

SUPREME COURT OF NIGERIA

FRIDAY 22ND JANUARY, 2016. SC. 451/2013

**CORAM:- W. S. N. ONNOGHEN, N. S. NGWUTA, M. U.
PETER-ODILI, O. ARIWOOLA, M. D. MUHAMMAD, JJSC**

CHIBUZOR NKEM BOUWOR APPELLANT
V.
STATE RESPONDENT

CRIMINAL LAW - Conspiracy - Ingredient of - Lies in mere agreement to do an unlawful thing which is contrary to the law - Whether or not accused had knowledge of its unlawfulness (H1)

MURDER - Conspiracy - Proof - The various roles played by co accused which support appellant's confession in exhibit D - Have established the offence of conspiracy to murder (H2)

CRIMINAL PROCEDURE - Conviction - Confession - Accused can be convicted on his confession - In which he admitted the commission of the crime as charged (H3)

CRIMINAL PROCEDURE - Conviction - Conspiracy - Validity - Conspiracy being a separate offence from actual crime - Conviction on same is valid although proof of the actual crime is not established (H4)

FACTS

At the High Court of Delta Ogwashi-Uku Judicial Division, accused/appellant and some others were arraigned for the offence of conspiracy to commit murder and murder of one Smart Okwute contrary to section 324 Criminal Code Cap 21 vol. 1, Laws of Delta State 2006. At the trial, prosecution/respondent called five witnesses and each of the accused persons testified in their own behalf and called no witness. Respondent's case is that appellant along with some other accused persons were members of an unlawful society known as "Jurice" and that they conspired to murder and indeed murdered the deceased on 21st of March 2010.

The case against 4th accused was that his sons were members

of the said “Jurice” and that they were involved in the murder of the deceased to the knowledge of 4th accused who assisted them to flee from justice. At the end of the trial, the court discharged and acquitted appellant and two others of the offence of murder, but they were convicted for the offence of conspiracy to commit murder. They were thus sentenced to 10 years imprisonment without option of fine, while 4th accused was discharged and acquitted. Dissatisfied, appellant appealed to the Court of Appeal Benin Division. The appeal was dismissed and the conviction and sentence of appellant were affirmed. Aggrieved further, appellant appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether in the circumstances of this matter the lower Court was right to affirm the conviction and sentence of the appellant for conspiracy to commit murder?

HELD (Unanimously dismissing the appeal per **PETER-ODILI JSC**)

CRIMINAL LAW - Conspiracy - Ingredient of

1. It falls to reason that to conspire, the persons jointly make secret plans to commit a wrongful act or a situation where the persons seem to be acting together to bring about an unfortunate result. Therefore the essential ingredient of the offence of conspiracy lies in the bare or mere agreement and association to an unlawful thing which is contrary to or forbidden by law, whether that thing be criminal or not and whether or not the accused persons had knowledge of its unlawfulness. It is therefore to be said that the evidence of conspiracy is generally inferred from surrounding facts and circumstances. (p. 782 H)

MURDER - Conspiracy - Proof

2. From the pieces of evidence referred to including the extra judicial statements of the accused person, the trial Court as affirmed by the Court below found enough upon which to hold that the offence of conspiracy was established as required by law. This is so, bearing in mind that the elements of the offence

are embedded in the agreement or plot among the parties, a position that is rarely capable of direct proof and so is deduced from the acts of the parties channeled or focused towards the realization of a common goal or mutual criminal purpose. The various parts played by the co-accused supporting the confession in the extra judicial statement of the appellant, Exhibit D have given a solid establishment of the offence of conspiracy to murder as alleged. (p. 785 F)

CRIMINAL PROCEDURE - Conviction - Confession

3. The point has to be tackled that the appellant's challenge of the decision, conviction and sentence of the appellant by the trial Court, affirmed by the lower Court which situation appellant's counsel says was erroneously done, the confessional statement not having been subjected to the veracity test. The reasoning in that posture cannot be sustained since it is now trite that accused can be convicted on his confessional statement in which he admitted the commission of the crime or offence as charged. (p. 786 A)

