

SUPREME COURT OF NIGERIA
FRIDAY 17TH FEBRUARY, 2017. SC. 316/2014
CORAM:- O. RHODES-VIVOUR, M. D. MUHAMMAD,
C. B. OGUNBIYI, C. C. NWEZE, A. SANUSI, JJSC

SOPAKIRIBA IGBIKIS APPELLANT
V.
THE STATE RESPONDENT

JUDGMENTS - Reversal of - Basis for - Decision of Court which does not arise from evidence on record - Constitutes such miscarriage of justice - That imposes on appellate Court the duty to set same aside (H1)

CRIMINAL PROCEDURE - Proof - Burden of - Onus of establishing crime beyond reasonable doubt lies on prosecution - Which does not shift - And where there is doubt - Accused is entitled to acquittal (H2)

EVIDENCE - Murder - Circumstantial evidence - Weight - It is often the best evidence - None of which provides Court with cogent proof of guilt - But when viewed together create strong conclusion of guilt of accused - With highest degree of exactitude (H3)

EVIDENCE - Murder - Suspicion - Weight - It does not constitute proof of appellant's guilt - Thus in absence of evidence linking appellant with the offences - Affirmation of his conviction is perverse (H4)

FACTS

Accused/appellant and two others were arraigned before the High Court of Rivers State, Port Harcourt for the offences of conspiracy to commit murder and murder. The case as presented by prosecution/respondent is that following an agreement arrived at a meeting in a hotel at Agudama Street, "D" Line, Port Harcourt on 12th January 2007, appellant and the two others along with

some persons now at large, murdered the deceased persons. The deceased were travelling on a speed boat from one community to another within Akuku Toru Local Government Area in Rivers State.

To prove its case, respondent called six witnesses and tendered Exhibits A, B, B1, C and C1, C17 in support. Exhibit B is appellant's extra judicial statement wherein he asserts being in Lagos at the time of the murder of the deceased and totally denies being part of the agreement to murder the deceased. In addition to appellant's testimony as DW4, three witnesses testified on his behalf. He tendered and relied on Exhibits D1- D16. At the end of trial, including addresses of counsel, the Court held that respondent had proved its case. The Court convicted and sentenced appellant and his co-conspirators as charged. Aggrieved, appellant appealed to the Court of Appeal Port Harcourt. The Court dismissed the appeal and affirmed the trial Court's decision. Dissatisfied, appellant has further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

(i) Was there any admissible evidence on record from which the Court below could have justifiably affirmed the trial Court's inference of conspiracy to commit murder by the appellant.

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

JUDGMENTS - Reversal - Basis for

1. Appellant's contention in this appeal is that the Lower Court's affirmation of the trial Court's judgment which does not arise from credible admissible evidence is perverse. I agree with learned appellant's counsel that on the authorities, a Court's decision which does not arise from the evidence on record constitutes such miscarriage of justice that imposes on the appellate Court the duty to set same aside. If indeed the Lower Court has failed to set aside the trial Court's conviction and sentence of the appellant which does not arise from any credible evi-

dence, then this Court is entitled to step in and do the needful. (p. 150 G)

CRIMINAL PROCEDURE - Proof - Burden of

2. The conviction and sentence of the appellant arises from a criminal trial. The onus of establishing his guilt beyond reasonable doubt lies on the respondent. The onus does not shift. If at the end of trial and on the whole evidence, the trial Court is left in a state of doubt, the respondent would have failed to discharge the burden the law puts on it thereby entitling the appellant to an acquittal. (p. 151 B)

EVIDENCE - Circumstantial evidence - Weight

3. It is evident from the foregoing findings of both Courts that appellant's conviction and sentence proceeded on the basis of circumstantial evidence. Circumstantial evidence is very often the best evidence. It is evidence of a combination of circumstances against an accused person, none of which, on its own, provides the Court with cogent proof of guilt but when viewed together create strong conclusion of his guilt with the highest degree of exactitude. In a number of its decisions, this Court has insisted that only such circumstances that make a complete and unbroken chain constituting sufficient proof that the accused person did commit the offence for which he is charged will sustain a conviction. (p. 154 D)

EVIDENCE - Suspicion - Weight

4. At best, therefore, the circumstances the two Courts found cogent and unequivocal enough to warrant the inference of appellant's guilt are very remote basis for suspicion. No matter how pointing the suspicion is, it does not constitute proof of the appellant's guilt. Thus in the absence of any evidence linking the appellant with the two offences, the Lower Court's affirmation of his con-

viction, learned appellant counsel is right, is perverse. Notwithstanding that the two Courts are concurrent in their findings as to appellant's guilt their findings which are not borne by the evidence on record cannot endure. Not being maintainable, the findings are hereby set aside. The appeal succeeds. The appellant is discharged and acquitted. (p. 155 E)

