

SUPREME COURT OF NIGERIA
FRIDAY 5TH FEBRUARY, 2010. SC. 287/2008
CORAM:- N. TOBI, A. M. MUKHTAR, I. F. OGBUAGU,
J. O. OGBE, J. A. FABIYI, JJSC

MOSES JUA APPELLANT
V.
THE STATE RESPONDENT

MURDER - Conviction - Circumstantial evidence - Accused can be convicted of murder - Where there is cogent and compelling circumstantial evidence - To the fact that he killed the victim (H1)

CROSS EXAMINATION - Objective - The main aim is to damage the case of prosecution - And to make court believe that accused did not commit the offence (H2)

CRIMINAL PROCEDURE - Proof - Forensic evidence - Where exhibits point unequivocally to guilt of accused - Forensic is not necessary and accused can be convicted of the offence (H3)

EVIDENCE - Proof - Evidence Act s. 149(a) - Import of - The subsection does not provide that particular witness must be called - Rather it proposes that particular evidence should be called (H4)

MURDER - Conviction - Corpus delicti - Absence of - Corpus delicti is not produced in all cases to secure conviction - As accused can be convicted where there is evidence linking him with killing of deceased (H5)

CONVICTION - Evidence - Best evidence - For purpose of conviction is voluntary confession to the crime by accused - And a conviction based on oral confession is proper in law (H6)

FACTS

Accused/appellant was arraigned before the Kwara State High Court Ilorin for the offence of murder punishable with death under section 221 of the Penal Code. The case against appellant as pre-

sented by prosecution/respondent is that he (appellant) was suspected for the theft of a motor cycle. A Police constable – Rotimi Jeremiah was detailed to take appellant to a place in order to produce the particulars of the motor cycle. The Police constable was no longer seen from that moment. Appellant was arrested in connection with the missing officer and taken to the Police station where he made both oral and written confessional statements.

After the arrest, appellant led the IPOs from the State CID to the crime scene where the cloths last worn by the deceased were recovered along with other items. At the trial, respondent called six witnesses in support of its case. In his defence, appellant retracted his confessional statements. He denied killing the deceased. After evaluation of evidence adduced by the parties, the learned trial judge in his findings disbelieved the evidence presented by appellant. In a reserved judgment, the court convicted and sentenced appellant to death by hanging. Dissatisfied, appellant appealed to the Court of Appeal Ilorin Division. The appeal was equally dismissed. Still not satisfied, appellant has appealed to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether the prosecution proved the case against the Appellant beyond reasonable doubt as required by section 138 of the Evidence Act.”

HELD (Unanimously dismissing the appeal per **TOBI JSC**)

MURDER - Conviction - Circumstantial evidence

1. It is not every case of murder, or every case of culpable homicide punishable with death that is proved by eye witnesses. And that, in my humble view, is the only essence of the jurisprudence of circumstantial evidence.

An accused person can be convicted of the offence of culpable homicide punishable with death if there exists, cogent and compelling circumstantial evidence to the fact that the accused person killed the victim.

I should add here that an accused person can also be convicted on strong and compelling circumstantial evidence in

the absence of corpus delicti. The evidence need not necessarily be direct. There is enough evidence that the body of constable Rotimi Jeremiah was burnt. How then can the corpus delicti be found? (pp. 2886 B/G/2891 B)

CROSS EXAMINATION - Objective

2. The main aim or objective of cross examination is to destroy or damage the case of the prosecution and to make the court believe that the accused did not commit the offence; or if he committed the offence there are valid defences available to him. It looks to me from the answers above that the cross examination gave another opportunity to the prosecution to strengthen or fortify its case. How can the experience of PW1 in the police force, particularly as exhibit Keeper be of any use to the proof of criminality of the appellant? I can hardly see any nexus. There is none. (p. 2888 C)

CRIMINAL PROCEDURE - Proof - Forensic evidence

3. Learned counsel for the appellant submitted that in the absence of forensic evidence on the exhibits the appellant cannot be convicted of the offence. That is quite a new one to me. With respect, I do not agree with him. Where exhibits point unequivocally to the guilt of an accused person, as evidence as in this case forensic is not necessary. (p. 2889 H)

EVIDENCE - Proof - Evidence Act s. 149(a) - Import of

4. Learned counsel submitted that Cpt. Uzor is an essential witness that the prosecution ought to have called. He urged the court to invoke section 149(d) of the Evidence act. Section 149(a) does not provide that particular witness should or must be called. The subsection proposes that particular evidence should be called. Some other witnesses gave evidence of the fact that the appellant was last seen with the deceased and so the evidence of Cpt. Uzor was not inevitable. I repeat that Section 149(a) is on a failure to call evidence and not failure to call a particular witness. Accordingly the failure to call Cpt. Uzor is neither here nor there. (p. 2890 B)

MURDER - Conviction - Corpus delicti - Absence of

5. That takes me to the failure of the prosecution to produce the corpus delicti. Learned counsel for the appellant made so much whether of it. It is not in all case where the corpus delicti is produced to secure conviction of an accused person. It is not the law that an accused person must be discharged and acquitted if the body is not produced for medical examination. The law knows that there are instances and circumstances where an accused person takes measures to destroy the body in order to avoid prosecution or conviction if prosecuted. Accordingly where there is evidence that a human being was killed by another human being, the latter can be convicted when the body of the former is not found. The important consideration is whether there is a nexus between the accused and the killing of the victim to the extent that the law comes of the conclusion that it is the accused person who killed the deceased. (p. 2890 E)

CONVICTION - Evidence

6. The best evidence for purpose of conviction is confession to the commission of the crime by the accused person. What the court should look into is whether the confession was voluntary and accords with section 27 of the Evidence Act and not against section 28 of the Act. In the case, the court of appeal rejected the confessional statement but accepted the oral confession made by the appellant to the police. A conviction on the oral confession is proper in law. Although learned counsel faulted the witnesses for the prosecution, I am of the view that they gave inculpatory evidence which justifies the conviction of the appellant and the subsequent confirmation of the conviction by the Court of Appeal. There was not enough cross examination to destroy the veracity of the evidence of the witnesses. The appeal fails. The appellant has to face the gallows. (p. 2891 E)

NOTABLE POINT OF INTEREST

TOBI JSC

1. Proof beyond reasonable doubt

The burden of proof in a criminal case is on the prosecution and it is beyond reasonable doubt. That is what section 138(1) of the Evidence Act says. The subsection provides that if the commission of a crime by a party to any proceedings is directly in issue in any proceedings, civil or criminal, it must be proved beyond reasonable doubt. B

Reasonable doubt which will justify an acquittal is a doubt based on reason arising from evidence or lack of it. It is a doubt which a reasonable man or woman might entertain. It is not fanciful doubt, it is not an imaginary doubt. It is a doubt as would cause prudent man to hesitate before acting in matters of importance to themselves. See Black Law Dictionary, 6th Edition, page 1265. A prudent man is a man who thinks carefully before taking action. He is careful to avoid risks unpleasantness and difficulties. D

While our adjectival law places on the prosecution the duty to prove a criminal case beyond all reasonable doubt, the prosecution has not the duty to prove the case beyond all shadow of doubt. Shadows of doubt could be reflected in the case of the prosecution but that cannot in law stop or inhibit conviction. The court can convict an accused person the moment the prosecution proves its case beyond reasonable doubt. And here, the proof beyond all shadow of doubt does not mean the same thing. The latter places a heavier burden on the prosecution, a burden which is not known to our adjectival law. And so I will use the test of proof beyond reasonable doubt in this appeal. (p. 2885 D) E

REPRESENTATION

O.O. OJUTALAYO, for the Appellant

WAHEED EGBEWOLE, for the Respondent G

CASES REFERRED TO

State v. Usman (2005) MLR (pt. 906) 80 H

Ahmed v. State (2004) 2 SCNJ 1

Nwachukwu v. State (2007) 7 SCNJ 230

Ogba v. State (1992) 2 NWLR (pt. 227) 164

- Akinfe v. State (1998) 3 NWLR (pt. 85) 729
Omah v. State (1985) 3 NWLR (pt. 12) 236
Gabriel v. State (1989) 5 NWLR (pt. 122) 457
Igabele v. State (2004) 15 NWLR (pt. 896) 331-332
Nasiru v. State (1999) 2 NWLR (pt. 589)
B Nwaeze v. State (1996) 2 NWLR (pt. 428) 1
Udo v. State (1992) 2 NWLR (pt. 158) 567
Opeyemi v. State (1985) 6 SC 347
Akinkunmi v. State (1987) 3 SC 152
C Oteki v. State (1986) 4 SC 222
Bakare v. State (1987) 3 SC 5

STATUTE REFERRED TO

Evidence Act, ss. 138, 149(a)(d)

D

BOOK REFERRED TO

Black Law Dictionary 6th Ed. p. 1265

LEAD JUDGMENT BY TOBI JSC

E This is an appeal against the judgment of the Court of Appeal which affirmed the judgment of the trial court, which convicted the appellant for culpable homicide punishable with death. The appellant was charged along with three other persons. Two of them died in the course of the trial.

