IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA
BEFORE HIS LORDSHIP: HON. JUSTICE A.S. UMAR
DELIVERED ON 1ST DAY OF JUNE, 2018
CHARGE NO: FCT/HC/CR/2/2011

BETWEEN

FEDERAL REPUBLIC OF NIGERIA - COMPLAINANT

AND

DAVID TOMBRA - DEFENDANT

JUDGEMENT

The defendant is charged before this court on one count of culpable homicide punishable with death, which reads as thus:

> **"That you Tombra David "m" 20 years of no fixed address on the 29/07/11 at about 2300hrs at Road 67, House 14 Gwarinpa Estate, Abuja, within the Abuja Judicial Division committed culpable homicide punishable with death in that you caused death of one Miss Barbara Ann "f" of Road 67, House 14, Gwarinpa Estate, Abuja by stabbing her on the neck with a knife, with the intention of causing her death or with the knowledge that her death would be the probable consequence of your act. You thereby committed an offence contrary to section 220(a) and punishable under section 221 of the Penal Code Law"**

The defendant was arraigned on the 7th day of November 2011. He pleaded not guilty to the one count charge necessitating the prosecution to open its case against the defendant. In an effort to

prove the charge the prosecution called a total of 6 witnesses and tendered documents marked as Exhibits AA1-AA3, Exhibit AA4[1-8], Exhibit AA5, AA6 & AA7[A&B] (pen knife, palm sandals and two Nokia handsets) and Exhibits AA8. Whereas the defense called 2 witnesses i.e.; mother of defendant and one other and thereafter closed his case.

At the close of trial, the defense filed their final written address and formulated the following issue for the determination in the case thus:

> **"WHETHER THE PROSECUTION HAS PROVED BEYOND REASONABLE DOUBT, IT'S CASE AGAINST THE DEFENDANT THAT HE KILLED THE DECEASED"**

Learned counsel for defense **C.C Ogbonna Esq.** on the lone issue contended that for the prosecution to succeed on the charge, it must prove all the ingredients of the offence as contained in section 221 of the Penal Code which ingredients must co-exist, none missing. He itemized the elements as thus:

a. That the deceased had died.
b. That the death of the deceased had resulted from the act of the Defendant.
c. That the act or omission of the Defendant which caused the death of the deceased was intentional with the knowledge that death or grievous bodily harm was its probable consequence.

Arguing on the issue he relied on the case of **OGBLO V STATE (2015 13 NWLR PT 1477 PG 570 @ 598 PARA B-D.** He submitted that the burden placed on the prosecution does not shift until all the elements of the offence are proved against the defendant and that the three ingredients must co-exist; for where one of them is either absent or tainted with a doubt, then the charge is said not to be proved. He cited **ALI V STATE (2015) 10 NWLR PT 1466 P9 1 @23 TO 24.**

Counsel went to criticize the evidence of the PW1 who is the Investigation Police Officer (IPO). He contended that his evidence is mainly a narration of how the defendant was arrested in Port Harcourt and brought back to Abuja and how he took the two statements from the accused and took statement from the witness; and the fact that an autopsy was conducted on the deceased body. That he gave the exhibits to the exhibit keeper.

Counsel outlined the answers elicited from the cross examination of the witness which shall also be incorporated in the course of this judgment.

Further, counsel submitted that whatever the PW1 claimed the security man told him amounted to hearsay and there was no attempt to investigate the claims of the security man as to its veracity. He argued that the IPO should have warned himself of the danger of relying solely on the claims of the security in coming to the conclusion that the defendant was the culprit, since he could be a tainted witness.

On the evidence of PW3, he contended that he was inconsistent in his narration of what transpired on that day because why he insisted that he was always sitting outside the gate of the house that day, yet from the testimony of PW2, he can conclude that he was not at his duty post when he, the PW2 arrived. Stressing on this issue, counsel said PW3 continued to claim that he was available throughout the day in question yet he admitted that at a time he went to Mosque and also went to eat. Yet he insisted that nobody could have entered the compound except the defendant.

