

SUPREME COURT OF NIGERIA
FRIDAY 22ND JANUARY, 2016. SC. 399/2013
CORAM:- W. S. N. ONNOGHEN, N. S. NGWUTA,
M. U. PETER-ODILI, O. ARIWOOLA,
M. D. MUHAMMAD, JJSC

UZOMA OKEREKE APPELLANT
V.
STATE RESPONDENT

MURDER - Ingredients - Proof - Prosecution must prove that deceased died - That the death was caused by accused - And that accused intended to kill the deceased (H1)

EVIDENCE - Crime - Admitted facts - Weight - Admitted fact or fact not in dispute - Need no further proof - And will be deemed established (H2)

CRIMINAL PROCEDURE - Dying declaration - Admissibility - Exhibit A was relevant and properly admitted as dying declaration - As it confirmed the testimonies of PWs who saw deceased before her death (H3)

EVIDENCE - Crime - Lying by accused - Where the fact of lying is taken together with other relevant facts - It may be concluded that accused is guilty of the offence charged (H4)

FACTS

At the High Court of Imo State sitting in Owerri, accused/appellant was arraigned with two others on a two count charge of conspiracy to murder and murder of the deceased - one Cecilia Ogbonna. Prosecution/respondent's case is that the deceased lived within the same neighbourhood with appellant's mother - Mrs. Ifeoma Okereke. PW1 gave testimony of how she on a certain day, witnessed appellant and his mother inflicting injuries on the deceased. PW1 further stated that when she later went to the deceased's house, she met her in the pool of her blood. The deceased told PW1 that the injuries on her were inflicted by appellant and the others. The deceased later

620 Okereke v. State (2016) 1 KLR (pt. 378) 619; (2016) 5 NWLR
died in the hospital as a result of the injuries sustained from the attack
witnessed by PW1.

In his defence, appellant denied ever inflicting any injury on the deceased but stated that there had been an armed robbery incident and that the said injuries on the deceased must have been inflicted by the armed robbers, who had attacked the neighbourhood. At the end of the trial, the learned trial Judge found the case as presented by respondent proved. Appellant's armed robbery story was disbelieved. Appellant was in the circumstance found guilty as charged. In his judgment, the learned trial Judge convicted and sentenced appellant to death by hanging. Dissatisfied, appellant appealed to the Court of Appeal Owerri Division. The conviction and sentence by the trial court were affirmed in the judgment of the Court of Appeal. Aggrieved further, appellant has appealed to the Supreme Court.

ISSUE FOR DETERMINATION

"Whether having regard to the facts and circumstances of this case the prosecution proved the guilt of the appellant beyond reasonable doubt."

HELD (Unanimously dismissing the appeal per
ARIWOOLA JSC)

MURDER - Ingredients - Proof

1. However it is trite law, that in a charge of murder, the burden is on the prosecution to prove and establish as a fact that the deceased died, that the death was caused by the accused; and that the accused intended to either kill the victim or cause him grievous harm.

In other words, in a murder charge, as the instant, the prosecution owes it a duty to discharge by proving the death of the victim of the alleged act that the accused is responsible by act or omission, intentional or otherwise, to the knowledge of the accused and that the act or omission could cause grievous bodily harm or death. The prosecution must prove that the act or omission caused death but not that it could have caused death. (p. 632 H)

EVIDENCE - Crime - Admitted facts - Weight

2. Before I proceed to consider the case as presented by both parties, it is necessary to state certain facts that were either admitted or not disputed by the defence now appellant in the case put forward by the prosecution.

These include:-

The fact that one Cecilia Ogbonna was attacked in her room in the early hours of 30th November, 2005.

That the said Cecilia Ogbonna eventually died as a result of the injuries sustained from the attack by her assailants.

That the deceased, Cecilia Ogbonna and the appellant and family lived within the same neighbourhood. Indeed, their respective houses were separated only by a wall.

That there was an unresolved boundary dispute between the deceased and appellant's mother.

There is no doubt that the prosecution was not expected to prove, any longer, the above facts that were either admitted or not denied or disputed by the appellant.

It is already settled law that any admitted fact or fact not in dispute, or not specifically denied need no further proof and will be deemed established. (p. 633 E)

CRIMINAL PROCEDURE - Dying declaration - Admissibility

3. It is note worthy that Exhibit A, which was said to have been made by the deceased while in the hospital, to the police confirmed the testimony of PW2, who saw the deceased shortly after she was attacked in her room in the early hours of 30th November, 2005. The deceased was said to have given the names of the appellant and the two others as her assailants.

There is no doubt, that at the trial of the appellant and his co-accused for murder of the deceased, there was no way the deceased could have been called as a witness to testify on the cause of her death. But the law is clear on the statements made by persons who cannot be called as witnesses. Section 33(1)(a) provides as follows:

"Statements written or verbal, or relevant facts made by a person who is dead are themselves facts in the following cases:-

(a) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question; such statements are relevant only in trials for murder or manslaughter of the deceased person and only when such person at the time of making such declaration believed himself to be in danger of approaching death although he may have entertained at the time of making it hopes of recovery."

I am therefore not in the slightest doubt that the trial Court was right in admitting the statement of the deceased as a dying declaration which was admissible and properly admitted and relied upon.

In the circumstance, I believe that the learned trial Judge was right in admitting the statement made by the deceased to PW6 and when that was taken together with the testimony of PW1 and PW3 on what the deceased told them respectively at different times when the attack was fresh. In other words, I am satisfied that Exhibit A was relevant and admissible as dying declaration and was properly admitted by the trial Court.
(pp. 636 G/638 E/640 B)

EVIDENCE - Crime - Lying by accused

4. In the instant case, the fact that the claim of the appellant and his mother that the people who had robbed them and inflicted injuries on Ifeoma, the appellant's mother also inflicted injuries on the deceased, and this was found to be untrue becomes relevant fact to the fact in issue because it throws light on it. Ordinarily, merely telling a lie or lying by a suspect or an accused person is not evidence of the commission of any offence let alone murder. But where the fact of lying is taken together with other relevant facts and circumstances, in the particular case, it may safely be concluded that the accused is guilty of the offence charged. In that case, the lie or those lies become(s) relevant fact to the fact in issue as evidence against him. (p. 639 E)

NOTABLE POINT OF INTEREST

ARIWOOLA JSC

1. Murder – Circumstances

The appellant had been charged pursuant to Section 319 (1) of the Criminal Code Cap 30 Vol. II Laws of Eastern Nigeria, 1963 as applicable to Imo State of Nigeria, with the offence of murder. B

The law is clear as to the circumstances where an offence of murder can be said to be committed. Murder is said to be committed when a person unlawfully kills another under any of the following circumstances; that is to say:- C

If offender intends to cause the death of the person killed, or that of some other person;-

If the offender intends to do to the person killed, or to some other person grievous harm;-

If death is caused by means of an act done in the prosecution of an unlawful purpose, which is of such a nature as to be likely to endanger human life;- D

If the offender intends to do grievous harm to some persons for the Purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant or for the purpose of facilitating the flight of an offender who has committed or attempted to commit such an offence;- E

If death caused by administering any stupefying or overpowering things for either of the purposes last aforesaid:- F

If death caused by willfully stopping the breath of any person for either of such purposes.