CRIMINAL PROCEDURE - Conviction - Conspiracy - Validity

4. The path the two lower Courts trod in making their findings that the offence of conspiracy to murder had been established while discharging them of the murder of the deceased is without fault since the conviction of conspiracy does not become inappropriate because the substantive offence has not been successfully proved. The reason is based on the fact that the principle of the law is that conspiracy to commit an offence is a separate and distinct offence standing independent of the actual commission of the offence to which the conspiracy is related. Another way of saying the same thing is that the offence of conspiracy to commit a particular offence is not derogated from merely because that offence specified is not proved as required. Therefore the particular substantive offence can fall as not proved beyond reasonable doubt while the conspiracy to so commit it is proved. In this there is no inconsistency. (p. 786 E)

REPRESENTATION

Isiaka Abiola Olagunju with Masud Alabelewe and Kehinde Olawunmi,
for the Appellant

O. F. Enenmo, Deputy Director Civil Litigation with N. B. Emakpor
SSC Delta State, for the Respondent

B

CASES REFERRED TO

Aituma v. State (2006) 10 NWLR (pt. 989) 452

Nsofor v. State (2004) 11-12 SC 43

C Nwaebonyi v. State (1994) 5 NWLR (pt. 343) 138

Ikomi v. State (2007) 7 WRN 121

Ogidi v. State (2005) 27 WRN 1

Odunye v. State (2001) 83 LRCN 1

Njovens v. State (1973) 5 SC 17

D Edhigere v. State (1996) 42 LRCN 1082

Dawa v. State (1980) 8-11 SC 236

Okeke v. State (2003) 109 LRCN 1426

Balogun v. A-G Ogun State (2002) 94 LRCN 260

Kaza v. State (2008) 32 WRN 46

E Adesina v. State (2010) 35 WRN 49

Haruna v. State (1972) ALL NLR 738

Dogo v. State (2013) LRCN 164

STATUTE REFERRED TO

F Criminal Code Cap 21 vol. 1 Laws of Delta State 2006, ss. 64, 319(1),
324

LEAD JUDGMENT BY PETER-ODILI JSC

G This is an appeal against the judgment of the Court of Appeal
Benin Division, or lower Court for short, delivered on the 16th day
of July, 2013 affirming the judgment of Honourable Justice T. O. Diai
sitting at the High Court, Ogwashi-Uku in Delta State. The appellant
and two others were found guilty and convicted for the offence of
H conspiracy to commit murder of one Smart Okwute contrary to Sec-
tion 324 Criminal Code Cap 21 vol. 1, Laws of Delta State, 2006
and sentenced to ten years imprisonment each with hard labour.

FACTS

In the information filed by the State, the appellant and three

others were first arraigned before the trial Court on a four count charge of conspiracy to commit murder, membership of unlawful society and accessory after the fact to murder. The prosecution later substituted the charge and a fresh plea was taken. The particulars of offences are hereunder thus stated:

STATEMENT OF OFFENCE: COUNT I

B

Conspiracy to commit felony to wit: murder, punishable under Section 324 of the Criminal Code Law Cap C21 Vol. 1 Laws of Delta State, 2006.

PARTICULARS OF OFFENCE

C

Okemefune Ndozie (M), Nosike Iboji (M), Chibuzor Nkembouwor (M) and others now at large on or about the 21st day of March 2010, at Utulu, in Ogwashi-Uku Judicial Division did conspire to commit murder.

STATEMENT OF OFFENCE: COUNT II

D

Murder, punishable under Section 319 (1) of the Criminal code Law Cap C1 Vol. 1 Laws of Delta, 2006.

PARTICULARS OF OFFENCE

Okemefune Ndozie (M), Nosike Iboji (M), Chibuzor Nkembouwor (M) and others now at large on or about the 21st day of March 2010, at Utulu, in Ogwashi-Uku Judicial Division murdered one Smart Okwute.

STATEMENT OF OFFENCE: COUNT III

Membership of unlawful society punishable under Section 64 of the Criminal Code Law Cap C21 Vol. 1 Laws of Delta, 2006.

PARTICULARS OF OFFENCE

Okemefune Ndozie (M), Nosike Iboji (M), Chibuzor Nkembouwor (M) and others now at large on or about the 21st day of March 2010, at Utulu, in Ogwashi-Uku Judicial Division belong to the unlawful society known as Jurice.