Further to this line of thought, counsel argued that in another breath, PW3 said he was outside with the defendant when he was washing the deceased car when he heard a noise inside the deceased house, then he repudiated and said the defendant was inside the

deceased house when he heard the noise. He asked; what will this court believe-that he was outside with the defendant or that the defendant was inside with the deceased when the noise was heard. He urged the court to treat the PW3 as a tainted witness. He cited **ADETOLA V STATE (1992) 4 NWLR (PT 235) PG 267, YOHANNA V STATE (2005) 1NCC PG 108, ISHOLA V STATE (1978) 9-10 SC @ 100, R V OMISADE (1964) NMLR 67 @ 99.**

He submitted that the testimony of PW3 is not to be relied upon because throughout he was laboring to cover up the facts that he was not diligent with his duties because under cross-examination, he admitted there were occasions when he was not on his duty post like when he went to pray and when he went out to find food, yet he insisted he was in a position to know when somebody else entered the deceased house. Yet he did not see PW2 when he entered the said apartment and indeed discovered that the deceased had been murdered.

Counsel posited that there is nothing in the testimonies of the witness that can prove that it was the unlawful act or omission of the defendant which caused the death of the deceased. He submitted that the prosecution's evidence has been discredited under cross examination, in that the PW3 clearly was not a witness of truth; he was a tainted witness who had issues to cover up and that the testimony of PW1 was also not a proof of culpability of the defendant. He urged the court to discountenance the evidence of PW1.

He submitted that generally speaking, the guilt of an accused can be proved by;

(a) The confessional statement of an accused
(b) Circumstantial evidence and
(c) Evidence of eye witness account of the crime.

He cited section 27 of the Evidence Act, case of **Haruna V AG Federation (2012) 9 NWLR PT 1306 P419 P445 paras C-F.** And submitted that the statement of the defendant does not amount to a confession and that cannot be a basis for conviction of the defendant. He cited **OKANLAWON V STATE (2015) 17 NWLR PT 1489 PG 445.**

Counsel went further to expound on circumstantial evidence and to argue that before a piece of evidence can be used on circumstantial evidence, such evidence must not fall short of the standard required by law, that is; prosecution must prove beyond reasonable doubt that such evidence points only to the guilt of the defendant. He relied on **Abike V State (1975) 9-11 SC P. 97, @ P 105,** to contend that for a trial court to convict an accused on circumstantial evidence such evidence must lead conclusively and indisputably to the guilt of the accused person. He cited **State V Edebor (1975) 9-11 SC P. 69.**

He submitted that on the 14th December, 2017, the defendant opened his defense. He called two witnesses vis; DW1 Mrs. Preye Dorcas Ekpebu who is the mother of the defendant and the DW2, Mr. Ejiofo Chidike an agronomist, who was next door neighbor to the deceased, Mrs. Barbara Ann. Counsel reproduced the testimony of the said witnesses and examination in chief answers to question put by defense counsel.

To further highlight on the above argument, counsel posed question thus: who is Aniete? He submitted that his name appeared like a recurring decimal in the testimonies of PW1, DW1 and DW2. He posited that he seems to be a clever gigolo who was stringing two friends, the deceased and DW1 (mother of the defendant) along. He submitted that when the deceased disclosed his duplicity to her friend the DW1, he got angry and threatened to deal with her. He stated that a policeman also revealed to the DW1 that the same

Anietie was the architect of her problems because he was the one that told them the defendant was the person that killed the deceased and; that DW2 also made unequivocal testimony about the same Aniete and told the police he would be willing to come to the station and make statement whenever required, but never came again.