In the second circumstance above, it is immaterial that the offender did not actually intend to hurt any person. In the last three cases, it is immaterial that the offender did not intend to cause death or did not know that death was likely to result. (p. 632 B) G

REPRESENTATION

L. M. Alozie, Esq., for the Appellant
A. N. Eluwa (Mrs.) SG & PS, Min. of Justice Imo State with K. A. Leweanya (Mrs.) ACSC, Min. of justice, Imo State, for the Respondent H

CASES REFERRED TO

- Jeremiah v. State (2012) 14 NWLR (pt. 1320) 253
 Orgi v. State (2008) 10 NWLR (pt. 1094) 31
 Ikemson v. State (1989) 3 NWLR (pt. 110) 455
 Nnolim v. State (1993) 3 NWLR (pt. 283) 567
 B State v. Oladotun (2011) 10 NWLR (pt. 1256)
 Abdullahi v. State (2008) 17 NWLR (pt. 1115) 203
 Kaza v. State (2008) 7 NWLR (pt. 1055) 125
 Oludamilola v. State (2010) 1181 LRCN 1
 Mohammed v. State (2007) 153L RCN 110
 C Durwode v. State (2000) 12 SC (pt. 1) 1
 Akpan v. State (2001) FWLR (pt. 56) 7351
 Idemudia v. State (2001) FWLR (pt. 55) 549
 Madu v. State (2012) 6 SCNJ 129
 D Ubanu v. State (2004) FWLR (pt. 191) 1533
 Igabele v. State (2006) 3 SCM 143

STATUTES REFERRED TO

- Criminal Code, s. 319(1)
 E Evidence Act, s. 4(1)

LEAD JUDGMENT BY ARIWOOLA JSC

- This is an appeal against the decision of Owerri Division of the Court of Appeal, delivered on the 11th day of July, 2012 Coram:
 F Abba Aji, Owoade and Tsammani, JJCA.

- The appellant and two others had been arraigned on a two count charge of conspiracy to murder and murder of one Cecilia Ogbonna. They were tried, found guilty and convicted by the High Court of Imo State sitting at Owerri. The three of them were sentenced to death pursuant to Section 319(1) of the Criminal Code applicable to the State.
 G

The fact of the case goes thus-

- The deceased Mrs. Cecilia Ogbonna lived within the same neighbourhood with the appellant's mother Mrs. Ifeoma Okereke. A common wall separated the houses of both women as they were both married into the same family. During her life time, there had been an unresolved dispute between the deceased and appellant's mother. The latter had accused the deceased of having killed her
 H

son's dog and threatened that the deceased would die just the way the dog had died. PW1 is one Grace Igwe, a trader who was married into the same family with the deceased. She testified that as she was returning from the market one day, she heard the deceased shouting that her electric wire had been tampered with and as she got closer to the house she saw the appellant and his mother, Ifeoma, who told the appellant to use a stick to break the head of the deceased. In the early hours of the 29th day of November, 2005, she had gone to the deceased's house. As she opened the door she saw the deceased in the pool of her blood with multiple injuries and was told by the deceased that the injuries were inflicted on her by the appellant and others. The injury led to her death later in the hospital. B C

In defence, the appellant denied ever inflicting any injury on the deceased but stated that there had been an armed robbery incident and that the said injuries on the deceased must have been inflicted by the armed robbers, who had attacked the neighbours. D

At the close of the trial, the Judge believed the story of the prosecution and disbelieved the defence. And in his considered judgment delivered on the 31st day of March, 2009 the trial Court convicted and sentenced the appellant and the co-accused to death by hanging. E

The appellant and others were dissatisfied with the decision, hence they appealed to the Court below. The appeal was found to be lacking in merit and was dismissed. The conviction and sentence by the trial Court were affirmed in the judgment of the Court of Appeal delivered on the 11th July, 2012. F

Further dissatisfied with the decision of the Court of Appeal led to the instant appeal by the appellant with a Notice of Appeal filed on 31st July, 2012. G

Upon settlement of records, briefs of argument were filed and exchanged by counsel.

When the appeal came up for hearing on the 29th October, 2015, the learned appellant's Counsel adopted and relied on his brief of argument settled by Alozie, Esq. and urged the Court to H allow the appeal and discharge the appellant. In the same vein, learned counsel to the respondent adopted and relied on the respondent's brief of argument settled by Mrs. C.C. Dimkpa of the Ministry of Justice, Owerri, Imo State. She urged the Court to dismiss the appeal

for lacking in merit and substance.

In the appellant's brief of argument filed on the 5th of August, 2013, the appellant distilled a sole issue for determination from his two grounds of appeal as follows:

"Whether having regard to the facts and circumstances of this case the prosecution proved the guilt of the appellant beyond reasonable doubt."

The respondent adopted the sole issue of the appellant in its brief of argument which was filed on the 21st November, 2013 but was deemed to be properly filed and served on the 25th day of February, 2015.

In arguing the sole issue, learned appellant's counsel reviewed the testimonies of PW1 and PW3 both under examination in-chief and cross examination and contended that from the testimonies, it was evident that the incident being narrated happened between the deceased and her assailants without any other eye witness. And that, there was no light in the deceased's room or premises, hence the PW1 had to go with her lantern. Learned counsel contended that there were contradictions in the testimonies of both PW1 and PW3 who each claimed to be living close and first saw the deceased in a pool of her blood yet neither saw the other. Couple with the fact that PW3 claimed to have heard the gunshot of armed robbers in the early hours of the day, learned counsel submitted that the entire testimonies of both PW1 and PW3 ought to have been discountenanced by the Courts below. He relied on the Court of Appeal decision of *Jeremiah V. State* (2012) 14 NWLR (Pt. 1320) 253.

Learned counsel further referred to the testimonies of PW3, PW5 and PW6. PW5 was the Investigating Police Officer (IPO) from the State Criminal Investigation Department (CID), Owerri, Imo State. He contended that the testimonies of the witnesses are materially contradictory that the Court ought to reject it. He contended further that there was no cogent or credible evidence identifying the appellant or indeed any other person, as the person that inflicted injuries on the deceased. He submitted that the identification of the appellant cannot be credible and authentic as one of the culprits.

Learned counsel referred to the testimony of PW4, one Dr. Raphael Egejuru who performed the autopsy on the deceased, with the result in Exhibit B. He contended that the testimony of PW4 as to

when he performed the autopsy and the testimonies of PW1 and PW3 on when the deceased actually died were contradictory and divergent and urged the Court to resolve the ambiguity in favour of the appellant.

Learned counsel referred to Exhibit A which was the statement said to have been made by the deceased after he was attacked by her assailants. It was contended that since the deceased was said to be unconscious after she was attacked, there was no evidence of the person who revived or resuscitated her from her state of unconsciousness, for her to make Exhibit A. He submitted that Exhibit A is so self contradictory and manifestly unreliable that no reasonable Tribunal can act on it.

