persons were aggrieved by the death of Kasali Shittu.

5. In the morning of 27th November, 2002 (i.e. less than 24^D hours after the gun battle of 26th November, 2002, some members of the OPC led by Dauda Azeez and Oluwole both of whom are now at large including the 1st, 2nd and 3rd accused persons with a common intention to kill in retaliation of the death of their late member Alfa Kasali Shittu the previous day while in a taxi cab, kidnapped one^E Raji Tiamiyu who is a traffic warden around Abede junction, Ogbomoso.

6. The said Raji Tiamiyu was taken to the outskirts of Ogbomoso town, i.e. a place called Onitirin, very close to Odo-Oba^F river and some distance from the Randa end of the tarred road.

7. Some of the accused persons particularly the 1st accused was armed with a single barrel gun to the knowledge of the others who were together with them on the 27th November, 2002.

8. At a point very close to the Odo-Oba river (a foot path)^G the victim Raji Tiamiyu apparently apprehensive of the fact that he was about to be killed started begging all his assailants which include 1st, 2nd and 3rd accused persons to spare his life.

9. The 2nd accused person, Waheed Balogun alias "Fenujeba"^H started to pity their victim and begged that the life of the victim be spared.

10. His (2nd accused) other colleagues refused/rejected the plea of the 2nd accused and decided to go ahead with their originally conceived common intention to kill the victim in retaliation of the

death of their colleague (i.e. Alfa Kasali Shittu).

11. Immediately thereafter an oath of secrecy was taken so that none of the people present, which includes 1st, 2nd and 3rd accused persons, will never disclose to anybody what was about to happen (i.e. killing of the victim, Raji Tihamiyu).

B 12. The victim Raji Tihamiyu was then shot and he died.

13. The assailants left the scene of the crime together and went straight to the house of the 2nd accused at J. K's House opposite the Seminary, Ogbomoso, where another round of oath of secrecy was administered on all of them present at the scene where Raji Tihamiyu was killed.

C 14. The accused persons together with others now at large ran away from Ogbomoso town in order to evade being arrested by the police.

D 15. The 4th accused was arrested at a village close to Iresa Adu on the 28th November, 2002 and charged with kidnapping as the Police were not sure of whether or not Raji Tihamiyu was still alive then.

E 16. On the 20th April, 2003, the 1st accused person was arrested and he made a statement denying knowledge of the commission of the offence.

17. On the 25th April, 2003, the 1st accused made an additional statement to the Police where he confessed that he and others took part in the killing of the deceased.

F 18. Following the confessional statement, the 1st accused person took the Police to the scene of the crime where he showed the Police the burnt remains of the deceased.

G 19. Photographs of the scene of crime showing the 1st accused person pointing to the spot where Raji Tihamiyu was burnt after being shot was taken.

20. Consequent upon the 1st accused confessional statements, other arrests were made by the Police.

H 21. The remains gathered at the scene which include some flesh and bones together with the burnt wire of a tyre were packed by the Police and sent to the State Hospital for autopsy.

22. The doctor in his evidence before the court confirmed the remnant bones to be that of a male adult.

23. The 2nd and 3rd accused persons also made confes-

sional statements to the Police (See pages 181 -183 of the records).

The Lower Court in its judgment reviewed the evidence adduced at the trial and held as follows at pages 279 - 280 of the records:-

"I cannot fault the findings of fact arrived at by the learned trial judge which was reproduced (supra) Appellant did not call the Okada men who took him and other accused to the scene to confirm the circumstances under which they went to the scene and oath administered on them. As rightly observed by respondent's counsel appellant's denial of his involvement is a mere evasive denial and trial court was entitled to disbelieve him having watched his demeanour in the witness box... From the totality of the evidence adduced it is my considered view that prosecution successfully proved the offence of conspiracy as charged. The appellant together with his co-conspirators under circumstances through which it can undoubtedly be inferred that they conspired with one another to assassinate the late Raji Tihamiyu. The learned trial Judge in my humble view rightly convicted the appellant for committing the offence of conspiracy."