F The prosecution called six witnesses. The case is that a motor cycle was stolen. Appellant was the suspect. Police Constable Rotimi Jeremiah took the appellant to Ipee to produce the particulars of the motor cycle. That was the last time Rotimi Jeremiah was seen alive.

G In the course of investigation, the appellant made both oral and written confession and statements that he, together with the other accused persons, killed the deceased. The confessions were made at Ede Police Station.

H The appellant was arrested. He was led to the scene of crime by the police. The clothes last worn by the deceased, four teeth and some strands were recovered at the scene. Appellant's efforts to escape from arrest were not successful.

At the trial, appellant retracted his confessional statement. He denied killing Rotimi Jeremiah. The learned trial judge did not be-

lieve his evidence. He was therefore convicted and sentenced to death. His appeal to the Court of Appeal was dismissed. This is a further appeal to this court.

Briefs were written and exchanged. Counsel for the appellant formulated the following issue for determination.

“Whether the prosecution proved the case against the Appellant beyond reasonable doubt as required by section 138 of the Evidence Act.”

Counsel for the Respondent has formulated the following issue for determination.

“Whether the prosecution has not proved its case beyond reasonable doubt in the circumstances of this case”

Both issue dovetail on proof. That is the common denominator. The apparent or seeming different is that while the issue of the appellant is couched in a language of neutrality, so to say, that of the respondent is couched in language of negativity. I do not see any substantial difference when both are taken in the light of the facts of the case, it is like a dozen and twelve. They come to the same thing at the end of the day.

Learned counsel for the appellant Mr. Ojutalayo submitted that as none of the prosecution witnesses was an eye witness, circumstantial evidence to be relied upon must be cogent and compelling as to lead to only one conclusion and it is to the guilt of the accused person. He referred to the case of State v. Usman (2005) MLR (Pt.906) 80 at 124. He submitted that the concurrent findings of the two courts are perverse and urged the court not to reply on them. He dealt specifically with evidence of PW4 and PW.6 at pages 8 and 9 of the Brief.

Learned counsel submitted that by virtue of section 138 of the Evidence Act, the prosecution has a duty to prove the case against the appellant beyond reasonable doubt and that the appellant has not duty to prove his innocence as he is presumed innocent until proved guilty. He contended that in order to convict the appellant of offence of culpable homicide punishable with death, the prosecution must prove the following ingredients beyond reasonable doubt.

- (a) That the deceased has died.
- (b) That the death was caused by the Appellant.
- (c) That the appellant had intention of causing the death of the

deceased or to cause him grievous bodily injury.

He referred to *Ahmed v. State* (2004) 2 SCNJ 1; *Nwachukwu v. State* (2007) 7 SCNJ 230 at 254; *Ogba v. State* (1992) 2 NWLR (Pt.227) 164 at 168; *Akinfe v. The State* (1998) 3 NWLR (Pt.85) 729 AND *Omah v. The State* (1985) 3 NWLR (Pt.12) 236.

B Learned counsel submitted that the quality of circumstantial evidence which led to the conviction of the appellant failed to meet the required standard of the law to justify the conviction. He argued that for circumstantial evidence to be strong enough to support conviction, it must be positive and unequivocal and must also prove C irresistibly the guilty of the appellant. Besides there must be no other co-existing circumstance throwing doubt on the inference that the appellant and no other person is guilty of the alleged offence. He referred to *Gabriel v. State* (1989) 5 NWLR (Pt.122) 457; *Igabelo v. D State* (2004) 15 NWLR (Pt.896) 331-332; *Nasiru v. State* (1999) 2 NWLR (Pt.589); without the page and *Nwaeze v. State* (1996) 2 NWLR (Pt.428) 1.

Counsel went through the evidence of PW.1, PW.5, PW.4, PW.3 in that order and submitted that the prosecution did not prove its E case beyond reasonable doubt. He contended that there were many unanswered questions from the case of the prosecution against the appellant. He put some of the questions as follows:

F “(i) *What kind of fire was made that burnt a whole human being including his bones and skull but left his hair and only four of his set of teeth un-burnt?*

G “(ii) *It is safe to assume that the essence of burning the body was to destroy any trace of the victim, Rotimi. Would a criminal who went to the extent of burning even bones, spare the victim’s jumper and trouser?*”

To learned counsel, failure on the part of the Court of Appeal to answer the above questions raised sufficient doubt as to the credibility of the evidence of the prosecution witnesses. He submitted that there was no proper evaluation of the evidence, a failure which occasioned miscarriage of justice. He referred to *Udo v. State* (1992) 2 H NWLR (Pt.158) 567 at 587.

Learned counsel argued that in the absence of direct or circumstantial evidence on the part of the prosecution regarding the occurrence of the death of Rotimi Jeremiah, this court should hold

that the findings of the lower courts are perverse. Counsel submitted in the alternative that the circumstantial evidence adduced by the prosecution witnesses is not strong enough to link the appellant with the commission of the alleged offence. In every murder case, the main burden is on the prosecution to prove that the act of the accused caused the death of the deceased. He referred once again to *Gabriel v. The State* B

Learned counsel submitted that in the light of the inability of the prosecution to produce the corpus delicti the evidence that certain uterine were collected from the body of the deceased was not strong enough to convict the appellant of the offence of culpable homicide punishable with death. C

Counsel argued that apart from the appellant there were other persons charged along with him as co-accused who had opportunity of committing the alleged offence based on the evidence of the prosecution witnesses. He further argued that the evidence of PW.5 which was corroborated by the 4th accused, James Yaji, who was discharged by the learned trial judge, shows that the cutlass admitted as Exhibit B which was tendered through PW.5 was not recovered from the appellant but from the 4th accused. He relied on the evidence of the 4th accused. E

Counsel argued that the finding of the Court of Appeal that the appellant was last seen with the deceased is inapplicable in the case because there seems to be a missing link and obvious loopholes in the evidence of the prosecution. He examined the evidence of PW.4 and related it to the evidence of PW.6. He asked six questions relating to the conduct of PW.6 at pages 24 and 25 of the Brief and submitted that the failure of the prosecution witnesses to provide answers to the questions in the course of the trial is fatal and rendered the evidence of the prosecution in support of the “last seen” theory very incredible and hollow contrary to the concurrent findings of both the High Court and the Court of Appeal. Counsel argued that Capt. Uzor was an essential, relevant and material witness to the prosecution if the “last seen” theory must be rightly invoked against the appellant. He referred to *Opeyemi v. State* (1985) 6 SC 347 and section 149 (d) of the Evidence Act. F G H

Learned counsel submitted that the Court of Appeal having expunged Exhibit F (the alleged confessional statement of the appel-

lant) it becomes an irrelevant material in considering the guilt of the appellant in the case, and that the only evidence of the appellant worth considering is his evidence on Oath before the High Court and nothing more. Counsel quoted copiously the evidence of the appellant at pages 28 and 29 of the Brief and contended that the courts
 B did not give any consideration to the evidence of the appellant.

Learned counsel urged the court not to believe the evidence of PW.4 which he said was not corroborated. He gave five reasons at page 33 of the Brief.