Learned Counsel referred to the testimony of PW5 and contended that her finding when she visited the scene of crime and her testimony are only consistent with the evidence of the appellant, when he testified as DW5. According to him, the deceased had died before the Police came to their compound.

Learned counsel further referred to the testimonies of DW1 the appellant's mother, DW2, cousin to the appellant and DW4 who was a co-accused with the appellant as they testified that there was an armed robbery incident where they were beaten by the armed robbers and robbed of their belongings on the same day the deceased was attacked.

Learned counsel again referred to the testimonies of PW1, PW3, PW6 and PW7 and contended that the prosecution's case when taken holistically leaves so much gaps and so many questions unanswered, that there is reasonable doubt which ought to have been resolved by the trial Court in favour of the appellant and others.

Learned counsel contended further that the defence that there was an armed robbery incident was not considered by the Court below. He submitted that the defence of armed robbery attack raised by the appellant should have created doubt in the minds of the Justices to lead them to resolve same in favour of the appellant and others. He relied on *Orgi V. State* (2008) 10 NWLR (Pt.1094) 31 & 50 *Ikemson V. State* (1989) 3 NWLR (Pt.110) 455; *Nnolim V. State* (1993) 3 NWLR (Pt. 283) 567. He submitted further that suspicion no matter how high or grave cannot ground a conviction in Court of law and that, in criminal trial, the burden of proof is one beyond

reasonable doubt.

He referred to the testimony of PW3 who agreed that it was possible that the injury inflicted on the deceased was as a result of the armed robbery incident. And PW3 who claimed to be present when the door of the deceased house was forced open in the presence of one Chijioke who was a tenant of the deceased and who agreed that there was an armed robbery incident. He submitted that there were so much loose ends and contradictions in the case presented by the prosecution that the Court below ought to have allowed the appeal, acquitted and discharged the appellant.

Learned counsel referred to the ingredients required of the prosecution to secure conviction for murder. He contended that manifest contradictions or inconsistencies in the prosecution's case always trigger reasonable doubt which the Court must resolve in favour of the accused. He relied on *State V. Oladotun* (2011) 10 NWLR (Pt.1256), *Abdullahi V. State* (2008) 17 NWLR (Pt.1115) 203.

He submitted that the purported recognition of the appellant by the deceased as contained Exhibit A is faulty and cannot be correct.

Learned counsel contended that the offence of murder like other offences can be proved by either direct or circumstantial evidence. He submitted that the evidence of all the prosecution witnesses amount to hearsay because none of them witnessed the attack or killing of the deceased. And that the mere suspicion against the appellant and other co-accused is not enough to secure conviction. He referred to Section 4(1) of the Evidence Act and contended that for a statement of the deceased person who can no longer be called to testify to be relevant and admissible in evidence, such a statement must qualify as a dying declaration. He contended that the belief that the declarant was in imminent danger of approaching death was absent in Exhibit A which, according to him, the two Courts below used to convict and affirm conviction of the appellant. He contended that in the instant case none of the prosecution witnesses testified that the deceased expressed any fear or apprehension of death.

Learned counsel contended that the purported dying declaration in this case of the deceased was a concoction by PW1 which she sold to other prosecution witnesses as a result of mere suspicion. He

submitted that the testimonies of PW1-PW7 as to what the deceased told them relating to the cause of her death was merely hearsay and inadmissible.

He contended further that apart from Exhibit A, there was no evidence before the Court which can qualify as *res gestae* in a dying declaration. He submitted that there was no legal basis to sustain the appellant's conviction by the Court below. He urged this Court to hold that the Court below was wrong in affirming the conviction. He submitted further that the prosecution failed woefully to prove the charge against the appellant beyond reasonable doubt as required by law. And that, as Exhibit A which was a translation by PW2 did not state the exact words of the deceased on her statement to the Police, it failed to meet the requirements of a dying declaration. He urged the Court to allow the appeal and set aside the decision of the Court below made on 11th day of July, 2012 and in its place acquit and discharge the appellant.

As I stated earlier, the brief of argument filed by the respondent to this appeal, the sole issue formulated by the appellant was adopted.

In arguing the appeal learned counsel referred to the essential ingredients or elements the prosecution is required to prove in order to secure conviction in a charge of murder. He stated that the prosecution, in order to prove its case may rely on direct eye witness account of the incident or circumstantial evidence. He relied on *Kaza V. The State* (2008) 7 NWLR (Pt.1055) 125 at 163; *Oludamilola V. State* (2010) 1181 LRCN 1 at 16; *Mustapha Mohammed & Anor V. State* (2007) 153L RCN 110 at 125.

Learned counsel contended that through the testimony of PW4 and Exhibit B, the Prosecution proved that one Cecilia Ogbonna had died.

On the second element to prove the charge of murder, that the act was done by the accused with the intention to cause death or that the accused knew or had reason to know that death could be the probable and not only the likely consequence of his act.

Learned counsel contended that in proving this element, the prosecution relied on Exhibit A which gave the age of the deceased as 60 years and that, part of the testimony was that the deceased was an old woman who lived alone in her house. He stated further that

Exhibit A described the type of beating meted out on the deceased, while Exhibit B described the type of injury she sustained that led to her death.

Learned counsel contended further that the intent to kill can be inferred from the nature of the weapon used and the wound inflicted. He referred to the testimony of PW4, the Medical Doctor who carried out the autopsy on the deceased and contended that his testimony was unchallenged and uncontradicted as to what injuries the deceased sustained. He submitted that the appellant intended the natural consequence of his act when they inflicted that type of injuries on the 60 year old woman.

On the third element on the identity of the accused person who carried out the act that led to the death, learned counsel contended that the prosecution relied on the testimony of PW1, PW2, PW3, PW6, PW7 and Exhibit A. He referred to the testimony of PW1 that there had been a long hostility between the deceased and DW1, Ifeoma Okereke, the mother of the appellant and Ugochukwu Okereke, the 2nd accused person and younger brother to the appellant, Reference was also made to testimony of PW2, PW3, PW6 and PW7 and learned counsel contended that the prosecution was consistent in the identity of the attackers of the deceased and that the said testimony of the prosecution was not debunked under cross examination in any form. He referred to the testimony of DW1 which, in a way, corroborated the prosecution's evidence of long term hostility between the deceased and DW1's family. He submitted that the prosecution successfully proved the identity of the appellant as one of those who attacked the deceased in the early hours of 30th November, 2005 and inflicted injuries on her, which led to her death on 4th December, 2005.

Learned counsel referred to the defence put up by the appellant. In particular, his evidence in-chief in Court and his various statements made to the police on 01/12/2005 and 06/12/2005 which were admitted without objection and marked as Exhibits F and C respectively. He contended that the contradictions and inconsistencies in the two statements and his oral testimony in Court were very glaring.