He argued that if the police had done thorough investigation of this matter, this defendant would not have gone through the trauma he had been subjected to due to the incompetence of the police. He cited the case of **ONONUJU V STATE (2014) 8 NWLR PT 1409 PG 345** to submit that it is trite law that the prosecution must present credible and cogent evidence to establish its case to secure conviction. This they have abysmally failed to accomplish. He referred to **OMOYELE V STATE (2014) 3 NWLR PT 1394.**

Restating the testimony of DW2, learned counsel submitted that the truthful evidence of DW2 was not destroyed by cross examination in that he maintained his lucidity and candor and was the most truthful witness throughout. He argued that failure of the prosecution to debunk the DW2 testimony that a man named Aniete was in Barbara's room and was engaged in a quarrel with her and that he never saw the defendant enter Barbara's room but was rather still washing her car as at the time the quarrel was ongoing renders the prosecution's case against the defendant very doubtful.

Counsel submitted that the evidence of DW1 that the Commissioner of Police told her that her son was innocent and not the culprit they were looking for and; that he had ordered his release was not debunked by the prosecution. She further gave evidence of how they were taken back to SARS and the frustrations they were subjected to because she could not raise One Hundred Thousand Naira (N100, 000.00) bribe. He stated that this same witness, DW1 narrated how police seized her ATM card in Port Harcourt and

extorted the sum of Fifty Thousand Naira (N50, 000.00) from her, clearly cast serious doubt on the motive of the police.

In conclusion, counsel submitted that by provision of section 36 (5) of the 1999 Constitution of Federal Republic of Nigeria, the defendant is presumed innocent until the contrary is proved by the prosecution and that section 138 and 139 of the Evidence Act place the burden of proving the offence charged on the prosecution beyond reasonable doubt. This burden does not shift. There is no doubt that someone was killed. What the prosecution must prove is that it was the defendant that did it. He contended that the prosecution has woefully failed to do this. He wondered and posed some rhetorical questions thus; why police did not carry out a forensic analysis of Exhibit AA5 (knife) to determine whose fingerprint was on it? Why did the police not take the finger prints of the three suspects they claimed they arrested? Yet they claimed Exhibit AA5 was the murder weapon when Exhibit AA6 they claimed belonged to the killer of the deceased. Would they not have had a strong case against the defendant if they had even asked him to wear the shoe? But they didn't even know the size of the shoe or the foot size of the defendant. That if police had investigated Mr. Anietie thoroughly may be the truth of what happened to Ms. Barbara would have become known. He submitted that the failure to establish forensic evidence of the fingerprints of the defendant on Exhibit AA5 is fatal to the prosecution's case.

In the end, counsel urged the court to discharge and acquit the defendant.

The prosecution's Counsel, A.B Mamman Esq. in response filed a 4 paragraph final written address dated the 13th day of April, 2018. He raised sole issue for determination in this case as thus:

WHETHER THE PROSECUTION HAS PROVED ITS CASE BEYOND REASONABLE DOUBT TO WARRANT THE CONVICTION OF THE DEFENDANT?

On this lone issue prosecution counsel submitted that the prosecution has proved its case beyond reasonable doubt. He contended that our adversarial criminal justice system is accusatorial, this is so because section 36 (5) of the Constitution of Federal Republic of Nigeria, 1999 as amended provides every accused person charged with a criminal offence shall be presumed innocent until he or she is proven guilty; also consistent with this cardinal principle of law that the commission of crime by a defendant must be proved beyond reasonable doubt. He cited section 135 of Evidence Act, 2011 which placed the burden in criminal cases on the prosecution.

He submitted that the prosecution is conscious of the onus of proof provided by the law in order to secure conviction against the defendant for offence charged. **He cited SOLÒMON ADEKUNLE vs THE STATE (2006) II CIPR.**

He argued that the prosecution is not required to prove an accused person's motive because the law is that a person intends the natural consequence of his conduct. He cited **ADAMU V KANO N.A (1995) FFSC 25 1 SCNLR 65. GIRA V STATE (1996) 4 NWLR PT 443, EMEKA VS THE STATE (2001) FELR (PT 66) 6&2.**

He finally urged the court to convict the defendant as charged.