NOTABLE POINTS OF INTEREST

OGUNBIYI JSC

1. Murder – Proof – Ingredients

Specifically and in a charge of murder for instance, the prosecution is saddled with the burden of establishing the following ingredients, which must all Co-exist:-

- a). that the deceased died
- b). that the death of the deceased was caused by the accused.
- c). that the accused person intended to either kill the victim or cause him grievous bodily harm. (p. 157 F)

2. Criminal procedure – Means of proof

It is also a settled principle of law that the guilt of an accused person may be proved by any or all of the following ways:-

- a). confessional statement of the accused;
- b). circumstantial evidence and
- c). evidence of an eye witness (p. 157 H)

REPRESENTATION

Wilcox Abereton Esq. with Emmanuel S. Njoka, for the Appellant
O. T. K. D. Amachree, Esq., for the Respondent

CASES REFERRED TO

- Ibodo v. Enarofia (1980) 5 7 SC 42
- Adeleke v. State (2014) ALL FWLR (pt. 722) 1552
- Rabiu v. State (1980) 8 11 SC 85
- Atolagbe v. Shorun (1985) 1 NWLR (pt. 2) 360

Williams v. State (1992) 10 SCNJ 74

Okputuobiode v. State (1970) LPLER 2524 (SC)

Ogundiyen v. State (1991) 3 NWLR (pt. 181) 519

Akpan Udoebre v. State (2001) 8 SCM 127

Ilori v. State (1980) 8-11 SC 52

Jua v. State (2010) 1-2 SC 96

B

Adesina v. State (2012) 6 SC (pt. III) 114

Solola v. State (2005) 11 NWLR (pt. 937) 460

Abirifon v. State (2013) 9 SCM 1

Njokwu v. State (2013) 2 SCM 177

C

Alake v. State (1992) 9 NWLR (pt. 265) 260

STATUTES REFERRED TO

Criminal Procedure Law Cap 38 Laws of Rivers State 1999, ss. 286 and 287(1)

D

Constitution of the Federal Republic of Nigeria 1999 (as amended), s. 36(5)

Evidence Act 2011, s. 135(1)(2)

E

BOOKS REFERRED TO

Wills on Circumstantial Evidence [7th ed.] A. Okekeifere, p. 324

Circumstantial Evidence in Nigerian Law (Port Harcourt: Law-house Books 2000), p. 1

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LEAD JUDGMENT BY MUHAMMAD JSC

This is an appeal against the judgment of the Court of Appeal sitting at Port Harcourt, hereinafter referred to as the Lower Court, delivered on 21st March 2014, affirming appellant's conviction and sentence for the offences of conspiracy and murder by the Rivers State High Court, the trial Court, in the latter's judgment dated 6th June 2013. The brief and undisputed facts that brought about the appeal are hereinunder recounted.

G

Respondent's case remains that following an agreement arrived at a meeting in a hotel at Agudama Street, "D" line, Port Harcourt, the appellant and two others with whom he was tried as well as others at large, on 12th January 2007, murdered Chief

H

Dan Opusingi, Chief Okpara Brown, Chief Obaye Ojuka, Chief Telema Eferebo, Chief Anthony Opuari, Gbang Gbang Pere, Ibiemi Bobmanuel, Bode Faabere and Ezekiel Kumi. The deceased were travelling on a speed boat from Abonnema to Kula both within Akuku Toru Local Government Area in Rivers State. The agreement among the conspirators was reached on the 5th January, 2007.

To prove its case, the respondent called six witnesses and tendered Exhibits A, B, B1, C and C1, C17. Exhibit B is Appellant's extra judicial statement wherein he asserts being in Lagos at the time of the murder of the chiefs and totally denies being part of the agreement to and the murder of the deceased. Of the witnesses the prosecution called, PW5 was the only eye witness to the murder in respect of which the appellant and two others were tried two of whom stand convicted which conviction is affirmed by the Lower Court. PW5 made three extra judicial statement. Exhibit C6 on 13th January 2007, Exhibit C4 on 22nd January 2007 and Exhibit C5 on 28th January 2011. PW5 neither mentioned appellant's name in Exhibit C6 nor Exhibit C4. He did so only four years later in Exhibit C5.

In addition to appellant's testimony as DW4, three witnesses testified on his behalf. He tendered and relied on Exhibits D1- D16.

At the end of trial, including addresses of counsel, the Court held that the respondent had proved its case, convicted and sentenced the appellant and his co-conspirators as charged. Aggrieved, the appellant appealed to the Lower Court on nine grounds. The Court dismissed the appeal and affirmed the trial Court's decision.