Learned counsel submitted that the Court below was right to have held that the deceased was first conscious when the appellant

and his co-accused attacked her but later lost consciousness. He submitted that the deceased recognized and identified the attackers including the appellant hence she gave their respective names.

Learned counsel referred to the defence of the appellant that there was an armed robbery attack, when his mother was attacked, robbed and wounded. But that neither was the robbery incident reported to the police nor was DW1 reportedly taken to any hospital for treatment of the injuries she was alleged to have sustained during the attack by the armed robbers. Indeed, learned counsel referred to the testimony of DW6, one of the investigating Police Officers who, on their visit to the appellant's house met the mother DW1 with bandage all over her head and legs. But upon his investigation/enquiry which led him to remove the bandages all over DW1, it was discovered that there was neither any wound nor bruises on her head or legs. That piece of evidence by PW6 was not debunked by the defence.

Learned counsel referred to the testimony of PW5 who stated that from the statement of one Ifeoma Okereke, a neighbor to the deceased and mother to the appellant, there were four masked men who broke into her room and robbed her of the sum of N30,000 and that the men later went to the deceased house, as she heard the deceased shouting.

Learned counsel contended that there was no contradiction in the evidence adduced by the prosecution that the testimonies of PW6 and PW7 on whether or not there was any armed robbery incident was not in any way contradictory. Indeed, he stated that there was evidence by the police that no incident of armed robbery was reported to the police. He submitted that there was no contradictions in the testimonies and evidence adduced by the prosecution to establish that the appellant was one of those who attacked the deceased.

Learned counsel submitted further that the two Courts below were right in holding that Exhibit A made by the deceased, was admissible and properly admitted and relied upon by the Courts.

He finally urged the Court to dismiss the appeal and affirm the decision of the Court below.

As earlier indicated, the appellant and two others, including his younger brother, were charged before the trial High Court with mur-

der of Cecilia Ogbonna, tried, found guilty as charged, convicted and sentenced to death by hanging. The three convicts' appeal to the Court below was dismissed leading to the instant appeal by the appellant.

The sole or lone issue formulated by the appellant and which B was adopted by the respondent once again is:

"Whether having regard to the facts and circumstances of this case, the prosecution proved the guilt of the appellant beyond reasonable doubt."

C The appellant had been charged pursuant to Section 319 (1) of the Criminal Code Cap 30 Vol. II Laws of Eastern Nigeria, 1963 as applicable to Imo State of Nigeria, with the offence of murder.

The law is clear as to the circumstances where an offence of murder can be said to be committed. Murder is said to be committed D when a person unlawfully kills another under any of the following circumstances; that is to say:-

If offender intends to cause the death of the person killed, or that of some other person;-

E If the offender intends to do to the person killed, or to some other person grievous harm;-

If death is caused by means of an act done in the prosecution of an unlawful purpose, which is of such a nature as to be likely to endanger human life;-

F If the offender intends to do grievous harm to some persons for the Purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant or for the purpose of facilitating the flight of an offender who has committed or attempted to commit such an offence;-

G If death caused by administering any stupefying or overpowering things for either of the purposes last aforesaid:-

If death caused by willfully stopping the breath of any person for either of such purposes.

In the second circumstance above, it is immaterial that the of- H fender did not actually intend to hurt any person. In the last three cases, it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

However it is trite law, that in a charge of murder, the burden is on the prosecution to prove and establish as a fact

that the deceased died, that the death was caused by the accused; and that the accused intended to either kill the victim or cause him grievous harm. See: Francis Durwode V. The State (2000) 12 SC (Pt.1) 1; Akpan V. State (2001) FWLR (Pt.56) 7351, Idemudia V. State (2001) FWLR (Pt.55) 549 at 564; Sabina C. Madu V. State (2012) 6 SCNJ 129 (2012) 15 NWLR (Pt. 1324) 405; (2012) B 50 NSCQR 67.

In other words, in a murder charge, as the instant, the prosecution owes it a duty to discharge by proving the death of the victim of the alleged act that the accused is responsible by act or omission, intentional or otherwise, to the knowledge of the accused and that the act or omission could cause grievous bodily harm or death. The prosecution must prove that the act or omission caused death but not that it could have caused death. See Ubanu & Ors V. State (2004) FWLR (Pt.191) D 1533 at 1546 Godwin Igabele V. The State (2006) 3 SCM 143 at 151; Elewo Abosede V. State (1996) 5 NWLR (Pt.448) 270.

In the instant case, to discharge the burden on it, the prosecution called seven (7) witnesses while the appellant in defence called five (5) witnesses.

Before I proceed to consider the case as presented by both parties, it is necessary to state certain facts that were either admitted or not disputed by the defence now appellant in the case put forward by the prosecution.

These include:-

The fact that one Cecilia Ogbonna was attacked in her room in the early hours of 30th November, 2005.

That the said Cecilia Ogbonna eventually died as a result of the injuries sustained from the attack by her assailants. G

That the deceased, Cecilia Ogbonna and the appellant and family lived within the same neighbourhood. Indeed, their respective houses were separated only by a wall.

That there was an unresolved boundary dispute between the deceased and appellant's mother. H

There is no doubt that the prosecution was not expected to prove, any longer, the above facts that were either admitted or not denied or disputed by the appellant.

It is already settled law that any admitted fact or fact not

in dispute, or not specifically denied need no further proof and will be deemed established. See Olale V. Ekwelendu (1989) 7 SCNJ (Pt.2) 62 at 1021; Ndayako V. Dantoro (2004) 13 NWLR (pt. 889) 187; (2004) 18 NSQR 646; Ehinlanwo V. Olusola Oke & Anor (2008) 10 SCM 28 (2008) 16 NWLR (Pt.1113) 357; (2008) B 6-7 SC (Pt.11) 123; Titiloye V. Olupo (1991) 9-10 SCNJ 122.

In the instant case what the prosecution was expected to prove were the person or persons that were responsible for the injuries sustained by the deceased. Indeed, the prosecution was to show by credible evidence that the appellant and his co-accused caused the death of the deceased. And that by the injuries the appellant inflicted on her, that they intended to either kill their victim or cause her grievous bodily harm. These elements, the prosecution was required to prove beyond reasonable doubt to earn conviction of the appellant.

As I stated earlier, the prosecution called seven witnesses. PW1 was one Grace Igwe. She testified that she knows the appellant and the deceased very well, both of them having come from the same neighbourhood.

Indeed, the deceased and herself were married to the same family. Their husbands being first cousins. She was aware of the hostility between the appellant's mother and the deceased, including the allegation against the deceased, by the appellant's mother that, the deceased killed her son's dog. PW1 testified further as follows:-

"On 29th November, 2005 by 5.30p.m, when returned from market, the said Cecilia showed me her wrapper which had been cut. She said she would burn it and I advised her not to burn the cloth. I advised her to go that I would come to her in the morning for us to have joint prayer. I went to her in the morning a few minutes past five o'clock. I was carrying my lantern. It was Wednesday 30th November, 2005. On getting close to her house, I heard some noise made by her. The noise was the noise of somebody who was in pains... As I went into her room I observed that my legs were matching on her blood on the floor. I raised the lantern and saw that her head had multiple injuries and blood all over her body. The body was bare, she was not wearing any blouse. I asked her what happened and she said that it was one Uzoma and Ugochukwu his brother and a tenant in Innocent's house who were responsible for the wounds that they had executed their threats that they would kill her. The three accused

persons are the people the deceased said were responsible for her death. After this I ran outside and raised alarm which attracted peoples' attention."