In a charge for an offence which is linked with conspiracy the actual presence of the accused where the offence is committed together with prior abetment means participation in the offence. See Buje v. State (1991) 4 NWLR (pt. 185) 287 at 298. ***When any person aids the commission of an offence by being present at the scene not as a mere onlooker but with the purpose of aiding and assisting any other person or persons committing the offence, he is equally guilty of committing the offence as a principal.*** See Nyam v. State (1964) 1 All NLR 361.

Learned Counsel for the appellant submitted that the Court of Appeal did not properly consider the defence and argument put up by the appellant well to appreciate the reason why he was at the area but not the scene of crime and why it would be absurd and impossible for him to call the Okada men to testify on his behalf before the trial court.

The appellant in his written statements to the Police which were admitted as Exhibits 8A, 14 and 144 stated:-

"I am a member of O.P.C. (Oodua People's Congress). I belong to Tagra Zone and one Ajibade is our leader/coordinator. On 26/11/02 at about 6p.m, I was on my farm at Molete area when I

heard that the O.P.C had engaged the Police in a gun fight in the Ogbomoso town. I heard several gun shots and I came back home. I then heard through some people that one Alfa Kasali died in the process. On the 27/11/2002 at about 8.00am, I went to Baaki area to greet the mother of Kasali about the death of her son. When I was
 B there at Baaki I saw a vehicle painted taxi colour but cannot know the registration number. When I got to the vehicle, I met Oluwole "m" who said I should board a motor cycle and be following him with others in the taxi' There in the vehicle I saw Waheed Balogun
 C alias "Fanujeba" We passed Randa road to a far distance along Onitiri village. At a point by Odo-Oba river, I was asked by Oluwole and Dauda to stop there while they went into the bush with a man kid-
 D napped. I never know him to be a Policeman then. I suddenly heard a gunshot. Oluwole and Dauda and Taiwo were all carrying guns
 E when they came back, they said they had killed him but I didn't ask whom the person was. We then boarded our motorcycles and a ve-
 F hicle they took there and started coming back to the town. Along the line while going, Waheed "Fanujeba" said the secret might leak and took us to his house at J. K's compound opposite the seminary
 G Ogbomoso and all of us including the Okada men and the taxi driver swore that we shall never reveal the secret that whosoever reveals shall die. On getting home, my mind was not settle. I revealed the
 H secret to one Sule that Oluwole and Dauda led us to somewhere a man was killed. I therefore warned Sule not to go to Abogunde area
 Ogbomoso for anything within these days. I did not inform the police about what happened about our murdering the Traffic Warden Raji Tiamiyu. I know that killing of the said Raji Tiamiyu and even any other person is a criminal offence."

In Exhibit 14A which was the additional statement made on 8/5/2003, the appellant admitted following the other accused into the bush where the traffic warden was killed but he denied that he was in the company of the other accused when the deceased was kidnapped. He said that it was Oluwole and Taiwo Oladejo who shot
 H the traffic warden. He then stated in Exhibit 14A that -

"After killing the traffic warden we all went to Waidi Balogun's house where Oluwole brought a charm comprising of a horn of dead animal to all of us to swear (sic) to anybody."

On 19th April, 2003 the 1st accused was arrested. His arrest

paved way for the arrest of the 2nd and 3rd accused (appellant).