STATEMENT OF OFFENCE: COUNT IV

Mekwunye Hezekiah, well knowing that one Onyeka and Onyebuchi Mekwunye, did on the 21st day of March, 2010 in Ogwashi-Uku Judicial Division on other days thereafter received, comfort, harbour, assist and maintain (sic) the said Onyeka and Onyebuchi Mekwunye.

At the trial, prosecution called 5 (five) witnesses and each of the accused persons testified in their own behalf and called no wit-

ness. The respondent's case was that the appellant along with the 1st and 2nd accused at the trial were members of an unlawful society known as "Jurice" and that they conspired to murder and indeed murdered the deceased person on the 21st day of March, 2010. The case against the 4th accused was that his sons were members of the said "Jurice" and that they were involved in the murder of the deceased to the knowledge of the 4th accused who assisted them to flee from justice.

In a considered judgment delivered on 23rd May, 2012, the 1st, 2nd and 3rd accused persons were discharged and acquitted in Counts II and III but were convicted on Count I and each sentenced to 10 years imprisonment without option of fine while the 4th accused person was discharged and acquitted in Count IV.

The 1st, 2nd, and 3rd accused being dissatisfied with the conviction and sentence filed separate notices of appeal against the said decision.

The lower Court in a judgment delivered on the 16th day of July, 2013 affirmed the conviction and sentence of the appellant. Further aggrieved appellant has appealed to the Supreme Court.

Mr. Isiaka Olagunju of counsel for the appellant adopted his Brief of Argument filed on the 31/10/2013 which had been settled by Olatunde Busari, Esq. He raised a single issue which is thus:

Whether in the circumstances of this matter the lower Court was right to affirm the conviction and sentence of the appellant for conspiracy to commit murder?

Learned counsel for respondent, Mr. O. F. Enenmo adopted their Brief of Argument filed on 12/12/13 and he identified a sole issue viz:

Whether having regard to the state of evidence before the trial Court the lower Court was right when it affirmed the judgment of the learned trial judge?

Each of the questions is saying the same thing in slightly a different way and it is safe to answer the question irrespective of which of the two issues is utilized.

SOLE ISSUE

Whether having regard to the state of evidence before the trial Court the lower Court was right when it affirmed the judgment of the learned trial judge.

Learned counsel for the appellant contended that the Court below erred when it stated that the trial Court was right in convicting the appellant of the offence of conspiracy to murder as the prosecution did not show that the accused agreed with one or more people to conspire to do an unlawful act. He cited *Aituma v. The State* (2006) 10 NWLR (Pt. 989) 452 at 469. B

That the prosecution had not proved the elements of the offence of conspiracy which are (a) an agreement by one or more persons to execute an agreed act, (b) the agreed act is unlawful.

Also that the Confessional Statements upon which the appellant and the other accused persons were convicted did not pass the six tests laid down by law or anything outside the statement to show it is true. He relied on *Nsofor v. The State* (2004) 11-12 SC 43 at 50-51; *Nwaebonyi v. The State* (1994) 5 NWLR (Pt. 343) 138. C

That the conviction of the appellant was primarily based on D circumstantial evidence and in order to ground a conviction, circumstantial evidence must be conclusive enough to lead to the irresistible conclusion that the accused and no one else is guilty which is not the case in the instant appeal. He cited *Ikomi v. The State* (2007) 7 WRN 121, *Ogidi v. The State* (2005) 27 WRN 1. E

Learned counsel for the respondent reiterated that the prosecution to prove its case against the accused person must do so beyond reasonable doubt which has been interpreted to mean that the prosecution must by credible evidence prove the ingredients of the offence for which the accused person is facing trial. That the evidential proof would be through: F

1. Credible evidence of witness.
2. Circumstantial evidence.
3. By admissions and confessions of the very people accused G of the crime.

That it is trite law that in a charge of conspiracy to commit murder the onus of proof is on the prosecution to establish by evidence that the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. He relied on *Odunye v. The State* (2001) 83 LRCN 1 at 16. H

Learned counsel for the respondent said since the gist of the offence of conspiracy is embedded in the agreement or plot between the parties it is rarely capable of direct proof and so the offence is

deduced from the act of the parties which is focused towards the realization of their common or mutual criminal purpose. He cited *Njovens v. The State* (1973) 5 SC 17.