C Learned counsel argued that the proper order the Court of Appeal ought to have made having rightly expunged the confessional statement was an order of discharge and acquittal, as the prosecution did not prove its case. He referred to *Ogunshowobo v. Inspector General of Police* (1958) WRNLR 23.

D Learned counsel urged the court to reverse the concurrent findings of the two courts as they are perverse. He referred to *Akinkunmi v. State* (1987) 3 SC at Page 152. He urged the court to allow the appeal.

E Learned counsel for the respondent, Mr. Wahab Egbewole addressed the court on the following: (i) Proof beyond reasonable doubt. (ii) Quality of circumstantial evidence (iii) Last seen theory (iv) Evaluation of evidence (v) Calling of witness (vi) Confession by appellant outside the confessional statement and (vii) Absence of *Corpus Delicti*.

F On proof beyond reasonable doubt, learned counsel submitted that by virtue of section 138 of the Evidence Act, it is the duty of the prosecution to prove its case against the accused person beyond reasonable doubt. Relying on *Oteki v. The State* (1986) 4 SC 222
 G and *Bakare v. The State* (1987) 3 SC 5, learned counsel submitted that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt. He relied on the confession of the appellant to PW.4, PW.5 and PW.6 that he and other accused persons killed the deceased. Learned counsel also relied on Exhibits A, A2 and D1 and
 H D3. Relying on the case of *Lawanson v. The State* (1975) 4 SC 115, learned counsel argued that the appellant had a duty to do some explanation to prove that the prosecution was not right in its allegation that he killed the deceased.

On the quality of circumstantial evidence, learned counsel ar-

gued that in the discharge of the burden of proof by the prosecution, it is not compulsory that there should be direct evidence leading to the involvement of the accused person in criminal activity; circumstantial evidence that are compelling, cogent, unequivocal and irresistibly lead to the guilt of the accused person, can sustain conviction. He referred to *Peter v. State* (1997) 12 SCNJ 53; *Akinmoju v. The State* (2000) 4 SCNJ 149; *Adio v. The State* (1986) 2 NWLR (Pt.24) 581; *Mohammed v. State* (2007) 11 NWLR (Pt.1045) 305 *Igho v. State* (1978) 3 SC. 8; *Emeka v. State* (2001) 14 NWLR (Pt.734) 666; *Archie v. State* (1993) 6 NWLR (Pt.302) 75. Counsel enumerated four conditions which the prosecution should satisfy in the case at page 9 of the Brief and submitted that the conditions were satisfied by the prosecution. As the appellant failed to provide any explanation in his defence, this court should uphold the decisions of the two courts, counsel argued. He relied on *Nwaeze v. The State* (1996) 2 SCNJ 42.

On last seen theory, learned counsel submitted that in murder or culpable homicide cases where the deceased was last seen with the accused, such an accused, like the appellant, has a duty to explain or show the whereabouts of the deceased or how the deceased met his death. Where no such evidence is forthcoming, as in this case, the court has justification to draw conclusion that it was the accused that killed the deceased. He relied on *Archibong v. The State* (2006) 14 NWLR (Pt.1000) 349 at 395; *Adeniji v. The State* (2001) 5 SCNJ 371; *Adepetu v. The State* (1998) 7 SCNJ 83 and *Lawal v. The State* (1975) 4 SC 115.

Learned counsel relying on the evidence of PW.6 argued that the submission of counsel for the appellant that there was no eye witness is hollow and cannot stand.

On the evaluation of evidence, learned counsel submitted that as it is the prerogative of the trial court to evaluate the evidence presented by the parties, an appellate court will not interfere in the finding of fact except in exceptional cases. He referred to *Abidoye v. Alawode* (2001) 6 NWLR (Pt.709) 463 at 473 and *Lagga v. Sarhuna* (2008) 6-7 SC (Pt.1) 101. Counsel submitted that the Court of Appeal is right in upholding the correct findings of fact of the trial court.

On calling of witnesses, learned counsel submitted that only essential witness need be called and it is not important that a particular witness

must be called. Learned counsel did not see his way clear why counsel for the appellant insisted that Cpt. Uzor and any policeman from the police station at Ede should be called. He referred to *Iyere v. Bendel Feed and Flour Mills* (2001) 7 - 12 SC. 151, *Oduneye v. The State*, supra *R. v. Agagariga* (1961) 1 All NLR 462; and *Opayemi v. The State* 91985) 4 NSCC 921.

On confessional by the appellant, learned counsel argued that the Court of Appeal did not reject the confessional statement on the basis whether it is true or not but rather because the trial within trial ordered by the trial court was not concluded. He pointed out that the Court of Appeal found the appellant guilty after expunging the confessional statement from the totality of the evidence available in the case. He cited *Idowu v. The State* (2000) 7 SCNJ 259 and *Ikemeson v. The State* (1989) 3 NWLR (Pt.110) 455; *Dana v. State* (1980) 8 - 11 SC 236 at 267 - 268.

Learned counsel contended that appellant should not be allowed to run away from his guilt. He pointed out that the appellant had the ample opportunity to show during the cross examination of the witness called by the prosecution that he did not commit the offence but he only waited till the time of presenting his case to deny the prosecution's case and put forth this defence. Citing the case of *Agbonifor v. Oba* (1988) 1 NSCC 237 at 248; learned counsel argued that the veracity of the defence must be tested by cross examining the prosecution witnesses on facts. Counsel argued that the failure on the part of the appellant to put across his case and confront PW.2, PW.3, PW.4, PW.6 and only to wait for the defence, is an after-thought. Counsel contended that since there are facts outside the confessional statement, the appellant was properly convicted.

On the issue of absence of corpus delicti, learned counsel argued that is not compulsory that there must be corpus delicti before an accused can be convicted. The only thing that the court has to take into consideration is whether there is positive evidence that the victim is dead. He relied on *Bubu v. The State* (1990) 7 NWLR (pt.460) 229 at 296. Counsel called in aid the fact that the victim was last seen with the appellant and the further fact that the clothes worn by the deceased were seen at the scene of the crime as well as strands of human hair and four human teeth.

Learned counsel contended that it is not the law that the cause

of death must be proved by medical evidence rather the only duty on the prosecution is to show that the death of the victim was the real consequences of the act of the accused to the exclusion of all other reasonable cause. He relied on *Ubani v. The State* (2003) 12 SCNJ 11. Counsel finally submitted that the circumstances as proved by the prosecution in the case fix the appellant as the killer of the deceased, PC Rotimi Jeremiah. He urged the court to dismiss the appeal. B

In his reply Brief, learned counsel for the appellant submitted that the onus of proof is on the prosecution throughout the case. Relying on *Shande v. State* (2005) 1 NWLR (Pt.107) 218 at 239 and *Ameh v. State* (1978) 6-7 SC 27; *Ugo v. Commission of Police* (1972) 11 SC 37; Counsel submitted that the prosecution failed to prove its case against the appellant beyond reasonable doubt having regard to the several lapses inherent in its case as clearly highlighted in the Brief. He urged the court once again to allow the appeal. D

The burden of proof in a criminal case is on the prosecution and it is beyond reasonable doubt. That is what section 138(1) of the Evidence Act says. The subsection provides that if the commission of a crime by a party to any proceedings is directly in issue in any proceedings, civil or criminal, it must be proved beyond reasonable doubt. E

Reasonable doubt which will justify an acquittal is a doubt based on reason arising from evidence or lack of it. It is a doubt which a reasonable man or woman might entertain. It is not fanciful doubt, it is not an imaginary doubt. It is a doubt as would cause prudent man to hesitate before acting in matters of importance to themselves. See *Black Law Dictionary*, 6th Edition, page 1265. A prudent man is a man who thinks carefully before taking action. He is careful to avoid risks unpleasantness and difficulties. F

While our adjectival law places on the prosecution the duty to prove a criminal case beyond all reasonable doubt, the prosecution has not the duty to prove the case beyond all shadow of doubt. Shadows of doubt could be reflected in the case of the prosecution but that cannot in law stop or inhibit conviction. The court can convict an accused person the moment the prosecution proves its case beyond reasonable doubt. And here, the proof beyond all shadow of doubt does not mean the same thing. The latter places a heavier burden on the prosecution, a burden which is not known to our G H

adjectival law. And so I will use the test of proof beyond reasonable doubt in this appeal.