In Exhibit 12, the 1st accused stated -

"I am a member of OPC and I joined the organization in the year 2000, I was at Ogbomoso on 27/11/2002 when Raji Tiamiyu was killed by the following OPC members (1) Dauda Lasisi (2) Oluwole and two of his boys that I don't know their names and myself. Tiamiyu B Raji did not personally offend (sic) us. We killed Tiamiyu Raji retaliation (sic) of the death of Kasali Shittu who died during Police OPC clash at Ogbomosho on 26/11/2002. I don't know the police men that killed Kasali Shittu. Waidi Balogun is also a member of OPC. C He was begging Oluwole Lasisi not to kill Tiamiyu Raji. But Oluwole did not agree he first shot Tiamiyu Raji on the head. After Oluwole's shot that killed Tiamiyu Raji, Oluwole made us to swear that we shall not inform or reveal the act to anybody and we all agreed. The killing of Tiamiyu Raji did not wake Kasali Shittu. The following OPC mem- D bers went to Abede Ogbomoso and got Tiamiyu Raji kidnapped (1) Oluwole Olawuyi (2) Dauda Azeez (3) Two of Oluwole Olawuyi's boys. Tiamiyu Raji was taken to Randa Road Odo-Oba via Ogbomoso. Waidi Balogun, Mukaila Salawu (3) and myself joined Dauda and Azeez and Oluwole Olawuyi later joined the kidnappers at Randa E Odo-Oba via Ogbomoso. Tiamiyu Raji was shot by Oluwole Olawuyi and the body later burnt to ashes. Tiamiyu Raji was not the person that kill Kasali Shittu. I led the policemen to where we killed Tiamiyu Raji about two weeks ago."

In the additional statement which was admitted as Exhibit F 12A, the 1st accused stated -

"It was Oluwole who came to my house with two of his boys and one Dauda Azeez that kidnapped the traffic warden at Abede Area Ogbomoso when the traffic warden was going on his duty. He G was kidnapped in a taxi golf car and they came to pick me in my house then later we went to pick one Waidi Balogun and Mukaila. Thereafter as the taxi golf could not convey all of us I personally took Okada while Waidi Balogun and Mukaila also took Okada to follow the golf taxi cab along roundabout road to Odo-Oba village via H Ogbomoso. It was truth that I carried one gun and Oluwole carried the second gun, the two gun (sic) belong to Oluwole. The said Oluwole first fired his gun at the traffic warden in the right side of the chest while I fired at the left side chest of the traffic warden. I actually agreed

that we killed the traffic warden but I don't know who burnt his corpse to ashes. Thereafter the killing we swore in the bush and later we went to the town at Waidi Balogun's house were (sic) we swore an oath in the second time because of the okada and the taxi cab who took us to the bush so that no one of us would reveal the secret to them."

Although section 27 of the Evidence Act provides that each accused person can be damnified on the basis of his own confessional statement and not on the basis of what other accused persons had confessed to. (as was decided in *Enitan v State* (1986) 3 NWLR (pt. 30) 604). **Nevertheless since the charge is woven round conspiracy, the evidence given by an accused (appellant) should be examined to see if there is a linkage between the evidence of the appellant and the admission of the co-accused.**

The statements made by the 1st accused gave an insight as to the role which was played by every accused person including the appellant. He was a member of the kidnap gang. It is clear beyond any doubt that the OPC members wanted to avenge the death of their member, Kasali Shittu having lost out the previous day in the gun battle with the Police; hence the hatching of the plot to carry out the kidnap of Tiamiyu Raji. The evidence revealed a common intention by members of the OPC to avenge the death of their member which they successfully executed the next day, 27/11/2002. Although the appellant feigned ignorance about the kidnapping of Tiamiyu Raji, his joining in the oath taking to conceal the kidnapping and subsequent murder of the deceased made him an active participant in the crime.

Learned Counsel for the appellant argued that the findings made by the trial Judge were perverse and the Lower Court ought to have set them aside.

If there are concurrent findings of fact made by the High Court and Court of Appeal, the Supreme Court will not readily set them aside and substitute its own views unless there is no evidence to support the findings. See *In re: Mogaji* (1986) 1 NWLR (Pt.19) 759; *Salami v. State* (1988) 3 NWLR (Pt.85) 670; *Mbenu v State* (1988) 3 NWLR (pt.84) 615.