That the learned trial judge was right in law when he inferred conspiracy from the criminal act of fighting and the murder of the deceased Smart Okwute. He cited *Haruna & Ors. v. The State* (1972) ALL NLR 738 at 754.

For the respondent it was canvassed that the learned trial judge could convict the appellant solely on the confessional statement and that subjecting a confessional statement to the veracity test is not a condition precedent to the conviction of the accused person. He cited: *Edhigere v. The State* (1996) 42 LRCN 1082 at 1812; *Dawa v. The State* (1980) 8-11 SC 236; *Gozie Okeke v. The State* (2003) 109 LRCN 1426.

That the fact that the appellant was discharged of the substantive offence does not render his conviction for conspiracy to commit murder inconsistent. He cited *Balogun v. A-G Ogun State* (2002) 94 LRCN 260 at 270.

In brief the position of the appellant is that the prosecution at the trial Court did not prove the ingredients of conspiracy against the appellant in any way possible that the appellant knew the other co-accused person. That the peculiarity of the offence of conspiracy is such that it is the actual agreement alone which constitutes the offence which actual agreement was absent in this case.

In contrast the respondent is of the view that there is evidence on record on which the trial judge held that the prosecution proved the offence of conspiracy to commit murder against the appellant and that the appellant failed to show why the lower Court's finding was perverse or not in line with the laid down rules of law.

The definition of "conspiracy" in Oxford English Dictionary, Tenth Edition at page 186 is thus:

"A secret plan by a group to do something unlawful or harmful. The action of conspiring."

It falls to reason that to conspire, the persons jointly make secret plans to commit a wrongful act or a situation where the persons seem to be acting together to bring about an unfortunate result. Therefore the essential ingredient of the offence of conspiracy lies in the bare or mere agreement and

association to an unlawful thing which is contrary to or forbidden by law, whether that thing be criminal or not and whether or not the accused persons had knowledge of its unlawfulness. It is therefore to be said that the evidence of conspiracy is generally inferred from surrounding facts and circumstances. See: Kaza v. The State (2008) 32 WRN 46; Adesina & Anor v. The State (2010) 35 WRN 49 at 69 per Kekere-Ekun, JCA (as she then was).

The learned trial judge had held thus:

“Each of the 1st-3rd accused persons in their respective statements said that they went to Otulu on the date in question at the invitation of a member of their secret cult. The 2nd accused person also stated that the members of their cult went to Otulu village to fight. Each of them stated that they participated in the fight, as other members of the cult, who were charged in this case. Each of the accused persons retracted his statement during the trial. The 3rd accused person also testified he was at home in Isele-Uku on the date in question.

Again, the particulars of where he was and those who were with him were not given to the police. It is trite law that the burden of establishing an alibi rest with an accused person, which burden is discharged by giving the police the particulars of the alibi at the earliest opportunity. None of the accused persons did so in this case. The respective alibi, therefore, fails. The Court does not believe their testimonies.

All the accused persons are not from Otulu. Was it then a mere coincidence that the members of the group came to Otulu on 21.3.010 to fight? In Exhibit “C” the statement of the 2nd accused person, he stated that one Onyeka had reported the late Smart Okwute in their secret cult meeting before the fight operation took place. It appears the fate of accused was sealed at the meeting. In the light of the evidence before the Court, it does not appear to be a coincidence that the members of the group invaded Otulu on that date material to his charge and participated in a fight in the course of which the deceased was killed.

Though the prosecution did not successfully establish that it was the act of the accused person which caused the death of the deceased, the offence of conspiracy to murder the deceased can in-

ferentially be deduced from the above facts.” See page 65 of the Record.