It is the case of the appellant that the prosecution did not prove the case against him beyond reasonable doubt. That is the only issue his counsel formulated for determination. Learned counsel relied on the fact that there was no eye witness to the act of murder by the appellant. ***It is not every case of murder, or every case of culpable homicide punishable with death that is proved by eye witnesses. And that, in my humble view, is the only essence of the jurisprudence of circumstantial evidence.*** In *R. v. Sala* (1938) 4 WACA 10, there was no direct evidence of anybody who saw the dead body of the person alleged to have been murdered. The West African Court of Appeal held that (i) in such case, the circumstantial evidence leading to the conclusion that the deceased died must be examined with great caution. (ii) In this case, the trial court was satisfied that the circumstantial evidence that the deceased died was so strong as to justify the finding, even though no witness testified to actually seeing the body. Delivering the judgment of the court, Kingdom, C.J. said at page 10.

“In this case the only difficulty is that there is no direct evidence of anybody having seen the dead body of the person alleged to have been murdered. In such cases the circumstantial evidence leading to the conclusion that the alleged deceased is dead has to be examined with great care. In this case we are satisfied that the circumstantial evidence that the child Hardo is dead is so strong as to justify the finding, even though no witness testified to actually seeing the body”

I entirely agree with Kingdom, C.J. I should say that like in *Sala*, the circumstantial evidence in the case is very strong.

An accused person can be convicted of the offence of culpable homicide punishable with death if there exists, cogent and compelling circumstantial evidence to the fact that the accused person killed the victim. See *Obosi v. The State* (1965) NMLR 129; *Onah v. The State* (1985) 3 NWLR (Pt.12) 236; *Akpan v. State* (2000) 12 NWLR (Pt.682) 667.

Both the High court and the Court of Appeal found compelling circumstantial evidence but the appellant does not agree with them. I will go through the evidence to see whether I agree with learned counsel for the appellant that the circumstantial evidence

proffered by the prosecution witnesses and relied upon by the lower courts below failed to meet the required standard of the law, to justify the conviction of the appellant.

I entirely agree with the cases cited by learned counsel for the appellant at page 12 of his Brief that for circumstantial evidence to be enough to support a conviction, it must be positive and unequivocal and must irresistibly point at the guilt of the accused. I shall in like manner, also go through the evidence of some of the witnesses. I shall return to the issue of circumstantial evidence. B

Learned counsel for the appellant first examined the evidence of PW1 in respect of things found by PW1 at the scene of the crime. Let me also take the evidence of PW1 first. PW1, Saleh Musa, in his evidence in chief said: C

“On 6/4/94, I was in the exhibit room as CID Officer when one Sgt. Innocent formally at same address with me, presently serving in Benue Police Command brought one cutlass, mean Yellow guinea jumper, one togu yellow guinea however, three photographs of Suzuki motor cycle with registration No. OY 56G and its negatives. He also brought 3 coloured photographs at the scene of the crime where the deceased was alleged to have been burnt. Some quantity of human hair was also brought to me. This was found at the scene of the crime was also brought to me. Also brought along was some quantity of soil from the scene of crime... I registered all these items as Exhibits Nos. KWS/30/94”. E

Counsel appearing for the appellant at the trial court did not object to the admissibility of torn clothes, the photographs of the Suzuki machine and its negative. He did not also object to the admissibility of the cutlass. He however objected to the admissibility of the photographs of the scene of accident. F

In a very well considered Ruling at page 10 to 12 of the Record, the learned trial judge admitted the exhibits. He said at page 12 as follows: G

“Therefore there was not been a breach or non compliance of the Evidence Law. The photographs are therefore admitted under section 24(4) of the Evidence Law. I therefore admit all the tendered items in evidence and they are accordingly marked as follows: H

1. The torn jumper and trouser - Exhibit A and A2
2. The cutlass - Exhibit B

3. *The photographs of Suzuki machine and its negative - Exhibit C and C2*

4. *The photographs of the scene - Exhibit D*”

PW1 was not cross examined on the exhibits he tendered and admitted. He was merely examined as to his experience in the force and he answered as follows:

“I am an experience Policeman, I joined the Police on June 1982. I was posted as an exhibit Keeper in December 1992. It is not compulsory to get police report on lost item. There is not report that the items burnt in the case were burnt in Lagos. The things got burnt at a government laboratory. We have dispatched books in the Police.”

That is all that came out from the examination. ***The main aim or objective of cross examination is to destroy or damage the case of the prosecution and to make the court believe that the accused did not commit the offence; or if he committed the offence there are valid defences available to him. It looks to me from the answers above that the cross examination gave another opportunity to the prosecution to strengthen or fortify its case. How can the experience of PW1 in the police force, particularly as exhibit Keeper be of any use to the proof of criminality of the appellant? I can hardly see any nexus. There is none.***

PW.3 in his evidence in chief said:

“When we came back from Offa around 6pm we met the complainant who was back with the particulars. We then started to search for constable Rotimi. We spent 21 days after the incident looking for Constable Rotimi and Moses Jua. After 21 days of search we got information from Ede Police State in Osun State that the suspect we were looking for Moses Jua had been arrested and detained there... When they brought Moses Jua, he confirmed that they had killed the Constable PC Rotimi. He then mentioned the names of all the other accused including the accused that was dead.”

PW.4 in his evidence in chief said:

“On 28/3/94 the O/C Erinle Police State, one PC Paul Makanjuola and myself left for Ede. On arrival at Ede, we met the DCO and he confirmed that one Moses Jua is in detention in the cell. He was then brought to Erinle. During interrogation at Ede Police

State, he confessed that himself and one Joseph Ahen Sebastin were the people who stole the motorcycle and that the father of Sebastine Telu was there when they killed PC Rotimi."

PW5 who took the confessional statement from the appellant, also said:

"We then searched the house of the accused persons with search warrants. We recovered a cutlass, which was believed to have been used in killing the deceased. Later, the torn guinea jumper, trouser, the cutlass, the teeth were registered as exhibits with the exhibits keepers."

Witness had earlier said in evidence that he recovered at the scene, one guinea yellow trouser with one yellow guinea jumper worn by the deceased as well as some quantity of human hair and three teeth.

PW6 in this evidence in chief also confirmed that the deceased was last seen with the appellant. He said.

"Capt. Uzor then said, I should go and call Constable Rotimi Jeremiah, the deceased. I went out to see if the officer in charge of the station was around and I now saw Constable Rotimi Jeremiah coming. Capt. Uzor now told Rotimi Jeremiah to follow the 1st accused to the Ibukun Olu Baptist Church area Ipee. Rotimi then asked him to book their movement to Ibukun Olu Baptist Church Area Ipee which I did. After booking their movement, they left with the motorcycle Reg. No. OY 3562 G both 1st accused and Constable Rotimi."

The evidence of PW1 and PW6 confirmed that the appellant and the deceased were last seen together. While evidence of accused person last seen together with a victim per se may not be proof of culpable homicide punishable with death, it can support and corroborate other acts of the accused person resulting in the death of the deceased.

Are there such acts in this case? Yes. There are. The things recovered from the scene of crime are evidence of the offence. Upon search of the houses of the accused persons including that of the appellant's house, the cutlass was found. That was the evidence of PW.5

Learned counsel for the appellant submitted that in the absence of forensic evidence on the exhibits the appellant

cannot be convicted of the offence. That is quite a new one to me. With respect, I do not agree with him. Where exhibits point unequivocally to the guilt of an accused person, as evidence as in this case forensic is not necessary.

B Learned counsel for the appellant rejected the evidence of the prosecution witnesses with a mere waive of the hand at pages 16 to 25. With respect, I do not agree with him. The evidence given by the witnesses were not dis-
lodged by the appellant under cross examination.