There is complaint by learned counsel that the learned trial judge made some findings of fact which were not based on any credible evidence on record. He referred to page 181 of the record where the trial Judge held “*the members of the Odua People’s Congress (OPC) in Ogbomoso which include the 1st, 2nd, 3rd and 4th accused persons were aggrieved by the death of Kasali Shittu*” and also the finding that “*the accused with others at large formed a common intention to kill in retaliation for the death of their late member Alfa Kasali Shittu, the previous day which in a taxi cab, kidnapped one Raji Tiamiyu who is a Traffic Warden around Abede Junction, Ogbomoso.*”

I fail to see the fuss which learned counsel is making regarding the members of O.P.C being aggrieved over the death of Kasali Shittu who was one of their members. I don’t know whether a person who goes to pay a condolence visit over the death of a colleague is expected to be rejoicing over such death. It is natural for a person to feel aggrieved over the loss of a relation, colleague or friend. The circumstances surrounding the death of Kasali Shittu and the retaliatory action taken the next day over the arrest and subsequent killing of Tiamiyu Raji should inescapably lead to the conclusion that members of the O.P.C wanted to avenge the death of Kasali Shittu.

The evidence revealed that the appellant and the other accused persons formed a common intention to commit a crime and since they agreed to conceal the kidnapping and the death of Tiamiyu Raji, whether it was one person that shot him or it was all of them that dealt the fatal blow becomes immaterial as regards their culpability in the commission of the crime. See: *Onyenye v. State* (2012) 15 NWLR (Pt.1324) 586 at 617, *Buje v State* supra at page 300. See also: *Bakare v State* (1987) 1 NWLR (Pt.52) 579. ***The Lower Court was quite right to put the burden of calling the Okada men to testify since he introduced them to show that he was an innocent bystander and not a participes criminis. The learned trial Judge properly invoked section 8 of the Criminal Code Law of Oyo State to find that the 2nd and 3rd accused were equally guilty of the offence of murder as the 1st accused who fired the shot from the gun that killed the deceased since they formed a common intention to kill the deceased and were actually present at the***

scene of the crime. The Lower Court could not have intervened to set aside such finding.

The appellant in his oral evidence alluded to an oath which was taken before the deceased was shot. He also mentioned that there was another oath taking ceremony after the deceased had been shot. Even though he tried to retract the statement by stating in oral evidence that he was not present when the deceased was shot, the statement of the 1st accused clearly said that two oaths were administered, the first one was after the kidnapping and the second oath taking was done after the killing of the kidnapped victim.

There is nothing either in the findings of facts or application of the law to the facts by the two Lower Courts that can be faulted. Accordingly I find no merit in the appeal and it is hereby dismissed. The appellant and his cohorts formed themselves into a tribal militia known as O.P.C. and in order to avenge the death of Kasali Shittu who was killed the previous day, they kidnapped Tihamiyu Raji and after he had been shot, his body was later burnt into ashes. It is revolting in the least. The action by the appellant and the other accused in carrying out their retaliatory action was quite horrendous. It was a bestial act which has no place in a civilized world of the 21st century and portrays the disintegration of our society. The drift must be stemmed in order to restore sanity to our country. The appeal entirely lacks any merit and it is accordingly dismissed.

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead Judgment of my learned brother AKA'AH'S JSC just delivered.

I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed.

I therefore order accordingly.

Appeal dismissed.

GALADIMA JSC

I have had the privilege of reading in draft the leading judgment of my learned brother AKA'AH'S, JSC just delivered. I agree with his reasoning and conclusion leading to the dismissal of this ap-

peal.

On 24/5/2012, the trial High Court of Oyo State of Nigeria after considering the evidence of seven witnesses called by the prosecution and the testimony of the appellant and his co-accused persons, convicted and sentenced them to death. The Court of Appeal affirmed his conviction. This prompted the appellant to further appeal to this Court upon six grounds of appeal. The complaint essentially, in all the issues formulated in the brief of argument are that the court below was not right in affirming his conviction and sentence, when the Okada motor cycle-riders, who took him and his co-accused to the scene of incident, were not called to testify to confirm the circumstances under which they went to the scene and why the oath of secrecy was administered on them.