Under cross examination by the appellant's counsel, the witness testified that she was in good terms with Ifeoma Okereke, the appellant's mother and her children. That even her own last child often visited Ifeoma's house. That she was returning from the market on the day in question when she heard Ifeoma's voice and she rushed to the scene. It was then she heard Ifeoma told the deceased that she would die like their dog. And the appellant then told the deceased that he would kill her before her children would arrive from Lagos.

Further testifying under cross examination, the witness was categorical that there was no armed robbery attack or incident in their neighbourhood or anywhere in the village on the day in question.

PW2 was a Police Constable Osuagwu Sampson. He testified as one of the policemen who visited the appellant's family house after the complaint against him and others of having wounded the deceased on 30th November, 2005. On getting to the house, neither the appellant nor his brother was in the house. Only the mother was met in the house and she said she did not know the whereabouts of her children including the appellant. The policemen later visited the deceased's house but discovered that she had been moved to the hospital. They went straight to the hospital where they obtained her statement. Indeed, as the only Igbo man of same tribe with the deceased, he obtained her statement. The statement of the deceased was tendered through the witness and when there was no objection it was admitted and marked Exhibit A.

Under cross examination, PW2 in response to the question posed by the defence counsel, had stated that the content of Exhibit A was what the deceased had told him which he recorded and read over to her and she confirmed that it was correct. She appended her right thumb impression on Exhibit A.

PW3 was also a neighbor to the appellant's family and the deceased. He also testified that the deceased told him that the appellant and two others, that he mentioned, inflicted the injuries on her. The witness confirmed his testimony under cross examination.

PW5 was the investigating Police Officer (IPO) who investigated

the case. He obtained the statement of the appellant properly under caution. The statement was tendered through him and when there was no objection, it was admitted and marked Exhibit C.

B PW6 was also a police officer who caused the appellant to be arrested on 1st December, 2005 sequel to the statement earlier made by the deceased whereby his name and others had been given as her assailants. The appellant's 1st statement made to the police was tendered and admitted as Exhibit F.

C PW6 was the officer who obtained the statement of the appellant's mother Ifeoma Okereke. Same was tendered and admitted without objection as Exhibit G.

Under cross examination, PW6 confirmed that the deceased gave him the three names of her assailants including the appellant, which led to their arrest.

D Exhibit B was the autopsy report of the medical doctor PW4 who found two deep cuts on the right side of the scalp, measuring 6cm and 7cm respectively with associated bleeding. And that the cause of death was *"traumatic and hemorrhagic shock due to soft tissue injuries and subdural hemorrhage consequent upon blunt injury to the head"*. The trial Court found that the deceased did not die natural death, from the report of the autopsy. The trial Judge further found that Exhibit A was the statement made by the deceased while alive as to who inflicted the injuries on her. Pursuant to Section 33 (1) (a) of the Evidence Act, the trial Court found the statement to amount to dying declaration by the deceased.

The trial Court had found that there were no material contradictions in the evidence adduced by the prosecution as regards the time the deceased died, to suggest that she did not make Exhibit A. G The Court concluded that there is abundant evidence that the deceased made Exhibit A before she died.

It is note worthy that Exhibit A, which was said to have been made by the deceased while in the hospital, to the police confirmed the testimony of PW2, who saw the deceased shortly after she was attacked in her room in the early hours of 30th November, 2005. The deceased was said to have given the names of the appellant and the two others as her assailants.

There is no doubt, that at the trial of the appellant and his co-accused for murder of the deceased, there was no way

the deceased could have been called as a witness to testify on the cause of her death. But the law is clear on the statements made by persons who cannot be called as witnesses. Section 33(1)(a) provides as follows:

“Statements written or verbal, or relevant facts made by a person who is dead are themselves facts in the following cases:-

(a) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question; such statements are relevant only in trials for murder or manslaughter of the deceased person and only when such person at the time of making such declaration believed himself to be in danger of approaching death although he may have entertained at the time of making it hopes of recovery.”

See Solomon Thomas Akpan V. The State (1992) NWLR (pt. 248) (1992) 7 SCNJ 22, (1992) LPELR 381 SC; Anthony Okoro V. The State (2012) 1 SCM 80; (2012) LPELR 7846 SC; (2012) NWLR (Pt.) (2012) 1 SCNJ 36.

It is interesting to note however, that even though the prosecution owes it a duty to prove the charge of murder against the appellant beyond reasonable doubt, the defence put forward by the appellant and others was that it was armed robbers who had attacked their house and wounded their mother Ifeoma Okereke that also attacked the deceased and cause the injuries on her.

But this defence was debunked by the prosecution. From the evidence adduced by the prosecution, there was no robbery incident at all within that neighbourhood. What is more, at least, none was reported to the police. Indeed, PW7, one Christian Akowunobi, was the Chairman of the Vigilante Group of Ndegwu people. He testified, inter alia, as follows:

“I know the late Cecilia Ogbonna. I know all the accused persons. As Chairman of Vigilante, my work is to guard Ndegwu town. I work with other subordinates. Each day we keep guard and patrol within Ndegwu community.

On 30th November, 2005, we were on duty of patrol till day break. At close of work, we received report that day, till 4.30am,

there was no report of armed robbery or gun shot. After 4.30am around 6am one Sopurachi and Felicia Igwe came to my house that one Cecilia Ogbonna had been killed...

We went to the house of Cecilia Ogbonna. On getting there, we saw her lying on the floor in a pool of blood. She was still alive
 B *(sic). I asked her who inflicted the injuries on her; she said it was one Uzoma, his younger brother and a tenant in late Uzoigwe's house...*

The following day, I reported the matter to the State CID, Owerri, I made statement to the Police"

C Under cross examination, PW7 was not shaken at all on the testimony he gave under examination in-chief. He confirmed that the deceased gave him the appellant's name as one of those who attacked her.

D What is more, from the uncontroverted testimony of PW6, the claim of armed robbery attack by the appellant and his mother, Ifeoma Okereke was found to be false. The bandages wrapped round her head and legs were false as there was no wound or bruises on her at all. In other words, the claim that there was a robbery incident was a make-up or fabricated story to cover the act of attack by the appellant and his co-accused.

I am therefore not in the slightest doubt that the trial Court was right in admitting the statement of the deceased as a dying declaration which was admissible and properly admitted and relied upon.