C **Learned counsel submitted that Cpt. Uzor is an essential witness that the prosecution ought to have called. He urged the court to invoke section 149(d) of the Evidence act. Section 149(a) does not provide that particular witness should or must be called. The subsection proposes that particular evidence should be called.** See Igwunor v. Corporative Bank of East-
D ern Nigeria Ltd. (1994) 8 NWLR (Pt.318) 90 at 119; Onuwaje v. Ogbeide (1991) 3 NWLR (Pt.178) 187 AT 162 and Aremu v. The State (1991) 7 NWLR (Pt. 201) 1 at 17. **Some other witnesses gave evidence of the fact that the appellant was last seen with the deceased and so the evidence of Cpt. Uzor was not inevi-
E table. I repeat that Section 149(a) is on a failure to call evidence and not failure to call a particular witness. Accordingly the failure to call Cpt. Uzor is neither here nor there.**

F **That takes me to the failure of the prosecution to produce the corpus delicti. Learned counsel for the appellant made so much whether of it. It is not in all case where the corpus delicti is produced to secure conviction of an accused person. It is not the law that an accused person must be discharged and acquitted if the body is not produced for medical exami-
G nation. The law knows that there are instances and circumstances where an accused person takes measures to destroy the body in order to avoid prosecution or conviction if prosecuted. Accordingly where there is evidence that a human being was killed by another human being, the latter can be convicted
H when the body of the former is not found. The important consideration is whether there is a nexus between the accused and the killing of the victim to the extent that the law comes of the conclusion that it is the accused person who killed the deceased.**

In *Babuga v. The State* (1996) 7 NWLR (Pt.460) 279 AT 296, Onu, JSC said.

“As a matter of fact conviction can properly be secured in the absence of a corpus delicti where there is a strong direct evidence. It is true that the body of the deceased has not been recovered, but it is settled that where there is positive evidence that the victim had died, failure to recover his body need not frustrated, conviction” B

I should add here that an accused person can also be convicted on strong and compelling circumstantial evidence in the absence of corpus delicti. The evidence need not necessarily be direct. There is enough evidence that the body of constable Rotimi Jeremiah was burnt. How then can the corpus delicti be found? C

I should also take the confessional statement of the appellant. Although the Court of Appeal rejected the confessional statement of the appellant, the court accepted the oral confessional to the crime by the appellant. The Court of Appeal said: D

“I agree with the learned trial judge that the Appellant had admitted commission of the crime orally to those who arrested him initially before he was ever transferred to the SIIB at Ilorin where the PW5 recorded the retracted statements in writing.” E

The best evidence for purpose of conviction is confession to the commission of the crime by the accused person. What the court should look into is whether the confession was voluntary and accords with section 27 of the Evidence Act and not against section 28 of the Act. In the case, the court of appeal rejected the confessional statement but accepted the oral confession made by the appellant to the police. A conviction on the oral confession is proper in law. Although learned counsel faulted the witnesses for the prosecution, I am of the view that they gave inculpatory evidence which justifies the conviction of the appellant and the subsequent confirmation of the conviction by the Court of Appeal. There was not enough cross examination to destroy the veracity of the evidence of the witnesses. The appeal fails. The appellant has to face the gallows. F G H

The appeal is dismissed.

MUKHTAR JSC

The appellant was convicted of the offence of causing the death of P. C. Jeremiah Rotimi, punishable under Section 221 of the Penal Code. The charge for which he was convicted reads as follows:-

B *“That on or about the 27th day of February 1994, at Orita Village, via Ipee in Oyun Local Government of Kwara State, did commit culpable homicide punishable with death in that the four accused persons caused the death of one P.C. Rotimi Jeremiah, a police officer by cutting the deceased several times with an axe and cutlasses, with the intention of causing his death and thereby committed an offence punishable under Section 221 of the Penal Code.”*

C The appellant appealed to the Court of Appeal, Ilorin Division, which affirmed the decision of the trial court, and dismissed the appeal. Again he has appealed to this court. Briefs of argument were D exchanged by learned counsel, to wit and appellant’s reply brief of argument (which contains repetitions of his earlier argument) was also filed. These briefs were adopted at the hearing of the appeal. A lone issue for determination was formulated in the appellant’s brief of argument, and this issue reads:-

E *“Whether the prosecution proved the case against the Appellant beyond reasonable doubt as required by Section 138 of the Evidence Act”.*

The issue was adopted in the respondent’s brief of argument. F By virtue of section 138 of the Evidence Act-

“1. If the commission of a crime by party to any proceeding is directly in issue in any proceeding, civil or criminal it must be proved beyond reasonable doubt.

G *2. The burden of proving that any person has been guilty of a crime or wrongful act is, subject to the provision of section 141 of this Act on the person who asserts it whether the commission of such act is or is not directly in issue in the action.”*

The ingredients of the offence of culpable homicide under Section 221 of the Penal Code are:-

- H
- a. That the deceased has died.
 - b. That the death was caused by the Appellant.
 - c. That the Appellant had intention of causing the death of the deceased or to cause him grievous bodily injury.

See Ahmed v. State 2001 1 2 SCNJ 1, Nwachukwu v. State

2007 7 SCNJ 230, Edwin Ogba v. State 1992 2 NWLR Part 227 page 168 etc relied upon by the learned counsel for the appellant.

It is a fact that the conviction of the appellant was predicated on circumstantial evidence, which if positive, strong and unequivocal could ground a conviction. The jumper and trouser of the deceased and a cutlass were tendered in evidence, but accordingly to learned counsel for the appellant there was not bloodstain on any of them. It is the submission of the learned counsel for the appellant that the cutlass should have been sent for forensic examination. The learned counsel for the respondent has submitted that the concept of proof beyond reasonable doubt has been judicially defined to simply mean when a court is satisfied that the charges had been proved. He placed reliance on the cases of Oteki v. The State 1986 4 SC 222, and Mufutau Bakare v. The State (1989) 3 SC 5.

Now, what were the circumstantial evidence before the court that assisted the learned trial judge in finding that the prosecution proved its case beyond reasonable doubt? PW3 in his evidence testified inter alia thus:-

"We spent 21 days after the incidence looking for Constable Rotimi and Moses Jua. After 21 days of search we got information from Ede Police State in Osun State that the suspects were detained in our station at Erin-Ile.

Moses Jua was arrested together with the machine. Three policemen were sent to Ede to bring Moses Jua and the machine. When they brought Moses Jua, he confirmed that they had killed the constable P. C. Rotimi. He then mentioned the names of all other accused, (sic) including the accused that was dead."

P.W.4 testified as follows:

"On arrival at Ede, we met D.C.O. and he confirmed that one Moses Jua is in detention in their cell. He was then brought to Erinle. During interrogation at Ede Police Station, he confessed that himself and one Joseph Ahen Sebastin were the people who stole the motorcycle and that the father of sebastine Telu was there when they killed P.C. Rotimi..."

I know P.C. Rotimi Jeremiah. He was working with me at the Erinle Police State before the incident occurred. On that very fateful day, I left him at home as we lived in same place. I saw him when he came back from service (church) wearing yellow guinea jumper and

the trouser. If I see the jumper and the trouser I can identify it. This is the jumper he wore on that day. This is also the trouser P.C. Rotimi wore on that day."