Dissatisfied, the appellant has further appealed to this Court seeking the determination of his appeal on the basis of the four issues he distilled one of which being the most apposite and on the basis of which the appeal will be determined reads:-

(i) Was there any admissible evidence on record from which the Court below could have justifiably affirmed the trial Court's inference of conspiracy to commit murder by the appellant (ground

5).

In arguing the appeal, Wilcox Abereton, learned counsel for the appellant, submits that the answer raised by the issue is in the negative. Of all the six witnesses the respondent called to prove its case against the appellant, it is contended, Ibitoroko Dan, PW5, is the only eye witness to the events which constitute counts 2 to 9 in the charge. The testimony of the four police officers, being hearsay, remains worthless. The findings of the trial Court, which decision the Lower Court affirmed, at Pages 181, 182, 202 and 261, learned counsel submits, bear out appellant's contention. At pages 366 - 367 and 370 in particular, learned counsel further submits, the trial Court having found the entire evidence of PW5 unreliable, rejected same.

Exhibit B, appellant's extra judicial statement, learned counsel further argues, is a total denial of appellant's participation either in the conspiracy that led to or the actual murder of the deceased by the appellant and his co-conspirators. At page 376 of the record of appeal, learned counsel submits, is the trial Court's finding that at the end of the prosecution's case no direct evidence avails to warrant appellant's conviction and sentence. The trial Court, by the combined operation of Sections 286 and 287(1) of the Criminal Procedure Law, CAP 38, Laws of Rivers State 1999 and Section 36(5) of the 1999 Constitution as amended should have discharged and acquitted the appellant. Appellant's conviction in breach of these two provisions having occasioned miscarriage of justice, on the authorities, learned counsel concludes, warrants this Court's interference. It urged that the appeal accordingly be allowed.

Responding, learned counsel contends that there is sufficient lawful evidence to sustain appellant's conviction by the two Courts below. Appellant's opinion of the late Chief Dan Opusingi as contained in Exhibit B, appellant's extra judicial statement, it is further submitted, clearly gives out the appellant. The appellant feared the late Chief and would be re-assured with nothing short of eliminating the chief. He did not take kindly to his being forced on exile by the late chief. Appellant re-emerged from exile, it is

argued, only to exterminate the person he so hated along with others he considered a threat. The Lower Courts affirmation of the trial Courts inference of appellants participation in the murder of the chiefs, learned counsel contends, is justified in law. The trial Courts findings at pages 375 - 376 and the Lower Court's concurrence at pages 473 479, it is argued, cannot be faulted.

Insistent, learned counsel submits that outside the evidence of PW5 the trial Court rejected, the two Courts relied not only on Exhibit B, appellant's extra judicial statement, but further on Exhibit B1, C and C1 the confessional statements of his co-accused, along with the evidence of PW1. These pieces of evidence, it is submitted, clearly show the appellant to be in concert with his co-accused persons in the murder of their victims on 12-1-2007. The law, it is submitted, places a burden on the appellant to rebut such evidence led which conclusively points at him as being one of the perpetrators of the offences. None of the cases cited and relied upon by learned appellant counsel, it is further contended, absolves the appellant from that duty. His failure to provide the evidence in rebuttal justifies both Courts' reliance on the unchallenged evidence to convict him. The defence of alibi appellant sought to raise in Exhibit B was rightly rejected by the two Courts below. Having failed to show that the concurrent decisions of the two Courts are perverse, learned counsel concludes, the appeal must accordingly fail. He relies on *Ibodo v. Enarofia* (1980) 5 7 SC 42 and *Adeleke V. The State* (2014) ALL FWLR (Pt.722) 1552 at 1668. On the whole, learned counsel urges that the unmeritorious appeal be dismissed.

Appellant's contention in this appeal is that the Lower Court's affirmation of the trial Court's judgment which does not arise from credible admissible evidence is perverse. I agree with learned appellant's counsel that on the authorities, a Court's decision which does not arise from the evidence on record constitutes such miscarriage of justice that imposes on the appellate Court the duty to set same aside. If indeed the Lower Court has failed to set aside the trial Court's conviction and sen-

tence of the appellant which does not arise from any credible evidence, then this Court is entitled to step in and do the needful. See Rabiu v. The State (1980) 8 11 SC 85; Atolagbe v. Shorun (1985) 1 NWLR (Pt.2) 360; (1985) LPELR 592 (SC) and Williams v. The State (1992) 10 SCNJ 74.