F In R V. Carnall (1995) Crim. LR 944, the accused was charged with the murder of V. Two witnesses had seen V. in the street outside their house. He was bleeding and asking for help. He claimed that he had been attacked with knives and baseball bat, and it had taken him about an hour to crawl from his home to the house. The witnesses asked him who had attacked him and he subsequently named the defendant. At hospital, before V died, he gave a statement to a police officer, again naming V as the attacker. The trial Judge admitted both the statement to the witnesses and that given to the police officer as
 G part of the res gestae. On appeal, it was argued that he had been wrong to do so. It was alleged that the time that had elapsed between the attack and the making of the statement (over an hour between the attack and the first statement, and nearer two hours in respect of the second statement) coupled with the fact that the statements had
 H

been made only in response to questions, meant that they were not sufficiently contemporaneous. Moreover, the appellant also contended that the statements were inherently unreliable, since the victim had lost a lot of blood, which could have resulted in a confused state of mind.

Dismissing the appeal, it was held that the crucial question was whether there was any real possibility of concoction or distortion, or whether the judge felt confident that the thoughts of the maker of the statements were at the time so dominated by what had happened that what the speaker said could be regarded as unaffected by any ex post facto reasoning or fabrication. In answering this question, the trial Judge had taken account of the appalling nature of the attack itself, the horrific injuries that were inflicted, the pain that the victim was undergoing and the obsession he had at the time, with getting help and trying to stay alive. The time factor was not conclusive. As to the question of the loss of blood, the Judge had rightly taken the view that this was merely speculative on the part of the appellant. Thus, the central issue for the Court was not a question of lapse of time, but whether there was a real possibility of concoction or distortion as a result of the lapse of time or any other proven factor.

The above was an English case whereby the rule of *res gestae* was applied. ***In the instant case, the fact that the claim of the appellant and his mother that the people who had robbed them and inflicted injuries on Ifeoma, the appellant's mother also inflicted injuries on the deceased, and this was found to be untrue becomes relevant fact to the fact in issue because it throws light on it. Ordinarily, merely telling a lie or lying by a suspect or an accused person is not evidence of the commission of any offence let alone murder.*** See *Anekwe V. The State* (1976) 9-10 SC 255; *Omogodo V. State* (1981) NSCC 119. ***But where the fact of lying is taken together with other relevant facts and circumstances, in the particular case, it may safely be concluded that the accused is guilty of the offence charged. In that case, the lie or those lies become(s) relevant fact to the fact in issue as evidence against him.*** See *Ajiboye & Anor V. State* (1994) 8 NWLR (Pt.364) 587 sy 603. The fact of this case that they claim that there was a robbery attack, when there was none.

And that the appellants' mother was injured and had to bandage her head were found to be lies are relevant facts taken together with the fact that immediately after the incident, both the appellant and his younger brother disappeared from the house, that their mother claimed she did not know their whereabouts, are relevant to the fact
 B in issue as to their involvement in the attack and the injuries inflicted on the deceased, which led to her death. ***In the circumstance, I believe that the learned trial Judge was right in admitting the statement made by the deceased to PW6 and when that was taken together with the testimony of PW1 and PW3 on what***
 C ***the deceased told them respectively at different times when the attack was fresh. In other words, I am satisfied that Exhibit A was relevant and admissible as dying declaration and was properly admitted by the trial Court.***

D In the final analysis, I hold that the sole issue distilled for the determination of this appeal should be and is hereby resolved against the appellant. In other words, this appeal lacks merit and deserves to be dismissed. The Court below was therefore right to have affirmed the decision of the trial Court that the prosecution proved the case
 E against the appellant beyond reasonable doubt. Accordingly, appeal is dismissed. The judgment of the Court below which affirmed the decision of the trial High Court of Imo State delivered on 31st March, 2009 hereby affirmed.

F

ONNOGHEN JSC

I have had the benefit of reading in draft, the leading Judgment of learned brother, ARIWOOLA JSC just delivered.

G I am in complete agreement with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

I accordingly dismiss the appeal.

H

NGWUTA JSC

I read In advance the leading judgment delivered by my learned brother, Ariwoola, JSC.

Except the name of the appellant this appeal is the same as appeal No. SC.398/2015 in which my learned brother also wrote the

lead judgment.

Based on the reasoning and conclusion in the leading judgment and my comment therein I also dismiss this appeal for lack of merit. I affirm the judgment of the Court below.

B

PETER-ODILI JSC

I agree with the judgment just delivered by my learned brother, Olukayode Ariwoola, JSC and to show my support for the reasoning from which the decision came about, I shall make some comments.

C

This is an appeal against the judgment of the Court of Appeal, Owerri Division affirming the conviction and sentence of the Appellant by the High Court of Imo State presided over by C. I. Ohakwe J.

The Appellant was one of the three accused persons found guilty of the offence of murder under Section 319 (1) of the Criminal Codes Cap 30 Vol. II Laws of Eastern Nigeria 1963 as applicable in Imo State.

FACTS:

The Appellant, Uzoma Okereke was arraigned with two others namely, Chukwuma Ezekwe and Ugochukwu Okereke at the High Court of Imo State sitting at Owerri on the 31st day of March, 2009 wherein they all pleaded not guilty to the charge of murder of one Cecilia Ogbonna.

The particulars of the offence are that on the night of 29th early hours of 30th November, 2005, the victim while sleeping in her house, her house was broken into and was attacked and wounded on her head, shoulder and all over her body, which eventually led to her death four days later being 4th December 2005 at the Federal Medical Centre, Owerri.

G

On the same 30th November 2005 before her death when she regained consciousness, she informed the PW1, PW2 and PW7 that the Appellant was among the accused persons that inflicted those injuries on her that resulted in her death four (4) days later.

While the woman was on admission, the police was invited H and she made a statement, Exhibit 'A' at Federal Medical Centre, Owerri on the same 30th of November 2006 on the hospital bed to PW2 and PW6 who were police officers. In her statement Exhibit 'A', she mentioned the names of the three accused persons, Appellant

inclusive as those that inflicted the injuries on her.

The prosecution called seven witnesses and closed its case, while each of the accused persons defended himself and jointly called two other witnesses.

In his judgment, the trial judge found the Appellant who was B the 1st accused guilty. The other two accused persons were also found guilty of the offence of murder.

The accused persons, the Appellant inclusive were convicted at the Lower Court and they jointly appealed to the Court of Appeal.

In their judgment on the appeal delivered on the 11th day of C July, 2012, the Court of Appeal unanimously dismissed the appeal and affirmed the judgment of the Learned Trial Judge.

On the 29th day of October 2015 date of hearing, learned D counsel for the Appellant, L. M. Alozie Esq. adopted the Brief of Argument of the Appellant filed on the 5/8/2013 in which he formulated a single issue which as follows:-

Whether having regard to the fact and circumstances of this case, the prosecution proved the guilt of the Appellant beyond reasonable doubt.

E Mrs. A. Eluwa, the Solicitor General of Imo State Ministry of Justice for the Respondent adopted the Brief of Argument of the respondent settled by Mrs. C. C. Dimkpa, Administrator General of the same Ministry. It was filed on the 21/11/2013 and deemed filed on the 25/2/2015. She equally adopted the issue as crafted by the F Appellant's counsel.