The Court of Appeal in its judgment anchored in the lead decision of Ogunwunmiju, JCA made similar findings as the trial High Court and stated as follows:

B “I cannot agree with the learned appellant counsel that there is
no evidence of a link between the appellant and the jurice cult mem-
bers whom the appellant specifically acknowledged in exhibit D as
belonging to when he referred to the cult as “our juris secret cult. The
C appellant mentioned other members by name and joined them in
drinking beer according to his statement. There is no doubt in my
mind that even if he did not go to Otulu to fight with the deceased,
then when the fight started, he joined the fight with the purpose of
doing grievous bodily harm to the deceased. The learned trial judge
D hit the nail on the head when his lordship inferred that their gather-
ing together as a cult in Otulu on the same day being not resident of
Otulu amounted to clear evidence of conspiracy to fight with the
deceased”.

E The findings as stated above of the two Courts below were
garnered from the confessional statement of the appellant, Exhibit D
admitted after a trial within trial and the confessional statement, ex-
hibits B and C of 1st and 2nd accused and the oral evidence of PW4.

I shall put down excerpts from the statements of the accused
F persons including that of the appellant in Exhibit B for a clear view
hereunder, viz:

G “On 21/3/2010 of about 1700 hours our number one man in
Jureecs’ or Amici secret cult called me on phone that I should come
to Otulu village. So on my arrival to that village the fight was already
on then I now joined them in the fight so on that process this our
number one man namely Onyeka (M) and Flash (M) now pursued
the said boy and shot him with gun before all of us now ran away
through Ubulu-Okiti Road to Isele-Uku so later Onyeka and Flash
now came to Isele-Uku and told us that he done Bantaram? I now
H asked them the meaning of Bantaram then he now told me the mean-
ing is that he shot him and also dagger him to dead?”

A critical portion of Exhibit C, the statement of the 2nd ac-
cused person is thus:

“On 21/3/2010 at about 1600 hours boys from my secret cult

kingdom namely Jureec's came to Otulu village for fight and the names of those I know? are Onyeka (M), Onyebuchi (M), Sparker (M), and Chaplet (M) others which I don't know their names but if see I can identify them. So on the fight one Smart Okwute was shot dead then after the fight incident everybody now ran away. I am a member of Jureecis Secret Cult. I am the number two man in the secret cult Otulu branch. The person that shoot Smart Okwute is Chaplet (M). Onyeka was the person that reported late Smart Okwute in our secret cult meeting before the fight operation took place".

The relevant portion of the statement of the 3rd accused person is as follows:

"On 21/03/2010 at about 1700hrs one of my secret cult member namely Onyeka (M) at Otulu village called me on phone that I should come down to Otulu village that one of our jurees secret cult member was holding a birthday party. So on my arrival at Otulu village I now mate (sic) them at one shop in Otulu junction before I now joined them in drinking beer. So as we were drinking... one of our secret cult member namely Okemefune (M)... was with us that day. So as we were there one Smart (M) which is late now stood up from where he was sitting and Okemefune (M) and asked him to give him his bike money which he use to carry him. So immediately Okemefune now broke bottle and sharply brought out gun and started shooting before everybody now scattered. So after the incident all of us followed Ubulu-Okiti Road to Isele-Uku and left... it was only one gun that he came with to that very operation. The person that shoot Smart (M) is Okemefune (M)..."

From the pieces of evidence referred to including the extra judicial statements of the accused person, the trial Court as affirmed by the Court below found enough upon which to hold that the offence of conspiracy was established as required by law. This is so, bearing in mind that the elements of the offence are embedded in the agreement or plot among the parties, a position that is rarely capable of direct proof and so is deduced from the acts of the parties channeled or focused towards the realization of a common goal or mutual criminal purpose. The various parts played by the co-accused supporting the confession in the extra judicial statement of the appellant, Exhibit D have given a solid establishment of

the offence of conspiracy to murder as alleged. I rely on *Njovens & Ors v. The State* (1973) 5 SC 17; *Haruna & Sons v. The State* (1972) ALL NLR 738 at 754.

The point has to be tackled that the appellant's challenge of the decision, conviction and sentence of the appellant by the trial Court, affirmed by the lower Court which situation appellant's counsel says was erroneously done, the confessional statement not having been subjected to the veracity test. The reasoning in that posture cannot be sustained since it is now trite that accused can be convicted on his confessional statement in which he admitted the commission of the crime or offence as charged. In this, my earned brother Ariwoola JSC in *Dogo v. The State* (2013) LRCN 164 has succinctly re-stated the correct position and that is thus;

D “Confession of an accused person to the commission of a crime has held to play a major and important part in the determination of guilt of the accused person and a Court of law is entitled to convict on the confession once it comes to the conclusion that the confession is voluntary. The reason being that confession puts an end to the rough and speculative edge of criminal responsibility in terms of the twin requirements of *men rea* and *actus reus*”. See also *Dawa v. The State* (1980) 8-11 SC 236, *Jimoh Yesufu v. The State* (1976) 6 SC 167 at 173.