The conviction and sentence of the appellant arises from a criminal trial. The onus of establishing his guilt beyond reasonable doubt lies on the respondent. The onus does not shift. If at the end of trial and on the whole evidence, the trial Court is left in a state of doubt, the respondent would have failed to discharge the burden the law puts on it thereby entitling the appellant to an acquittal. See Okputuobiode & Ors v. The State (1970) LPELR 2524 (SC) and Ogundiyin v. The State (1991) 3 NWLR (Pt.181) 519. What then are the crucial findings of the trial Court in relation to the evidence led by the respondent that the Lower Court affirmed? B

In the determination of appellant's guilt under count one of the information, conspiracy, the trial judge at page 354 of the record commendably started by reasoning thus:- D

"I find that by Exhibit B1 the 2nd accused person have admitted the role he played in the commission of the offence i.e. count 1 of the information and also incriminated the 1st and 3rd accused persons but Exhibit B1 cannot be used against the 1st and 3rd accused persons without more. This is because a voluntary confession is deemed admissible and relevant against the maker and not against another person....." (Underlining supplied for emphasis). F

The Court proceeded through page 355 of the record as follows:- G

"Leaving the 2nd accused person aside, I go to the 1st and 3rd accused persons. From the evidence adduced in this case, I find that while the 3rd accused person was the Chairman of Kula Youth Organization, the 1st accused was the organizing secretary. I also find as a fact that the 1st and 3rd accused persons were driven out of Kula Community and the 1st accused is one of those H

the 3rd accused referred to as his boys that were driven out of Kula Community as a result of the disagreement between the 3rd accused as the Chairman of Kula Youth Organization and the Kula Council of Chiefs headed by Chief Dan Opusingi. The 1st and 3rd accused persons, therefore had issues to settle with the Kula Council of Chiefs.

Even though, the 2nd accused person in Exhibit B1 and his evidence in Court denied that the 1st accused was present at the meeting of 5th January, 2007, the conduct of the 1st accused after 12th January, 2007 as revealed in his evidence in Exhibit B and his evidence in Court portray him as someone who was not only privy to the meeting but was aware of the plan to carry out the dastardly act of murder on 12th of January, 2007. The 3rd accused in Exhibit 'C' and 'C1' demonstrated being the Leader of the boys who carried out the dastardly act on 12th January, 2007. I do not believe the evidence of the 1st and 3rd accused person denying count 1 of the information." (Underlining supplied for emphasis).

And concluded at page 357 of the record thus:-

"I must say that although proof of the offence of conspiracy is generally a matter of inference to be deduced from the criminal acts and omissions of the conspirators, in the instant case, from the totality of the evidence adduced, there exists not only evidence from which this Court can infer the offence of conspiracy but also evidence in positive proof of same. For example, Exhibits 'B', 'C', 'C1' and 'C2' as well as the conduct of the 1st accused in wanting to run to the 3rd accused camp near Idama in Abonnema and also 3rd accused person avoiding police arrest from January, 2007 until January, 2011.... Consequently, I hold that prosecution has proved count 1 of the information against each of the accused persons." (Underlining supplied for emphasis).

On counts 2 - 9 of the information, the trial Court at page 366 of the record found in relation to the evidence of PW5, the only eye witness to the commission of the offences, as follows:-

"In Exhibit 'C4', while PW5 mentioned the names of 2nd and 3rd accused persons and some others at large, he did not

mention the name of the 1st accused person as one of those who attacked their boat on the 12th January 2007 but in his evidence in Court he mentioned his name... the fact this is a criminal trial where the prosecution is to prove the case against each of the accused persons beyond reasonable doubt makes the submission of the learned counsel for the 1st accused person that since PW5^B did not mention the name of the 1st accused in Exhibit 'C4' but mentioned it in his evidence in Court, this Court cannot rely on PW5's evidence implicating the 1st accused person is potent (sic) and I agree with him. This is more so when the said submission is^C viewed against the evidence of PW5 under cross-examination that he knows the 1st accused person very well and anywhere he sees him, he would know him.... By the authorities of Abudu V. State (supra) and Bassey & ors V. The State (2003) FWLR (Pt 164) 292 at 310-311, the evidence of PW5 an eye witness, implicating the 1st accused person is rendered unreliable and this Court cannot act on it against the 1st accused." (Underlining supplied for emphasis).^D

Notwithstanding the foregoing, the trial Court held in relation to the 2nd to 10th counts at pages 376 - 377 as follows:-^E

"Even if there is no positive evidence from any of the prosecution witnesses since P.W.5 evidence implicating the 1st accused was rejected establishing that the 1st accused was seen on the 12th day of January, 2007 committing the crime for which he was^F charged to Court, but from my findings while considering count 1 of the information on the alibi pleaded by the 1st accused, I cannot but hold that the 1st accused was privy to the plan to kill Chief Opusingi and therefore by the provision of Section 8 of the Criminal Code Law (supra) he cannot escape the consequences of what^G happened on 12th January, 2007..., I hold that the prosecution has proved that the accused persons committed this heinous crime of murder beyond reasonable doubt.

In the final analysis, I find each of the accused persons^H guilty in count 1 and in counts 2 to 9 of the information." (Underlining supplied for emphasis).