Appellant has contended that an accused making a confessional statement as to his participation in a crime is not a confession binding his accomplices. That the trial court failed to properly appraise the defence put up by the Appellant in his confessional statements, Exhibit 8 and 8A and his testimony that he went to commiserate with one Kasali Shittu's mother when he saw DW2 who was also there for a similar purpose. That he was never part of the plan to kidnap the deceased, Raji Tiamiyu, a traffic warden then serving in Ogbomosho town of Oyo State.

On his part, Learned Attorney-General for the respondent has contended that the courts below were right to have held that the appellant deliberately refused to call the Okada motor-cyclists that took him and co-conspirators to the scene of crime to testify because their testimonies would be against him. He further contended that the circumstantial evidence relied on by the trial court was cogent compelling and positive leading to the conclusion of that court that the appellant committed the offences charged.

This is one case, I know, no matter, how much the appellant tries to wriggle out of the situation, the more he sinks deeper. Appellant's culpability for the murder of the deceased has been proved by the prosecution beyond reasonable doubt. All the essential elements of the offence were established.

It is clear that the Appellant and his co-conspirators acted under the circumstances that point to the irresistible conclusion that they conspired with one another to assassinate the deceased. He

admitted these facts himself in his confessional statements and quite sufficient inferences have been made and placed before the trial court. These are that:

1. Appellant had formed intention with his co-conspirators to kidnap and murder the deceased.

B 2. He was at the scene of crime to assist the other co-accused in carrying out the murder of the deceased.

3. he and the co-conspirators had taken the oath of secrecy before the killing of the deceased and at the scene of the crime.

C 4. In order to facilitate their dastardly and cruel act, the appellant and co-conspirators had arranged with the motor-cycle riders to ply to and fro, the scene of crime, conveying them for such purpose.

The foregoing inferences were in line with the findings of the D two courts below. These and other evidence available, were cogent compelling enough to conclude that the appellant and his co-accused killed the deceased. I cannot disturb these concurrent findings of the two courts below.

E In conclusion, I hold that this appeal is lacking in merit and I too dismiss it, and affirm the decision of the Court of appeal.

PETER-ODILI JSC

F I am in agreement with the reasonings and judgment just delivered by my learned brother, Kumai Bayang Aka'ahs, JSC and to show that support, I shall make some comments.

This is an appeal against the judgment of the Court of Appeal, Ibadan Division delivered on 24th May, 2012 which affirmed G the judgment of the High Court of Oyo State, Coram M. A. A. Abass delivered on the 14th July, 2005 wherein he convicted the Appellant (3rd Accused person) for the offences of conspiracy to commit felony and murder contrary to Section 324 of the Criminal Code and punishable under Section 319 of the Criminal Code Cap. 38 Vol.II, Laws H of Oyo State, 2000.

FACTS BRIEFLY STATED:

The Appellant with three other co-accused namely, Taiwo Oladejo (1st Accused), Waheed Balogun (2nd Accused) and Oluwole Olawuyi (4th Accused) were prosecuted for the offences aforesaid.

The case against them is that they kidnapped one Raji Tihamiyu, a traffic warden then serving in Ogbomosho, Oyo State from his duty post and took him to Odo-Oba village where he was shot to death and then burnt in order to conceal the crimes.

At the trial, the prosecution called seven witnesses including Mrs. Saruyu Raji (PW6) wife of the deceased, Raji Tihamiyu. The Appellant and his co-accused did not call any independent witnesses but individually testified to defend themselves of the charges against them individually and/or collectively.

Statements made by the suspects and/or accused persons were tendered before the High Court together with the medical report of the doctor that conducted a post mortem examination on what remained of the burnt corpse of the deceased. Also the tyres used to burn the deceased were tendered and admitted in evidence. The High Court convicted the Appellant of the offences as charged and sentenced him to death, but aggrieved, he appealed to the Court of Appeal which affirmed what the trial Court did, hence the appeal to this Court.