F **The path the two lower Courts trod in making their findings that the offence of conspiracy to murder had been established while discharging them of the murder of the deceased is without fault since the conviction of conspiracy does not become inappropriate because the substantive offence has not been successfully proved. The reason is based on the fact that the principle of the law is that conspiracy to commit an offence is a separate and distinct offence standing independent of the actual commission of the offence to which the conspiracy is related. Another way of saying the same thing is**
 H **that the offence of conspiracy to commit a particular offence is not derogated from merely because that offence specified is not proved as required. Therefore the particular substantive offence can fall as not proved beyond reasonable doubt while the conspiracy to so commit it is proved. In this there is**

no inconsistency. See Balogun v. A-G Ogun State (2002) 94 LRCN 260 a 270 & 277.

From all I have been saying above laced with some judicial authorities in support and considering the concurrent findings of the two Courts below, I see no way out of following along that route of the findings of the trial Court as affirmed by the Court of Appeal. These are concurrent findings that the apex Court has no room to depart from, upset or interfere with. In the end I resolve the sole issue crafted in favour of the Respondent and see no merit in this appeal which appeal I hereby dismiss. I affirm the judgment of the Court below in its affirmation of the conviction and sentence of the Appellant by the trial high Court.

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother Peter-Odili, JSC just delivered.

I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

I accordingly dismiss same.

NGWUTA JSC

I have had a preview of the lead judgment delivered by my learned brother, Peter-Odili, JSC and I agree with the reasons adduced for dismissing the appeal as devoid of merit.

The principle is that proof of the offence of conspiracy is generally a matter of inference. See *Erim v. State* (1994) 5 NWLR (Pt. 346) 522 at 538. See also *R v. A.S Pinall* (1976) 2 QBD 48 at 58-589 wherein it was held that the involvement of the appellant can be inferred from all the collateral circumstances of the case.

On the facts of this case, proof of the involvement of the appellant in the conspiracy went beyond mere inference as the appellant made a confessional statement. The statement was admitted in evidence after a trial within trial. It is at the trial within trial that the appellant can effectively challenge the prosecutor as to the voluntariness vel non of the confessional statement.

If the confessional statement is admitted after the trial within

trial the appellant cannot argue simply that he did not make the confession voluntarily without first impugning the trial within trial. Appellant's voluntary confession which is direct positive and satisfactorily proved is sufficient to warrant conviction even without any corroborative evidence so long as the Court is satisfied of the truth of the confession. See *Sunday Effiong v. The State* (1998) 59 LRCN 13961 at 3975; *Kalu & Anor v. King* 14 WACA 30.

There is no reason for the Court to disturb the concurrent findings of the trial Court and the Court below.

For the above and the fuller reasons in the lead judgment I also dismiss the appeal as devoid of merit.

Appeal dismissed.

D **ARIWOOLA JSC**

I had the privilege of reading in draft, the leading judgment of my learned brother, Peter-Odili, JSC just delivered. I am in total agreement with the reasoning therein and conclusion arrived thereat.

From the confessional statement of the appellant which was found to be direct and voluntarily made by the appellant and was corroborated by the confessional statements of the co-accused, I am of the firm view that the trial Court was right in relying on the confession in convicting the appellant for the offence of conspiracy with which he was charged. The Court below was also in order in affirming the conviction and sentence of the appellant.

Accordingly, the appeal is dismissed by me while the judgment of the Court below which had earlier affirmed the decision of the trial Court is affirmed.

Appeal is dismissed.

MUHAMMAD JSC

I read in draft the lead judgment of my learned brother Peter-Odili, JSC, whose reasoning and conclusion therein I adopt in dismissing the unmeritorious appeal. I also abide by the consequential orders made in the judgment.