In affirming the trial Court's foregoing findings, the Lower

Court at page 478 - 479 of the record concluded as follows:-

B *“The trial Court by circumstantial evidence found that the Appellant was among those who caused the death of the deceased... They i.e. the Appellant and the two other convicts all nursed a common purpose i.e. to eliminate Chief Dan Opusingi their common foe tormentor and oppressor according to them. The learned trial Court found that the weapon of choice i.e, firing guns at the deceased human beings was an act the probable consequence of which is death. This is in cognizance with the decision in Akpan v. State (1994) 9 N.W.L.R. Part 368 pages 347 at 362 paragraph D.*
C *The findings of the leaned trial judge on the circumstantial evidence are cogent and point irresistibly to the fact that the Appellant was privy to the plan to kill Chief Dan Opusingi. The findings are not perverse and this Court has no cause to reverse it.”*
D (Underlining supplied for emphasis).

It is evident from the foregoing findings of both Courts that appellant’s conviction and sentence proceeded on the basis of circumstantial evidence. Circumstantial evidence is very often the best evidence. It is evidence of a combination of circumstances against an accused person, none of which, on its own, provides the Court with cogent proof of guilt but when viewed together create strong conclusion of his guilt with the highest degree of exactitude. See Isong Akpan Udoebre & ors v. The State (2001) 8 SCM 127, Joseph Ilori & anor v. The State (1980) 8-11 SC 52 and Moses Jua V. The State (2010) 1-2 SC 96. **In a number of its decisions, this Court has insisted that only such circumstances that make a complete and unbroken chain constituting sufficient proof that the accused person did commit the offence for which he is charged will sustain a conviction.** See Ofe Adesina (A.K.A. Alhaji) & anor V. The State (2012) 6 SC (Pt.III) 114.
G

H In the case at hand, the two Courts relied on appellant’s animosity with, nay hatred for, the late Chief Opusingi whom, from Exhibit B1, C1 and C2, the extra judicial statements of the 2nd and 3rd accused persons respectively, is shown to be the leader of

the rival union that sent the appellant on exile. On return from exile and given this circumstance, the trial Court held, the appellant would settle for nothing short of the murder of the deceased chief and his associates. This conclusion is arrived at in spite of the aspect of Exhibit B1 which absolves the appellant from being privy to the agreement arrived at on 5th December 2007 in a hotel at Aguduna Street 'D' line Port Harcourt by the conspirators which agreement led to the murder of the chiefs. Appellant's alibi in Exhibit B the trial Court adjudged untenable and his demeanour in the course of testifying provide the Court the further irresistible circumstance of inferring that the appellant was a party to the conspiracy and eventual murder of the deceased. B C

These circumstances cannot form the basis of the inference the trial Court made as to appellant's guilt. Appellant's alibi comes into issue only when a prima facie case is made out against him by the respondent in respect of the offences he is charged. There is, as shown in the passages of the trial Court's judgment earlier reproduced herein, no evidence whatsoever outside the evidence of PW5 linking the appellant either with the conspiracy or the murder both Courts convicted him for. The finding of the trial Court that PW5's evidence is unreliable renders same unavailing. That finding has not been appealed against. It still persists. D E

At best, therefore, the circumstances the two Courts found cogent and unequivocal enough to warrant the inference of appellant's guilt are very remote basis for suspicion. No matter how pointing the suspicion is, it does not constitute proof of the appellant's guilt. Thus in the absence of any evidence linking the appellant with the two offences, the Lower Court's affirmation of his conviction, learned appellant counsel is right, is perverse. Notwithstanding that the two Courts are concurrent in their findings as to appellant's guilt their findings which are not borne by the evidence on record cannot endure. Not being maintainable, the findings are hereby set aside. The appeal succeeds. The appellant is discharged and acquitted. F G H

RHODES-VIVOUR JSC

I read in draft a copy of the leading judgment prepared by my learned brother, M.D. Muhammad, JSC, and I agree with his lordship that the appellant should be acquitted on the counts and discharged from Court.

It has been said in a plethora of cases that this Court would rarely disturb or upset concurrent findings of the two Courts below except there are exceptional circumstances such as the findings are perverse, there is miscarriage of justice or violation of some principle of law or procedure. See *Daniel Holding Ltd. v UBA PLC* (2005) 13 NWLR (Pt.943) P.533, *Solola v State* (2005) 11 NWLR (Pt.937) p.460.

This, without doubt is one of the rare cases in which this Court would quickly set aside concurrent findings of fact which have been found to be perverse.

The evidence against the appellant is circumstantial. PW5 is the only eyewitness. He made three extra judicial statements to the Police investigating these multiple murders. His statements were made on 13/7/2007 - Exhibit C6. On 22/1/2007 - Exhibit C4. On 28/7/2007 - Exhibit C5.