At the hearing on the 23rd October, 2014, Mr. A. A. Adedeji learned counsel for the Appellant adopted their Brief of Argument settled by counsel and filed on the 11/7/2012. He identified five issues for determination from the six grounds of appeal which are as follows:-

a. Whether justices of the Court of Appeal were right when in affirming the conviction and sentence of the Appellant by the trial court, on the count charge of conspiracy, they stated that the Appellant did not call the Okada men who took him and his co-accused to the scene to confirm the circumstances under which they went to the scene and oath administered on them? (Ground One)

b. Whether justices of the Court of Appeal were right when they held that the Appellant together with his co-conspirators acted under circumstance through which it can undoubtedly be inferred that they conspired with one another to assassinate the late Raji Tihamiyu? (Ground Two)

c. Whether Court of Appeal was right when it held that conduct of the Appellant clearly implicated him and for not offering acceptable explanation as to why he was at the scene of crime? (Ground Three)

d. Whether circumstantial evidence against the Appellant was cogent and compelling to warrant Court of Appeal's affirmation of the Appellant's conviction and sentence by the trial court? (Ground Four)

e. Was the Court of Appeal right that Prosecution proved the offence of murder beyond reasonable doubt? (Ground Five)

Learned Attorney General of Oyo State, Mr. M. O. Adebayo adopted the Brief of the Respondent settled by Mr. J. M. M. Majiyagbe, filed on 27/5/14 and deemed filed on 11/6/14. Respondent adopted the issues as crafted by the Appellant.

The issues so formulated shall be utilized in the determination of this appeal.

ISSUES 1, 2, 3, 4 & 5

The questions herein raised are whether the Court of Appeal was right in affirming the conviction and sentence of the Appellant by the trial Court on the charge of conspiracy when the Okada men who took him and his co-accused to the scene were not called to testify to confirm the circumstances under which they went to the scene and the oath administered on them. Also, the circumstances under which the inference of the conspiracy was made.

Also how the conduct of the Appellant implicated him, while he had no explanation for being at the scene of crime at the material time.

In answering the above posers, learned counsel for the Appellant contended that findings of fact by the Courts must be based on credible evidence or reasonable inference drawn from the facts presented by the prosecution in the matter. Also that it is unsafe to base a conviction on speculative finding on what the appellant did but ought not to have done. He cited *Amadi v State* (1993) 8 NWLR (Pt.314) 644.

Mr. Adedeji of counsel went on to submit that a decision is said to be perverse where it runs contrary to the evidence or where it has been shown that the trial court took into account matters which it ought not to have taken into account or shut its eyes to the obvious or where it has occasioned a miscarriage of justice. He referred to the cases of *Ebba v. Ogodo* (1984) 1 SCNLR 372; *Bunyan v. Akingboye* (1999) 7 NWLR (Pt.609) 31; *Okhwarobo v. Aigbe* (2002) 9 NWLR (Pt.771) 29.

He stated that the trial court made a total of 23 findings of fact not supported by credible evidence of the prosecution and so the conclusion arrived at faulty. Furthermore, that the finding of the learned trial judge leading to the conclusion that Appellant was involved in the kidnapping of the late Raji Tiamiyu was incorrect as the basis for that finding was absent. B

For the Appellant was further contended that an accused making a confessional statement as to his participation in a crime is not a confession for his accomplices and so cannot be used against the accomplices. He relied on the case of *R. Ajani & Ors. (1936) 3 WACA 3*; *Mbang v State (2009) 18 NWLR (Pt.1172) 140*. C

Mr. Adedeji stated on that the trial court failed to properly appraise the defence put up by the Appellant in his confessional statements, Exhibits 8 and 8A and his testimony of going to commiserate with Kasali Shittu's mother when he saw DW2 who had himself come to register his condolences. That he was never part of the plan to kidnap Raji Tiamiyu as the act had been done before Appellant came on the scene. D

On the oath taking after the killing of the deceased, learned counsel for the Appellant said the worst scenario is Appellant being made an accessory after the fact and not a fact to be used to infer participation in the act of murder. E

The learned Attorney General for the Respondent contended that the Courts below were on a sound footing in reaching their decisions and the Appellant was wrong to assert that he did not know the motorcyclist that took him and his co-conspirators to the scene of the crime. The Appellant deliberately refused to call the Okada motorcyclists to testify leading to the conclusion that their testimonies would be against him. F