B *"Later a team led by SUPOL Fasakun left for the scene of the crime with the accused persons. I also went with the team to the scene. At the scene, one guinea yellow trouser with one yellow guinea jumper worn by the constable were recovered. Some quantity of human hair was also recovered with three teeth-all at the scene."*

The P.W.6 gave the following testimonies amongst others:-

C *"Cpt. Uzor now told Rotimi Jeremiah to follow the 1st accused to the Ibukun Olu Baptist Church area, Ipee. Rotimi Jeremiah then asked me to book their movement to Ibukun Olu Baptist Church Area, Ipee, which I did. After booking their movement, they left with the motorcycle Reg. No. OY 3562 G, both - 1st accused and constable Rotimi Jeremiah. After they left, I waited till my handing over time, about 6pm. - I did not see them return. After my handing over, I reported to them, that P. C. Rotimi Jeremiah and one Moses Ajua left for Ibukun Olu Baptist Church - Ipee, to collect the particulars of motorcycle Reg. No. OY 3562 G. I never saw P. C. Rotimi Jeremiah again... On the day in question Rotimi was wearing a yellow guinea brocade. These are the jumper and the trousers (Exhibits A1 N2) being worn by - P. C. Rotimi Jeremiah."*

F None of these pieces of evidence was successfully challenged or discredited, and when linked together they make sense. There seems to be correlation and good chain link from one evidence to the other. The appellant denied the whole case of the prosecution in his evidence in court. It was a total denial of the whole sequence of event. The evidence of PWs. 3, 4, 5, and 6, circumstantial as they may have been were believed by the learned trial judge who saw and heard the witnesses, and accepted them as good and credible evidence when she found that the circumstantial evidence before her were reliable. This is buttressed by the finding of the trial court when she found as follows in her judgment:-

H *"In the case at hand, there are no other possibilities in this case other than it was the 1st accused, Moses Jua, who committed the offence of culpable homicide.*

In other words, there is no evidence that others, other than the 1st accused had the opportunity of committing the offence for

which he is charged. See the case of Essai v. The State 1967 11 SC P.39. Circumstantial evidence that will meet the requirement of onus of proof in criminal cases in the evidence that fixes the accused person to the crime with sufficient cogency which excludes the possibility that someone else had committed the crime. Once circumstantial evidence conclusively points to the accused as the perpetrator of the crime and same is adequately scrutinized and accepted by the court, the onus shifts to the accused to rebut the presumption of guilt or to case (sic) a reasonable doubt to rebut the presumption of guilt or to case (sic) a reasonable doubt on the prosecution's case albeit by preponderance of probabilities. See the case of Onokpua v. Queen (1959) SCNLR P.384...

There is therefore before the court enough circumstantial and cogent evidence to prove a conviction for the offence of murder against the 1st accused as he was the only person last seen with P. C. Rotimi Jeremiah on 27/2/94, the last day the police corporal was last seen."

The court below was in full agreement with the learned trial judge, for in affirming the trial court's judgment Ogunwumiju JCA made the following finding:-

"There is no doubt that each taken in isolation the circumstantial evidence against the Appellant may not be weighty. However, when considered together, I am of the humble view that they make a compelling case against the offence. The oral confession of the Appellant immediately he was arrested, the fact that he has not been able to explain the whereabouts of the deceased who as last seen with him, his taking them to the scene of crime where the deceased clothes were recovered, all together point inescapably to the fact that he is guilty of the death of the said P. C. Rotimi Jeremiah."

Authorities abound that circumstantial evidence that are strong, compelling, cogent, unequivocal and point irresistibly to the guilt of the accused can sustain a charge of crime and ground the conviction of an accused person. The evidence must irresistibly point to the guilt of the accused, and once it is credible and incontrovertible, such conviction cannot be faulted. See Akpan v. State 2001 15 NWLR page 745, Ukorah v. State 1980 1 - 2 SC 116; and Adeniyi v. State 2001 13 NWLR PART 730 page 375. The finding of the learned trial judge was predicated on such tight and unassailable evidence that the lower

court had no choice than to endorse it. I also subscribe to the findings of the two courts and affirm them.

Perhaps I should reiterate the position of the law on proof in criminal cases at this juncture. Although the law requires that a crime must be proved beyond reasonable doubt, it does not envisage that such proof be beyond the shadow of doubt. This proposition of the law is well echoed by Lord Denning in the case of *Miller v. Minister of Pensions* 1947 2 All E. R. Page 372 which is encapsulated thus:-

“Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice.”

This is an appeal against concurrent findings of two courts, which cannot be disturbed by this court. The law is trite that an appellate court will not ordinarily interfere with the findings of a trial court unless such findings are not supported by credible evidence and have occasioned miscarriage of justice. See *Efee v. State* 1976 11 SC, *Michael Omisade v. State* 1976 11 SC 75, *Egwe v. State* 1982 9 S.C. 174, and *Sele v. State* 1993 1 NWLR Part 269 page 276.

For the above reasoning I also dismiss this appeal as it is devoid of merit. I have read in advance the lead judgment of my learned brother Niki Tobi JSC, and I am in full agreement with the conclusion reached therein.

G

OGBUAGU JSC

This is an appeal against the judgment of the Court of Appeal, Ilorin, Division (hereinafter called “the court below”) delivered on 25th April, 2007 affirming the judgment of the Kwara State High Court, Ilorin - per Elelu-Habeeb, J delivered on 27th February, 2006 convicting and sentencing to death of the Appellant for the murder of one P. C. Rotimi Jeremiah.

Dissatisfied with the said judgment of the court below, the Appellant has further appealed to this Court on two grounds of Appeal.

The Appellant has formulated one lone issue which is adopted by the Respondent namely,

“Whether the prosecution proved the case against the Appellant beyond reasonable doubts as required by Section 138 of the Evidence Act”.

I will deal even briefly with not particularly in the same manner or sequence as argued in both Briefs of the parties. On 12th September, 2009 when this appeal came up for hearing, the leading learned counsel for the parties, adopted their respective Brief including the Reply Brief of Argument of the Appellant. While Ojutalayo Esq., - learned leading counsel for the Appellant, urged the court to allow the appeal, Dr. Egbewole - learned lead counsel for the Respondent, urged the court to dismiss the appeal. Thereafter, judgment was reserved till today.

DOCTRINE OF LAST SEEN:

Circumstantial evidence (which I will later deal with), may ground a conviction where it is unequivocal, positive and points irresistibly to the guilt of the accused person. See the case of *Oladejo v. The State* (1987) 3 NWLR (Pt.61) 419; (1987) 7 SCNJ. 218. The position as firmly settled, is that if Mr. A. was last seen alive with or in company of Mr. B. and the next thing that happened, was the disappearance of Mr. A., the irresistible inference, is that Mr. A. was or had killed Mr. B. The onus will then be on Mr. B. to offer an explanation for the purpose of showing that he was not the one who killed Mr. A. See the case of *Igho v. The State* (1978) 3 S.C. 87; *Gabriel v. The State* (1989) 5 NWLR (PT.122) 457; (1989) 12 SCNJ. 33 - Per Belgore, JSC (as he then was).

In the case of *Nwaeze v. The State* (1996) 2 SCNJ 42 @ 51, this Court held that the evidence relied upon, may be direct or be circumstantial. Whether the evidence is direct or circumstantial, it must establish the guilt of the accused beyond reasonable doubt. The circumstantial evidence that will meet the requirement of onus of proof in criminal cases is the evidence that fixes the accused, to the crime with sufficient cogency and which excludes the possibility that someone else had committed the crime. See the case of *Fatoyinbo v. Attorney-General Western Nigeria* (1966) NMLR 4.

In this case leading to the instant appeal, the Appellant was arrested on the allegation that he stole a motor-cycle. When he could

not produce the particulars, he was detained and one Cpt. Uzor - a superior officer to both PW6 and P. C. Rotimi Jeremiah, intervened on his behalf to allow the Appellant to produce or bring the particulars of the motor-cycle from his house at Ipee Town. To this, the Appellant was followed that trip, P. C. Rotimi Jeremiah. The Appellant, did not return to the Police State until he was later arrested at Ede, in Osun State where he was detained for committing another criminal offence. This was while the Appellant was hiding and was being looked for. The appellant took the police to the scene of crime where the clothes - a jumper and trouser worn last by P. C. Rotimi Jeremiah when he left Erin-Ile Police State with the Appellant were recovered. See Exhibits A and A2. The Appellant also confessed to the hearing of the PWs 4, 5 & 6, that he and other accused person, killed P. C. Rotimi Jeremiah. See also pages 71, 73 and 87 of the Records. There is Exhibits D-D3 taken at the scene of the crime in the presence of the Appellant showing what were discovered or recovered at the scene of crime.

I am aware that the Last Seen doctrine is a mere presumption which like all other presumptions, is rebuttable. It means in effect however, that the law presumes that the persons last seen with the decease, bears the full responsibility for his death if it turns out that the person last seen with him, is dead. See the case of *The State v. Ogere Uke & 2 Ors* (1981) 1 MSLR 107. The doctrine was well articulated in the case of *The State v. Godwin Nwakerendu & 3 ors.* (1973) 3 ECSLR (PT.11) 757. See also the cases of *The State v. Kalu* (1993) 7 SCNJ. 113 @ 124 - 125; and *Adepetu v. The State* (1998) 1 SCNJ 83 @ 97 - Per Ogundare JSC (of blessed memory). In other words, where as in the instant case, direct evidence of eye witnesses, is not available, the court may infer from the facts proved, the existence of other facts that may legally tend to prove the guilt of the accused person or the Appellant.