On page 222 of the Record of Appeal PW5 said:

"I know the 1st accused person very well. Anywhere I see the 1st accused I will know him..."

The 1st accused person is the appellant. PW5 made Exhibit C4 on 22/1/2007, that is within two weeks after the murders were committed when the events should be fresh in his memory, yet he claimed to know the appellant very well but failed to say in his statement that the appellant was one of the murderers, but four years later when he wrote his third statement on 28/1/2011, Exhibit C5, he mentioned the name of the appellant as one of those who murdered the Chiefs. There can be no doubt that the memory of healthy people fade with time. A witness who could not remember the appellant as one of those who, according to him was involved in the murders very soon after the murders but remembers that the appellant committed the murders four years after the mur-

der is clearly unreliable. Indeed the learned trial judge did find that PW5 evidence was unreliable.

In view of the fact that PW5, the only eyewitness evidence is unreliable and there is no other evidence linking the appellant with the conspiracy and Murders, the appellant is entitled to an acquittal. B

It is for these reasons and those given in the leading judgment that I too, allow this appeal. The appellant is acquitted and discharged.

C

OGUNBIYI JSC

I have had the privilege of reading in draft the lead judgment of my learned brother Hon. Justice Dattijo Muhammad, JSC. I agree that the appeal has merit and should be allowed. D

For purpose of making my brief contribution to the judgment, which is very well written, I would seek to reproduce the issue *which is at the centre of this appeal as follows:-*

“Was there any admissible evidence on record from which the Court below could have justifiably affirmed the trial Court’s inference of conspiracy to commit murder by the appellant.” E

The law is trite and well settled that in a Criminal trial, the prosecution has a duty to prove its case against an accused person beyond reasonable doubt. See the case of Abirifon v. State F (2013) 9 SCM page 1 at 5.

Specifically and in a charge of murder for instance, the prosecution is saddled with the burden of establishing the following ingredients, which must all Co-exist:- G

- a). that the deceased died
- b). that the death of the deceased was caused by the accused.
- c). that the accused person intended to either kill the victim or cause him grievous bodily harm. H

See case of Njokwu v. The State (2013) 2 SCM page 177 at 180.

It is also a settled principle of law that the guilt of an ac-

cused person may be proved by any or all of the following ways:-

- a). confessional statement of the accused;
- b). circumstantial evidence and
- c). evidence of an eye witness

B In the case at hand, the prosecution relied heavily on their witness PW5. For the witness's evidence to support and sustain the conviction of the appellant, it must be credible, reliable and points irresistibly to no one else but the accused/appellant. In the event of any doubt being entertained in the trial of an accused C person, the doubt is resolved always in favour of the accused. This is obvious in view of our Constitutional provision which cherishes and guarantees the presumption of innocence until proved guilty.

D It is obvious from the record of appeal that PW5 was the only eye witness to the commission of the offences. The said witness's statement was admitted as Exhibit C4. Therein the statement, while the names of accused persons in particular 2nd, 3rd and some others at large were mentioned among those who attached their (PW5's) boat on the fateful day, there was no mention E of the 1st accused/appellant in Exhibit 'C4', except however in the PW5's evidence in Court at the trial. The learned trial Court in its wisdom did not waste time in refusing to rely on PW5's evidence which tended to implicate the 1st accused/appellant.

F It is also imperative and revealing to state further that with the level of familiarity claimed by PW5 of the appellant, his name would not have been left out easily by PW5 if he was truly one of their attackers.

G It is intriguing, that despite the findings and conclusions arrived at by the trial judge in exonerating the 1st accused/appellant from counts 2 - 9 of the charge, His Lordship however held a contrary view in respect of the 1st count. In other words, the trial Court did hold that the appellant was privy to the plan and conspiracy to kill Chief Opusingi and was therefore adjudged culpable. H

The Lower Court endorsed the judgment of the trial Court which it held was decided based on circumstantial evidence.

This is what the Lower Court had to say for instance at

pages 478 - 479:

“The trial Court by circumstantial evidence found that the appellant was among those who caused the death of the deceased

They i.e. the appellant and the two other convicts all nursed a common purpose i.e. to eliminate Chief Dan Opusingi their common foe tormentor and oppressor according to them. B

The findings of the learned trial judge on the circumstantial evidence are cogent and point irresistibly to the fact that the appellant was privy to the plan to kill Chief Dan Opusingi.