The sole issue aforesaid is apt and would be used by me in the determination of his appeal.

SINGLE ISSUE:

G The question herein raised is whether having regard to the facts and circumstances of the case the prosecution proved the guilt of the Appellant beyond reasonable doubt.

Mr. Alozie of counsel for the Appellant contended that the evidence of the PW1 as to what the deceased told her did not sufficiently identify the Appellant and the two other accused persons as H the persons that assaulted the deceased. That the evidence of the PW3 materially contradicted the evidence of the PW1 so much so that it can be safely concluded that one of them was lying and since the Court cannot pick and choose therefrom which to believe or

disbelieve the evidence of the two, PW1 and PW3 ought to have been discountenanced by the Courts below. He cited *Jeremiah v. State* (2012) 14 NWLR (Pt. 1320) 253 (CA).

Also that the evidence of PW2, PW5 and PW6 are contradictory as PW2, Police constable told the Court that his office received the complaint of wounding and that he went with PW6 to effect the arrest. That PW1 said PW2 did not take part in the investigation. He stated there were some variations the pieces of evidence from these police witnesses. That the defence put up by the Appellant was not considered.

It was further submitted for the Appellant that the identification of appellant was not credible and authentic as one of the culprits. That a serious doubt raised from the evidence of PW5 as to how the appellant entered the room and committed the alleged offence without breaking into the house or breaking the key to the door. That a lot of doubt existed which has to be resolved in favour of the Appellant. He relied on the cases of *Orji v. State* (2008) 10 NWLR (Pt. 1094) 31 at 50; *Ikemson v. State* (1989) 3 NWLR (pt. 110) 455; *Nnolim v. State* (1993) 3 NWLR (Pt. 283) 567. That suspicion no matter how high or grave cannot ground a conviction in a Court of law. He cited *Orji v. State* (supra) 44; *Iko v. State* (2001) 14 NWLR (Pt. 732) 221.

Mr. Alozie of counsel contended for the Appellant that the statement of the deceased fell short of a dying declaration since it did not qualify as such. He cited *R v. Woodcock* (1789) IL Each 500 at 502 or 168 English Report 353; *Law of Evidence* 4th Edition, T. Aguda pp.72 - 73; *Hausa v. State* (1994) 6 NWLR (Pt. 350) 281 at 287; *Okoro v. State* (2012) 4 NWLR (Pt. 1290) 351 at 371-371.

Mrs. Eluwa, learned Solicitor General for the Respondent submitted that there are no material contradictions in the prosecution's case to create any doubt in the mind of the Court which could be resolved in favour of the Appellant. That the main issue in this case is whether the deceased before her death made the Statement Exhibit 'A' mentioning those that attacked her and inflicted the injuries that caused her death. That the concurrent findings of the two Courts below that indeed the Statement was a dying declaration cannot be faulted within the ambit of Section 33 (1) (a) of the Evidence Act.

She further submitted that the defence of armed robbery at-

tack on the family of the Appellant was a ruse to cover up their heinous crime and this was brought to light by the fact that DW1's bandage was found to be a sham.

In summary, the contrasting positions of the parties are thus, for the Appellant that the case of the prosecution/respondent is so materially contradictory and confusing that it cannot be said that the prosecution proved its case beyond reasonable doubt. The respondent disagrees contending that the prosecution proved its case beyond reasonable doubt and that Exhibit 'A' was a dying declaration sufficient to ground a conviction as the two Courts below found.

"It all happened yesterday night but I cannot actually prompt the time. Three boys entered my house namely Uzoma, Ugochukwu but I cannot remember their surnames and one Chukwuma who is a tenant residing in our area. They came saying that they will kill me before I could make a report or words. They started beating me with matchets and sticks. They forced the door open when I was deeply asleep. They used their matchets to give me deep wounds on my hand end used stick to beat me all over my body more especially my shoulder and heart. I was very unconscious when blood full all over my body. It was then they feel that I am dead but I was in the state of coma and there they took to their heels which I do not know the time they left because of my helpless condition...."

In urging the Court not to be persuaded by the concurrent findings of the two Courts below and the line of thinking and views of the learned counsel for the respondent, the learned counsel for the appellant displayed a mastery of the legal principles surrounding a dying declaration, its acceptability or rejection and the circumstances that would stand one way or the other. In this the appellant's counsel reminded the Court of what it should bear in mind before taking the side of one as against the other. In this, I shall refer to the English Case of *R v. Andrews* (1987) 1 All ER 513.

"Hearsay evidence of statement made to a witness by the victim of an attack describing how he had received his injuries was admissible in evidence, as part of the res gestae, at the trial of the attacker if the statement was made in conditions which were sufficiently spontaneous and sufficiently contemporaneous with the event to preclude the possibility of concoctions or distortion. In order for the victim's statement to be sufficiently spontaneous to be admissible, it has to be

so closely associated with the events which excited the statement that the victims mind was still dominated by the events if there was a special feature, e.g., malice, giving rise to the possibility of concoction or distortion the trial judge had to be satisfied that the circumstances were such that there was no possibility of concoction or distortion...”

The Appellant stated that the Court had an obligation to take B into consideration all the defences possible or available to the appellant even if stupid, weak, fanciful or improbable as the contradictory versions from the prosecution witnesses evidence, the alibi raised not to talk of those areas the prosecution’s case that had thrown some doubt which have to be resolved in favour of the accused. Again C brought out is the fact that all that may have been available to the Court did not go beyond suspicion which no matter how high or grave cannot ground a conviction in a Court of law. As I alluded to the submissions of learned counsel for the Appellant are seductive D but they are certainly not for the case in hand from the findings of the two Courts below. I relied on Ekang v. State (2001) 11 NWLR (Pt. 723) 1; Annabi v. State (2008) 13 NWLR (Pt. 1103) 179; Orji v. State (2008) 10 NWLR (Pt. 1094) 31 at 80.

I would quote extensively the relevant areas in the judgment E of the Court of Appeal anchored by Abba-Aji JCA, to highlight why this Court has to go along with the concurrent findings of the trial High Court and the Court below. See pages 183, 184, 188 and 189 of the Record of Appeal and that is as follows:-

“Exhibit ‘A’ was strongly supported in content by the testimony F of PW1, PW3 and PW7 who said the deceased told her In the morning she visited her that Uzoma, Ugochukwu, his brother and a tenant living in Innocent’s house inflicted the wounds on her. She recognized the three Appellants as the persons that inflicted her with the G multiple injuries which caused her death.