It must always be borne in mind that it is the duty of an accused person, to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is and will be justified in drawing the inference that the accused killed the deceased. See the case of *Adeniji v. The State* (2001) 5 SCNJ 371 @ 386 and my concurring judgment in the case of *Archibong v. The State* (2006) 14 NWLR (Pt.1000) 349 @ 395; (2006) 5 SCNJ

202 @ 232 - 241; (2006) 5 S.C. (Pt.III) 1 @ 30 - 40; (2006) All FWLR (Pt.322) 1747 @ 1780 - 1788; (2006) 8-9 SCM 43 @ 73 - 83; (2007) Vol. 143 LRCN 228 @ 261 - 270; (2007) 10 WRN 1 @ 46 - 57; (2007) 1 JNSC (Pt.29) 734 @ 774 - 784

The court below - per Ogunwumiju, JCA at pages 175 and 176 of the Records, thoroughly dealt with this doctrine and referred to the case of Adepetu v. The State (supra) and stated inter alia, as follows:

“.....In the case at hand, the Appellant who was supposed to go and bring back documents of his motor-cycle to the Police State did not return that day or the next day with the particulars. He was arrested weeks later in another place on another offence. I agree that the court cannot draw any other inference than that the Appellant was obliged to explain the where about of P. C. Rotimi Jeremiah and having failed to do so, his death at the hands of the Appellant can be presumed.”

I agree completely.

The court below at page 178 of the Records, shared the view or the finding of fact and holding of the learned trial judge at page 113 of the records that:

“There is therefore before the court enough circumstantial and cogent evidence to ground a conviction for the offence of murder against the 1st accused as he was the only person last seen with P. C. Rotimi Jeremiah on 27/2/94, the last day the Police corporal was last seen.”

I also agree.

CIRCUMSTANTIAL EVIDENCE

It is now firmly settled that if the evidence adduced by the prosecution (as in the instant case), was tested, scrutinized and accepted and conclusively points to the Appellant as the perpetrator of the crime, it is for the Appellant to rebut the presumption that he committed the murder of the deceased or to cast a doubt on the prosecution's case by preponderance of probabilities. See the case of Onokokaya v. R. (1959) 4 F.S.C. 150; Ikebudu v. Barnu n. A. (1966) NMLR 44 and Francis Idika Kalu v. The State (1993) 7 SCNJ. (Pt.1) 113 @ 125. In my respectful view, the evidence adduced by the prosecution, cogently, irresistibly and unmistakingly, pointed to the Appellant as the murderer. See the cases of Atibunkya & anor. V. The

State (1972) 1 SC. 11; Esai & ors. V. The State 91976) 11 SC. 39; Ukeje v. The State 91977) 4 SC. 167; Shazali v. The State (1988) 5 NWLR (PT.39) 16; 4; (1988) 12 SCNJ 145.

It need be emphasized as this is also settled that circumstantial evidence may ground a conviction, where it is unequivocal, positive and irresistibly, point to the guilt of the accused person. See the cases of Lori v. The State 91980) 8 - 11 SC. 81; Oladejo v. The State (supra) and Baje v. The State (1991) 4 NWLR (Pt.195) 281.

At page 114 - 115 of the Records, the learned trial judge stated briefly the facts of the case and at page 116 thereof, he stated inter alia, as follows:

“The prosecution’s witnesses testimonies were cogent uncontradicted, sufficient and have not in any way been rebutted by the evidence given by the 1st accused person”.

I agree as this is borne out of the Records:

The court below at page 177 to 178 of the Records, stated inter alia, as follows:

“Circumstantial evidence may be a combination of circumstances against an Accused none of which taken alone can form cogent proof of guilt but when taken together create strong conclusions of his guilt with a high degree of certainty. There is also the need to ensure that no other co-existing circumstance which weakens or destroys such an inference of guilt exists. See Niyi Akimoju v. The State (2000) 4 SCNJ 149”.

It concluded thus:

“For reasons given above, I affirm the conviction of the Appellant by the learned trial judge and dismiss this appeal.”

I cannot fault the above.

CORPUS DELICTI-

The law as regards the absence of corpus delicti is that a court may still convict an accused person of murder even though the deceased’s body, cannot be found, provided that there is sufficient compelling circumstantial evidence to lead to the inference that the man had been killed. See the cases of R. v. Sala (1938) 4 WACA 14; R. v. Onufrejeigyk (1955) 9 CAR 1; Adelakun Ayinde v. The State 91972 4 S.C. 147 @ 152; Edim v. The State (1972) 4 S.C. 160 @ 162. In other words, the fact of death, is provable by circumstantial evidence notwithstanding that neither the body nor any trace thereof,

had been found and that the accused person, has made no confession of any participation in the crime. However, before the prisoner can be convicted, the fact of death should be proved by such circumstances as to render the commission of the crime certain and leave no ground for reasonable doubt. The circumstantial evidence therefore, should be so cogent and compelling as to convince a court or jury that on no rational hypothesis other than murder can the facts be accounted for. See Onufrejezyuk (supra); The State v. Nwakerendu (1973) 3 ECSLR (Pt.2) 75 (supra).

In the instant case, the circumstantial evidence of death as borne out by the Records – i.e. The testimonies of the witnesses, the Exhibits and the findings of fact by the trial court connecting the Appellant, was in my respectful view, enough for this conviction even though no dead body, was actually found. See the cases of R. v. Salasti (1938) 4 WACA 10; Commissioner of Police v. Robert Ogbone Cofie (1947) 7 D WACA 179 and Ogunwole & ors. V. The Queen (1954) 14 WACA 458, 485.

In the case of Alhaji Babuga v. The State 91996) 7 NWLR (Pt.460) 229 @ 296; also cited in the Respondent's Brief (it is also reported in (1996) 7 SCNJ 217) this Court - per Onu, JSC referred to some of the case I have cited above, and stated inter alia, as follows:

“As a matter of fact conviction can properly be secured in the absence of a corpus delicti where there is strong direct evidence. See... where the Supreme Court following Ogundipe and ors. V. The Queen (1954) 14 WACA held:

“It is true that the body of the deceased has not been recovered, but it is settled that where there is positive evidence that the victim had died failure to recover his body nee not frustrate conviction”.

For purposes of emphasis, and as rightly submitted in the Respondent's Brief at page 19 paragraph 10.02, it is in no doubt that P. C. Rotimi Jeremiah, was last seen with the Appellant, his cloth which he wore on the day he was last seen with the Appellant, was recovered from the scene of crime where the Appellant took the police investigators to, strands of human hair, four human teeth were also recovered at the said scene and taken for laboratory analyses but unfortunately, the laboratory was destroyed by fire. All these facts,

were not controverted by the Appellant and they all pointed to the death of P. C. Rotimi Jeremiah. The Appellant did not and has not asserted or proved that P. C. Rotimi Jeremiah is alive. See also the cases of Godwin Igabele v. The (2006) 2 S.C. (Pt.11) 61; (2006) 2 SCNJ 124; (2006) Vol. 139 LRCN 1831; (2006) All FWLR (pt.311) 1797 @ 1829 - 1830; (2006) 3 SCM 143; (2006) Vol.5 MJSC 96; (2007) 1 JNSC (pt.28) 542.

From the foregoing, it will not be necessary for me to go into other issues like what proof beyond reasonable doubt is all about, evaluation of evidence, calling of witnesses, the confession by the Appellant and Medical Report which have been lumped up in this lone issue by the Appellant and the Respondent's learned counsel. This is because, I note that there are concurrent findings of fact and holdings by the two lower courts. At least, last seen with P. C. Rotimi Jeremiah, the oral confession of the Appellant immediately after his arrest, and his taking the police to the scene where the deceased was murdered and some Exhibits were recovered. The attitude of this court, is not to disturb or interfere. See the case of Sobakin v. The State (1981) 5 S.C. 75 and Igue v. The State 91982) 9 S.C. 174 and many others.