I have gone through the prosecution's case; watched the demeanor of witnesses called to establish the charge against the defendant and the defence witnesses, the materials tendered and admitted in proof of the charge. To my mind, the sole issue that would suffice in this case is as thus:

WHETHER THE PROSECUTION HAS PROVED HIS CASE AGAINST THE DEFENDANT BEYOND REASONABLE DOUBT AS REQUIRED BY LAW?

I have also considered the Defendant's adumbration submission dated 18-04-18.

Before proceeding, it is pertinent to give a background summary of the prosecution's case as garnered from the testimonies of its witnesses thus;

The allegation against the defendant is that he murdered one Ms. Barbara herein referred to as the "Deceased" in her house situate at Road 67, House 14, Gwarnipa Estate, Abuja, by stabbing her on the neck with a knife on the 29/7/11.

Prosecution witness No. 1 ASP Clifford Agboji told the court that he knows the defendant as Tombra David who was transferred to him from Life Camp Police station in 2011 as a murder suspect in a homicide case involving one Ms. Anna Barbara, a 52 year old woman. He said the detectives led by ASP Emenike left for Port Harcourt where they arrested the defendant and he interrogated the suspect. He told the court that autopsy was carried out on the body of the deceased and the exhibit knife was registered with their exhibit keeper. He recorded the statement from the suspect and visited the scene twice. He said the deceased was sighted with the defendant at different occasions on that day, when; they went together to buy recharge card and when they returned from the market. He said the security man sighted the defendant while he was washing the deceased car.

After washing the car, he went inside and joined the deceased in her apartment. During this period, there was nobody entering the said house except the defendant who was sighted running out from the same compound barefooted and was also seen entering Keke Napep. Few minutes later, a friend of the defendant came in looking

for the deceased. For clarity, the testimony of this witness covers that of the PW2 who is the friend to the deceased that saw the deceased's body lying lifeless in blood pool.

According to Prosecution witness No. 3, Shehu Aliu (security guard); he said that on the said day, the defendant came to their area and asked him to lend him (defendant) some money so that when his madam (deceased) returns he will pay him. When his madam returned; she and the defendant went to market and came back around 5:00 clock; they entered into the house and the defendant brought water and started washing the car. Then he started hearing some noise, shouting inside the house. The defendant came out and started running; there was no shoe on his leg and he was holding a bag. Then a friend of the deceased came and saw her vehicle outside and asked him who was the owner of the vehicle parked there, he pointed at the deceased house and he entered the house. The man saw a person lying down in the compound; he came out and called him that he saw somebody lying down. He asked him; is there any police station nearby and he showed the police station. He reported to police station.

At this juncture, I wish to state that in the course of trial on 17/2/14, the above statement of the PW3 was duly rejected in evidence having not passed through the test of admissibility. The court was left with his oral testimony given in the course of the trial.

Continuing, PW4 Inspector Godfrey Agia; he told the court that on 29/7/2011, while on duty at Gwarinpa Police station, one Uchenna Ubike reported a case that he visited his friend (deceased), that while he was in the compound he found a person lying dead in the compound. The case was referred to him for investigation. He went to the scene of crime with the complainant. On entering the compound he saw the lifeless body of the deceased with pool of blood. By the side he saw a stained knife. They proceeded to the

room and by the door there was palm sandal and handset of the deceased recovered as exhibits. Thereafter the corpse was moved to Wuse General Hospital where it was deposited for autopsy. On conclusion of his preliminary investigation, the case was transferred to state CID for further investigation.

Before proceeding further let me reiterate and affirm the position of the law that in criminal trial, the Prosecution must prove the case against an accused person beyond all reasonable doubt. This is the standard requirement under section 138 of the Evidence Act and the burden of proof is always on the prosecution and it never shifts. See also **Elizabeth v The State (1991) 4 SCNJ 44; Mallam Zakari Ahmed v The state (1999) 5 Sc (pt 11)39, UZOKA v. FRN (2009) LPELR-4950(CA)**

With respect to the present charge, the ingredients necessary to sustain the charge of culpable homicide punishable by death under the penal code law are:

1. The death of the deceased
2. The death resulted from the act of the defendant
3. That the defendant caused the death of the deceased intentionally or with knowledge that death or grievous bodily harm was its probable consequence.