Learned counsel for the Appellant, Mr. Adedeji contended that the circumstantial evidence used by the Prosecution as the basis in securing his conviction and sentence by the trial Court for the offence of culpable homicide punishable by death were not cogent and compelling and also cannot be said to be positive, unequivocal leading to the irresistible conclusion that the accused person/appellant committed the offences charged. That circumstantial evidence is proof of fact by inference from facts proved. He cited *Aigbadion v State (2000) 7 NWLR (Pt.666) 68*; *Uwaekweghinva v State (2005) G*

9 NWLR (Pt.930) 227; *Shazali v State* (1988) 12 SC (Pt.II) 58; *Udedibia & Ors v The State* (1976) 11 SC 133 at 138 - 139; *Lori & Anor v The State* (1980) 12 NSCC 269 at 272.

For the Appellant was submitted that the essential ingredients that the Prosecution must establish in order to succeed are:

- B (a) that the deceased has died;
- (b) that the death of the deceased has resulted from the act of the accused persons;
- (c) that the act of accused person was intentional with knowledge that death or grievous bodily harm was its probable consequence.

C That in this instance, there is no doubt that the deceased died, but that the second and third ingredients of the offence of murder were not established against the Appellant beyond reasonable doubt. He referred to *Onah v State* (1985) 3 NWLR (Pt.12) 236, *Ogba v. The State* (1992) 2 NWLR (Pt.222) 164.

E That there was nowhere in the Appellant's statements Exhibits 8 and 8A where he admitted or confessed to the crime in respect of which he was convicted and sentenced by the trial Court. Learned counsel stated that the Prosecution did not lead any evidence of that common intention and there was no evidence that Appellant had fore knowledge or knowledge of the fact that *Dauda Azeez* and his group had the intention of killing the deceased. That there was no evidence of an agreement between Appellant and the other people to kill or do any unlawful act and so the proof beyond reasonable doubt was not made. He referred to *Asimiyu Alarape v. The State* (2001) FWLR (Pt.41) 1872 at 1898.

F G Mr. Adebayo of counsel for the Respondent submitted that the Supreme Court will not generally disturb concurrent findings of facts of two Lower Courts particularly in matters that relate to credibility of witnesses as in this case. Also, that there is no miscarriage of justice or any perversity for which the concurrent findings would be interfered with. He relied on *Martins v COP* (2013) 4 NWLR (Pt.1343) 25 at 43; *Oguonzee v. The State* (1988) 5 NWLR (Pt.551) 521 at 547 - 548.

H The learned Attorney General for the Respondent said the Appellant's culpability for the murder of the deceased has been proved beyond reasonable doubt as all the essential elements of the offence

were established.

Mr. Adebayo of counsel for the Respondent had stated that from the evidence of the Appellant and other witnesses, it is clear that Appellant and his co-conspirators acted under circumstances that point to the irresistible conclusion that they conspired with one another to assassinate Raji Tiamiyu. Also, that assuming Appellant did not call the Okada riders what happened with the other members of the Alliance for Democracy, who went to commiserate with the family of Alfa Kasali Shittu on November 26th, 2002. That the Appellant's conduct clearly implicated him especially in the absence of credible explanation for his being at the scene of the crime. B
C

The Appellant's grouse with the Court of Appeal holding that the trial court found correctly that the Appellant and the other accused took the oath of secrecy before the killing of the deceased and at the scene of crime were enough to place him as a principal actor in the act of murder but also had been in agreement before the act, this, the Appellant is not accepting as such. D

The stance of the Appellant is difficult to go along with in view of what the Appellant admitted himself as to the role he played every inch of the way material to the matter in hand. Indeed, I agree with the inferences made by learned counsel for the Respondent on the following:- E

1. That Appellant was of the common mind or intention with the other accused persons to kidnap and murder the deceased. F
2. He was at the scene of crime to assist the others in carrying out the murder of the deceased.
3. Appellant and co-travelers had taken the oath and burnt the corpse of the deceased in order to conceal the crime they had jointly carried out. G
4. In facilitating the act, the Appellant and co-accused had lived the motorcycle or Okada riders for their use in getting the scene of crime, completing the act and being transported out.