It is from the foregoing and the much fuller judgment of my learned brother, Nike Tobi, JSC just delivered and which I had the advantage of reading before now that I agree with and therefore, also dismiss this appeal is grossly unmeritorious. I hereby affirm the judgment of the court below affirming the judgment of the trial court. The appellant from all indications, appears to be a heartless criminal who deserves being hanged for his being a party to the heinous and wicked killing of the Police Constable who was performing his lawful duty when his life was unjustifiably and brutally terminated.

OGEBE JSC

I had a preview of the lead judgment of my learned brother Niki Tobi, JSC just delivered and I agree entirely with his reasoning and conclusion. The appeal is devoid of merit and also dismiss it and affirm the judgments of the lower courts which convicted the appellant of culpable homicide perishable with death.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother, Niki Tobi, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal is devoid of merit and should be dismissed.

The appellant was arraigned along with three other persons at the trial court for the offence of culpable homicide by causing the death of P. C. Rotimi Jeremiah punishable under section 221 of the Panel Code. B

The cold facts on record are that the appellant was suspected for the theft of a motor cycle. Police constable P. C. Rotimi Jeremiah was detailed to take the appellant to Ipee to produce the particulars of the motor cycle. P. C. Rotimi Jeremiah was no longer seen alive since then. The appellant escaped to Ede in Osun State from Ipee in Kwara State. C

The appellant made both oral and written confession that he, along with other accused person, killed the deceased while at Ede Police Station where he was arrested, at Erin-Ile Police State where he was brought and at the State CID Police Headquarters, Ilorin where the case was transferred for further investigation. D

After the arrest, the appellant led the IPOs from the State CID to the scene of crime where the cloths last worn by the deceased were recovered along with other items. E

At the trial, the appellant retracted his confessional statement. He denied killing the deceased. The learned trial judge did not believe this evidence. He was convicted and sentenced to death by hanging. He appealed to the Court of Appeal which dismissed same. He felt unhappy with the stance taken by the two courts below and has further appealed to this court. F

Before this court, Brief of Argument were filed and exchanged. The lone issue formulated in the appellant's brief of argument, read as follows:- G

"Whether the prosecution proved the case against the appellant beyond reasonable doubt as required by section 138 of the Evidence Act" H

In the same manner, the Respondent also couched one issue for determination, It reads as follows:

"Whether the prosecution has not proved its case beyond rea-

sonable doubt in the circumstances of this case.”

It is now settled that the requisite ingredients that must be proved beyond reasonable doubt to sustain a conviction for the offence of culpable homicide punishable with death are -

1. The death of the deceased.
- B 2. That the death was caused by the appellant.
3. That the appellant had intention of causing the death of the deceased or to cause him grievous bodily injury.

For the above, I should refer to *Haruna v. The State* (1972) 8 C - 9 SC 174; *George v. The State* 91993) 6 NWLR (Pt.297) 41; *Archibong v. The State* (2004) 1 NWLR (Pt.855) 488 and *Kaza v. The State* (2008) 7 NWLR (Pt.1085) 125.

In this appeal alluring submission were made on behalf of the parties touching on the ‘Last Seen Theory’. It is that in murder or D culpable homicide case, where the deceased was last seen with the accused, such an accused, like the appellant herein, has a duty to explain or show the whereabouts of the deceased or how the deceased met his death. See *Archibong v. The State* (2006) 14 NWLR (Pt.1000) 349 at 395. And where no explanation is forthcoming the E court has justification to draw conclusion that it was the accused that killed the deceased. See *Adeniji v. The State* 5 SCNJ 371, *Adepetu V. The State* (1998) 7 SCNJ 83.

I need to specifically refer to the decision of this court in *Peter F Igho v. The State* (1978) N.S.C.C. 166 at 168; the facts of which are very similar to those in the appeal. Eso, JSC, (as he then was) pun- gently pronounced as follows:-

*“The deceased was last seen alive with the appellant. This evi-
G dence was accepted by the learned trial judge. He rejected the denial
of the appellant. The only irresistible inference from the circumstances
presented by the evidence in this case is that the appellant killed the
deceased. We can find no other reasonable inference from the cir-
cumstances of the case. The facts which were accepted by the learned
trial judge, amply supported by the evidence before him, called for
H explanation, and beyond the untrue denials of the appellant (as found
by the learned judge) none was forthcoming see R. v. Mary Ann
Nash (1911) 6 C.A.R. 225 at page 228. Though this constitutes cir-
cumstantial evidence, it proof beyond every reasonable doubt of the
guilt of the appellant. For these reasons, we dismissed the appeal on*

2nd March, 1978.”

It hardly needs any further gainsaying that the appellant herein is caught in the web of the ‘Last Seen Theory.’ There is evidence which the trial judge believed that the appellant was last seen with the deceased who escorted him on instruction to Ipee to procure motor-cycle documents. The deceased was never seen thereafter. The appellant failed to show or explain the whereabouts of the deceased or how he met his death. Beyond his untrue denials which were not believed by learned trial judge, none was forthcoming. B

The next crucial point canvassed on behalf of the parties relates to circumstantial evidence employed in this matter. It is basic that where there is a conglomerate of circumstantial evidence that is compelling, cogent, unequivocal and irresistibly lead to the guilt of the accused person, the court has a duty to pronounce conviction. See *Peter v. The State* (1997) 12 SCNJ 53. The court, however, has the duty to ensure that there are no co-existing circumstances that waken the guilt of the accused person. C

In *The State. Nafiu Rabi* (1980) 1 N.C.R. 4 at page 50, Nasir, PCA (as he then was) observed that circumstantial evidence must be examined narrowly and with care. To be sufficient for a conviction, it has to point to only on conclusion, namely that the offence had been committed and that is was the accused who had committed it. Refer to *Nasiru v. The State* (1999) 2 NWLR (Pt.589) 87 at page 89; *Teper v. T.* (1952) A.C. 480. *The Queen v. Ororosokode* (1960) SCNLR 501 at 504; 5 FSC 208 at page 210. E

It is on record that the appellant was last seen with the deceased. As stated earlier on, he failed to give explanation as to his whereabouts. He escaped from Ipee in Kwara State to Ede in Osun State. He later on took IPOs from State CID, Ilorin to the scene of crime where the dress last worn by the deceased were found. The totality of the evidence led was cogent, compelling and unequivocal. They point at the direction of the appellant. They lead conclusively and indisputably to his guilt. See *Peba v. The State* (198) 8 - 11 SC 76; *Omogode v. The State* (1981) 5 SC. 5. F

Let me briefly touch on the absence of corpus delicti. It is not compulsory that there must corpus delicti before an accused can be convicted. If the body of a deceased is made extinct by burning same as herein, none can be produced. The only thing to be considered is H

whether there is positive evidence that the victim is dead. See Babuga v. The State (1996) 7 NWLR (Pt.460) 229 at page 296. Absence of corpus delicti will not frustrate conviction where there is strong evidence as in this case. The circumstances, as depicted by the prosecution, fix the appellant as the killer of the deceased. See Ubani v. The State (2003) 12 SCNJ 11. The appellant failed to wriggle himself out of culpability.

Learned counsel for the appellant felt that the prosecution failed to prove the charge against the appellant beyond reasonable doubt. With due respect, I am not at one with him. This is because proof beyond reasonable doubt is 'not proof to the hilt' according to Denning, J. (as he then was), in *Miller v. Minister of Pensions* (1947) 3 All ER 373. It is not proof beyond all iota of doubt as pronounced by Uwais, CJN, (as he then was), in *Nasiru v. The State* (supra) at page 98. Where all the essential ingredients of the offence have been proved by the prosecution, as herein, the charge is proved beyond reasonable doubt. See *Alabi v. The State* (1993) 7 NWLR (Pt.307) 511 at 523. Refer to section 138 of the Evidence Act, 1990.

For the above reason and the fuller ones contained in the judgment of my learned brother, I, too, feel that the appeal is devoid of merit and should be dismissed. I order accordingly. The sentence of death by hanging passed by the learned trial judge and affirmed by the court below stands inviolate.

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