It is not full proof that once the Police fails to investigate an alibi, the accused person must ipso facto be acquitted. His acquittal or otherwise will depend on the circumstances of each case and whether the trial Court believed the evidence of visual identification H of the accused person. In the instant case, there was a clear identification of the 3rd Appellant by the deceased. The Appellant also stated that the deceased was known to him and could identify him anywhere. His alibi was effectively and completely destroyed. There was

no duty on the prosecution to investigate the alibi and no need for the prosecution to call evidence to rebut the alibi. The trial Court was right to have acted on Exhibit 'A' and the evidence of PW1, PW3 and PW7. See *Ede v. Fed. Rep. of Nigeria* (2001) 1 NWLR (pt. 695) 502; *Alabi v. State* (1993) 7 NWLR (pt.307) 511; *Nwabueze v. State* (1988) 4 NWLR (Pt. 86) 16; *Okosi v. State* (1989) 1 NWLR (pt.100) 642. The presence of the Appellants at the scene of the crime was therefore established and the plea of alibi is destroyed.

The other dimension to the case introduced by the Appellants was that armed robbers operated within the neighbourhood and resident of the deceased on the night of 29/11/2005 and that the armed robbers inflicted the injuries on the deceased. This aspect of the case was introduced by the Appellants as their defence that it was the armed robbers that inflicted the injuries on the deceased that caused her death. This is deducible from the evidence of DW1, Ifeoma Okereke, the mother of the 1st and 2nd Appellants and also that of the 1st and 2nd Appellants. The learned trial Judge did not believe their story. He believed the evidence of the prosecution witnesses particularly PW6, the Investigating Police Officer and PW7, the Chairman of the vigilante group of Ndegwu that no armed robbery was committed in the community that night.

Pw6 testified to the effect that in the cause of investigation he met Ifeoma Okereke, the mother of the 1st and 2nd Appellants with bandages all over her head and legs, that armed robbers came to their compound and inflicted the injuries on her. He stated that he removed all the bandages on her head and discovered that she had no wound or bruises on her head or any part of her body. He concluded that from his investigation, no armed robbers visited the Community on the night of the incident and no report of armed robbery was lodged to the police.

The law does not insist that there must be no contradictions in the evidence of witnesses called by the same party on any issue in contention. What the principle of law is, of which the Courts are well familiar in practice is that, the contradictions by the witnesses should not be material to the extent that they cast serious doubts on the case presented as a whole by that party or as to the reliability of such witnesses. Where conflicts and contradictions in the evidence of the prosecution witnesses raised no doubts as to guilt of the accused, the

only duty of the trial judge is to observe and comment on them as such and no more.

Such contradictions are not fatal to the prosecution, on the issue of contradiction, it is only contradictions on a material fact that would make a Court doubt the evidence before it. It is not just on any point. See *Dominic Princet v. State* 2002 12 SCNJ 280; *Omotola v. State* 2009 All FWLR (Pt. 464) 1490; *Omonga v. State* (2006) 14 NWLR (pt. 1000) 532; *Osuagwu v. State* (2009) 1 NWLR (Pt. 1129) 523 at 542 - 543. Therefore contradictions which are not material or substantial go to no issue. The main interest of the Court is that the witnesses are in union or unison as to the happening of the event, but give different versions In respect of the peripheral surrounding the event.

In the instant case, the items of contradiction alluded to by the Appellants was in respect of the testimonies of PW1, PW3, PW4, PW5 and PW6 that they were grossly at variance with each other and cannot be relied upon to ground a conviction. The fact that PW1 did not state in her evidence that at the time she was in the house of the deceased and pushed the door open did not state that PW3 was there does not amount to a material contradiction. Also, the fact that PW3 stated that there was armed robbery and PW2 did not say so is not a material contradiction. They are just different version in respect of the peripheral surrounding the event. Also, the fact that PW3 stated that they took the deceased to the hospital and she made statement to the police and gave the names of the Appellants as those who inflicted injuries on her and the fact that PW2 said that they moved to the house of the deceased and did not see anybody and moved to the hospital and saw the deceased lying on the hospital bed with bruises and wound on her head, showed that injuries were inflicted on the deceased and those injuries caused her death. The trial Court considered the defence of armed robbery put forward by the Appellants and came to the conclusion that there was no armed robbery.

In the circumstance, I hold that the learned trial Judge was right in law in convicting and sentencing the Appellants to death”.

In a murder trial such as the case at hand, the prosecution has the duty to prove the case beyond reasonable doubt and the essential elements that must be established are:-

(a) That the death of a human being has actually taken place.

b) That such death was caused by the accused.

(c) That the act was done with the intention to cause death or that the accused knew or had reason to know that death should be the probable and not only the likely consequence of his act.

In proving these necessary ingredients, the prosecution could
 B rely on direct eye witness account of the incident or circumstantial evidence. See the cases of *Kala v. State* (2008) 7 NWLR (Pt. 1085) 125; *Oludamilola v. State* (2010) 185 LRCN 1 at 16; *Mustapha Mohammed v. The State* (2007) 153 LRCN 110 at 125; *Adop v. State* (1986) 2 NWLR (Pt. 24) 581.

C In line with the principles above referred to and considering what the Court below did which has been extensively restated, the cause of death of the deceased was the injuries inflicted on her as a result of the attack and the said death which occurred four days later.
 D The death was clearly caused by the act of the accused persons whose identity was not in doubt the prosecution relying on the evidence of PW1, PW2, PW3, PW6 and PW7 and of course, Exhibit 'A', the dying declaration of the deceased who made the narration knowing the end was near. The various defences put up by the accused such as
 E the alleged armed robbery attack and alibi had no peg to hinge on as the prosecution effectively pinned the accused assailants not only at the scene of crime but as the perpetrators of the crime. Also, the mother of the attackers who claimed to have been injured the armed robbery was shown not to have any injury when the bandage she
 F had on was removed.

The contradictions alluded to by the appellant were far from material and it is now trite that for a contradiction to be fatal in the prosecution's case, the conflicting contradiction or discrepancy in the
 G evidence of witnesses for the prosecution has to be substantial or fundamental to the main issue before the Court of trial and not just any flimsy divergence which naturally would occur in the presentations by different persons of the same event in accordance with human nature. To have the effect of creating that doubt which resolution
 H in favour of the accused would change the course of events and thereby produce an acquittal for the accused the inconsistency or contradiction must go to the root of the main issue and that is not the case here. See *Bolande v. The State* (2005) 7 NWLR (Pt. 925) 431 at 454.

Indeed what has played the major role in the prosecution's case and which the two Lower Courts accepted is Exhibit 'A' as a dying declaration within the ambit of Section 33 (1) (a) of the Evidence Act which alone is enough to ground a conviction. Even then there are numerous backing pieces of evidence flowing along the same path such that the case of the prosecution is really rock solid and the two Courts below were right in their findings and conclusion. There is therefore nothing on which those Courts did can be interfered or tampered with. See *Eholor v. Osayande* (1992) 6 NWLR (Pt. 249) 524.

It is therefore that with the above and the well articulated reasoning in the leading judgment that I too dismiss the appeal and abide by the consequential orders as made.

MUHAMMAD JSC

Having had a preview of the leading judgment of my learned brother Ariwoola JSC, I entirely agree with my lord that the appeal lacks merit. I dismiss the appeal too and abide by the consequential orders reflected in the leading judgment.