The inferences above were in line with the findings of the two Courts below who found enough to reach the conclusion that the evidence available was cogent, compelling, leading irresistibly to the conspiracy by Appellants and co-accused and the very act of murder of Raji Tiamiyu, the deceased traffic warden. The cases of Peter v. State (1997) 3 NWLR (Pt.495) 625 at 641; Okoro v State H

(2012) All FWLR (Pt.621) 1471 at 1497 are relevant to the case in hand.

It is in the light of the above that the contention as put across by the Appellant that the conviction was based on speculative findings for which this court should intervene and reverse is not sustainable as the reality is far from that position as this is one of those instances where this court should not disturb the concurrent findings of the two Courts below. The questions raised in all the issues are clearly answered against the appellant and in favour of the Respondent.

From the foregoing and the better considered lead judgment, I have no difficulty in also dismissing this appeal which lacks merit and affirm the decision of the Court of Appeal.

D

ARIWOOLA JSC

I had the opportunity of reading in draft the leading judgment just delivered by my learned brother, Aka'ahs, JSC. I am in agreement with His Lordship's reasoning and the conclusion arrived thereat.

The appellant was arraigned and tried along with three others before the Oyo State High Court of Justice, Ogbomosho Judicial Division, for the offences of conspiracy to commit felony and murder of one Raji Tiamiyu, a traffic warden. They both pleaded not guilty to the charge. In a considered judgment of the trial court, three of the said four accused that stood trial were found guilty of the two count charge and were convicted and sentenced accordingly. The 4th accused was found not culpable and was discharged and acquitted.

The instant appellant along with the other two convicts were not satisfied with the judgment, hence they appealed to the court below which appeal was dismissed.

Being further dissatisfied led to the instant appeal by the appellant upon six grounds of appeal from which five issues were distilled. The said issues have been beautifully dealt with in the lead judgment of my learned brother.

There is no doubt, the main complaint of the appellant is that the prosecution failed to prove beyond reasonable doubt the offence of murder, against him in particular and the court below should

not have affirmed the decision of the trial court.

Generally, it is settled law that for there to be a valid conviction of an accused person for the offence of murder under Section 319(1) of the Criminal Code, it is imperative on the prosecution to establish or indeed prove the following ingredients beyond reasonable doubt.

(a) That the deceased actually died; B

(b) That the death of the deceased resulted from the act of the accused person(s) and;

(c) That the action of the accused that led to the deceased death was intentional with knowledge that death was its probable consequence. See Inyang Akpan Vs The State (1994) 9 NWLR (Pt.368) 347; Akinfe vs The state (1988) 3 NWLR (pt.85) 729; Ogha Vs The State (1992) 2 NWLR (Pt.222) 164; Frank Uwagboe Vs The State (2003) 12 NWLR (Pt.1102) 621, (2008) 34 NSCQR (Pt.11) 664. In the instant case, there is ample evidence that all the above ingredients were established beyond reasonable doubt. In other words, there is evidence from the various oaths of secrecy taken by the appellant with his co-accused persons on the killing of the deceased that there was conspiracy between the accused and those at large. In the same vein, I am not in the slightest doubt that the prosecution proved all the above ingredients it was expected to prove beyond reasonable doubt. The appellant was rightly and properly convicted for the two count charge and correctly sentenced accordingly. The court below was therefore right and perfectly in order in affirming the decision of the trial court which in its considered judgment had found the appellant guilty, convicted and sentenced. The appellant's counsel did a very good job with the appeal but the case is a bad one and cannot succeed. C
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In the light of the above brief comments and the fuller reasoning of my learned brother, Aka'ahs, JSC, I consider the appeal unmeritorious and liable to dismissal. The appellant and his co-accused are simply wicked and unreasonable. I shall also dismiss the appeal. Appeal is dismissed. G

H