The findings are not perverse and this Court has no cause to reverse it.” C

For all intents and purposes, from the community reading of the evidence given by PW5 and relying also on his extra judicial statement to the police, admitted as Exhibit C4, the circumstantial evidence concept applied by the learned trial judge to convict the appellant and which was also endorsed by the justices of the Lower Court, was without any legal basis. D

In my view, the conviction at best, was bordered on mere suspicion, which no matter how strong, cannot constitute a crime or ground a conviction. See the case of *Alake v. State* (1992) 9 NWLR (Pt.265) 260 at 272. E

As rightly submitted by the learned counsel for the appellant, the Court below was in grievous error when it affirmed the trial Court’s conviction of the appellant for murder, when there was no evidence on record linking him (appellant) with the alleged killing. The appellant did not in his statement to the police (Exhibit B) confess to the crimes alleged. The witness PW5 was from the same Kula Community but he did not name the appellant in his statement, Exhibit C4. F G

The evidence of PW5, an eye witness, implicating the 1st accused/appellant was rendered unreliable. Therefore, the trial Court should not have acted on same against the 1st accused person. H

At page 366 - 367 of the record of appeal for instance, this was what the trial Court said:-

“PW5 did not in his evidence offer any explanation as to

why he could not mention the name of the 1st accused person in Exhibit 'C4' which he made almost nine days after the alleged commission of the offence....

The evidence of PW5, an eye witness, implicating the 1st accused person is rendered unreliable and this Court cannot act on it against the 1st accused person."

It is relevant to say that there was no appeal against the said findings (supra).

Also at page 376 the trial Court further said:-

"....there is no positive evidence from any of the prosecution witnesses establishing that the 1st accused was seen on the day of committing the crime...."

It is intriguing that despite the findings by the trial Court supra, it nevertheless proceeded to convict the appellant of murder. The conviction was affirmed by the Lower Court. This is regardless of the constitutional provision, that an accused person is presumed innocent until he is proven guilty.

As rightly submitted by the appellant's counsel, at the close of the prosecution's case on the totality of the witness PW5 and his statement Exhibit C4, a prima facie case was not made out against the appellant to warrant his being called upon to defend. At that point in time, it was incumbent on the Court, suo motu, even without the appellant's application, to have invoked SS 286 and 287 (1) of the Criminal Procedure Law, Cap 38, Laws of Rivers State, 1999 to have discharged the appellant.

The failure of the trial Court in taking that step in the instant case had occasioned a violation of the fundamental right as guaranteed him by Section 36(5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

See the case of Okoro v. State (1988) 3 NSCC (Pt.II) Vol. P.275 at 295 - 6.

With the seeming oversight by the trial Court, the duty was on the Lower Court to have corrected the mistake. The general burden was on the Prosecution to prove the accused's guilt. The onus never shifts see Section 135 (1) and (2) of the Evidence Act, 2011. The failure of the trial Court to discharge the appellant was

tantamount to placing upon him the onus of establishing his innocence. This the trial judge projected when at page 375 of the record he said:-

“... the 1st accused failed to establish where he was at the material time of the commission of the offence....”

The findings by the trial Court was upheld by lower court erroneously. B

This Court has held times without number that a conviction must be founded on evidence establishing the guilt of the accused beyond reasonable doubt. See I. T. Muhammad, JSC in the case of *The People of Lagos State v. Umaru* (2014) 7 NWLR (Pt.1407) 584 at 606. See also *Arabambi v. Advance Beverages Ltd.* (2005) 19 NWLR (Pt.959) 1 at 28. C

The law is again firmly established that findings of fact must be based on admissible evidence (oral or documentary). Where it is however otherwise and based on inadmissible evidence, the finding will be held as perverse and the law enjoins an appellate Court to interfere therewith and set it aside. See *Olayinka v. State* (2007) 9 NWLR (Pt.1040) 561 at 578, where it was held that a decision is perverse where: D

- i). It is speculative and not based on any evidence or
- ii). the Court took into account matters which it ought not to have taken into account; or
- iii). the Court has ignored the obvious. F

See again *Umah v. Akpabio* (2014) 7 NWLR (Pt.1407) 472 at 488.

In the case at hand, as rightly submitted by the appellant's counsel, the prosecution was unable to produce any evidence that linked the appellant with the death of the deceased Chiefs. G

Neither PW5 nor any other witness singled out the appellant by name or description as having participated in murder of the chiefs.

In the circumstance, I hold the firm view that the Court below was wrong to have affirmed the conviction and sentence of death on the appellant. There was no basis for that conclusion whatsoever. This is unfortunate indeed. The issue is hereby re- H

solved in favour of the appellant.

With the few words of mine and taking into consideration the totality of all the issues and conclusion arrived at by my learned brother, Dattijo Muhammad, JSC, I adopt the totality of his judgment which is well considered, as mine.

B In the same vein therefore, I also set aside the concurrent findings by the two Lower Courts as perverse. The appeal has merit and I allow same in terms of the leading judgment. The findings of the two Lower Courts are hereby set aside, the appeal succeeds and the appellant is acquitted and discharged forthwith.

NWEZE JSC

D I had the advantage of reading the draft of the leading judgment which my Lord, M. D. Muhammad, JSC, just delivered now. I endorse the conclusion that, being meritorious, this appeal ought to be allowed.

E This short contribution is limited only to an elaboration of the point made in the said leading judgment that only such circumstances that make a complete and unbroken chain, constituting sufficient proof that an accused person committed the offence for which he is charged, that would sustain a conviction.

F From an intimate reading of the findings of the Courts below, I am left in no doubt that the appellant's conviction and sentence eventuated from the said Courts' sustenance of what was, actually, a remote evidence of circumstances only.

G My Lords, it is true, indeed, that the category of evidence known as circumstantial evidence, which is, more often than not, the best evidence, *Obosi v State* (1965) NMLR 119; *Ukorah v State* [1977] 4 SC 167; *Lori v. State* (1980) NSCC 269; *Onah v State* [1985] 3 NWLR (Pt.12) 236; *Ebenehi v State* [2009] All FWLR (Pt.486) 1825, 1832-1833; *Ijiofor v State* [2001] 9 NWLR H (Pt.718) 371, 385, is the evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics, *Ijiofor v State* (supra) 385.

The reason is not far-fetched. In their aggregate content, such circumstances lead cogently, strongly and unequivocally to the conclusion that the act, conduct or omission of the accused person caused the death of the deceased person, *Idiok v State* [2008] All FWLR (Pt.421) 797, 818.

Put, simply, it means that there are circumstances which are accepted so as to make a complete and unbroken chain of evidence, *Omotola and Ors v. State* [2009] 7 NWLR (Pt.1139) 148, 178; (2009) LPELR -2663 (SC) 42-43. Where such circumstances are established to the satisfaction of the Court, they may be properly acted upon, *Wills on Circumstantial Evidence* [Seventh edition] A. Okekeifere 324, *Circumstantial Evidence in Nigerian Law* (Port Harcourt: Law-house Books, 2000) 1; *Omotola v. State* (supra) 178.

Thus, where there is no eye witness account or direct evidence of the commission of an offence, a conviction may be based on circumstantial evidence, *Igbale v State* [2004] 15 NWLR (Pt.896) 314. However, such circumstantial evidence must point to only one conclusion, namely, that the offence had been committed and that it was the accused person who committed it, *Dick v C. O. P.* [2009] 9 NWLR (pt 1147) 530, 551.

However, there is a snag here. For the purpose of drawing an inference of an accused persons guilt from circumstantial evidence, there must not be other co-existing circumstances which would weaken or destroy that inference, *Igbo v State* [1978] 3 SC 87; *State v Edobor* [1975] 9-11 SC 69. Thus, all other factors and surrounding circumstances must be, carefully considered for they may be enough to adversely affect the inference of guilt, *Lori v. State* [1980] 8-11 SC 81; *Udedibia v. State* (1976) 11 SC 133; *Aigbadion v. State* (2000) 7 NWLR (Pt.666) 686.

The explanation for this need for circumspection is simple: evidence that falls within this category may be fabricated to cast aspersion on other people, per Lord Normand in *R v. Tepper* (1952) 480, 489 approvingly adopted in *State v. Edobor* (1975) 9 11 SC 69, 77. That is why a Court must, properly appraise the circumstantial evidence adduced by the Prosecution before conviction

and accused person thereon, *Adepelu v. State* (1998) 9 NWLR (Pt.565) 185; *Iko v. State* (2001) FWLR (Pt.68) 1161; (2001) 14 NWLR (Pt.732) 221; *Orji v. State* (2008) All FWLR (Pt.422) 1093, 1107.

B It must be noted, however, that there is no yardstick by which any circumstantial evidence can be measured before a conviction can be entered against an accused person. Thus, each case depends on its own facts. However, one test which such evidence must satisfy is that it should lead to the guilt of the accused person C and leave no degree to possibility or chance that other persons could have been responsible for the commission of the offence, *Ijiofor v. State* (supra) 385; *Ebenehi v. State* (supra) 1832.

D This is where the Courts below erred. As pointed out in the leading judgment, the circumstances which the Lower Courts adjudged to be cogent and un-equivocal were, actually, remote.

It is for these, and the more detailed, reasons in the said leading judgment that I, too, shall set aside the concurrent findings of the Lower Courts. I, therefore, enter an order allowing this appeal. E The appellant is, accordingly, acquitted and discharged.

SANUSI JSC

F I had the advantage of reading before now, the judgment just delivered by my learned brother M. D. Muhammad JSC. I am at one with the reasoning and conclusion arrived at that this appeal is meritorious and ought to be allowed. It is also accordingly allowed by me. I have nothing useful to add except to abide by the G consequential orders made in the lead Judgment. Appeal allowed.

H