See Nyam and ors. v. The State (1964) 1 All NLR 361.

The first ingredient to prove that there was death of a human being. Thus; Exhibits AA 4^{1-8} are photographs showing the lifeless body of the deceased which were admitted in evidence on 01/07/2014. The documents are corroborated by Exhibit AA8 which is the medical report that certifies that one Ms. Barbara was killed. These material evidence coupled with the testimonies of witnesses point to one fact ie; that there was killing of a human being. The other two ingredients

as to what resulted to her death and who did the act shall be considered in the course of this judgment.

I wish to begin by saying that there are three ways of proving a crime generally in Court. These are: (1) Direct evidence. (2) Confessional statement/statements made by the accused, and (3) Circumstantial evidence. See **Adeyemo v. State (2015) 4 SC (pt. 11) 112 at 129 paras 30-35.** "If the accused pleads guilty and admits the facts as laid the prosecution has no duty to prove what has been admitted." Per NGWUTA, J.S.C. (P. 15, Paras. A-B)."

I will look at various ways enumerated above in relation to this case. First, I would like consider this case from angle of direct evidence. By direct evidence as in this case, there must be the evidence of an eyewitness of the incident of the crime.

Like I have earlier demonstrated above, the extra judicial statement of PW3 which is the near direct perception of the incident under consideration was rejected in evidence. The court would only review his testimony in court in determining the culpability or otherwise of the defendant through direct evidence approach since his extra judicial statement can no longer be reckoned with. Under examination in chief and cross examination section of PW3; he answered questions as thus:

> Q. you said you heard a shout in the compound. The time you heard a shout where was the accused person?
>
> A. he was in the house.
>
> Q. the accused came out of the house with a bucket of water and began to wash the car, and then you started hearing shout from the house. Is that what you told the court in your examination in chief?

A. yes!

With the above questions and answers elicited at this section, it appears the witness testimony is riddled with contradiction regarding what he saw on that fateful day. In one breath he said that while defendant was washing car he heard the shout in the compound and in another version, he posited that the defendant went inside the house and he heard a shout. With this unsteady evidence, I have the firm view that the direct evidence is no longer applicable in this case. It gives the suggestion or the impression that either that the witness was not physically present at the scene of the crime or he had no grip of what actually transpired in the circumstance.

This shadow of doubt was not cleared at the trial by re-examination of the witness by the prosecution. It is not possible for the defendant to be at different places at the same time except if he is a spirit which I know he is not. It is the duty of the prosecution to streamline this material contradiction in evidence of its principal witness. This it has failed to accomplish.

Ordinarily, the direct evidence required to prove the cause of death must be such as would connect the death of the deceased person with the act of the accused. See; **Oguntolu v. State (1996) 2 NWLR (pt 432) 503." Per ARIWOOLA, J.C.A. (P. 47, paras. E-F)**

Therefore, it would accord with the best practice and in the overriding interest of justice to disallow this piece of evidence in terms of direct evidence approach to this case. I hereby discountenance with his evidence as not being direct and positive as required by the law.

The next consideration is to look at the angle of circumstantial evidence. Let me make it clear as held by the Apex Court in **NWEKE vs. THE STATE (2001) LPELR-2119 (SC) 1 at 11**: Circumstantial evidence is very often the best. It is evidence of surrounding circumstances

which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial." See also **ADIE vs. THE STATE (1980) 1-2 SC 116 and UKORAH vs. THE STATE (1977) 4 SC 167." Per OGAKWU, J.C.A. (Pp. 30-31, Paras. D-A).** The law is clear on the point; where, as in the instant case, direct evidence of eye witness is not available, the court may infer from the facts proved the existence of other facts that may logically tend to prove the guilt of an accused person." Per OGUNDARE, J.S.C. (P. 21, Paras. A-B).

To this end, I have studied the evidence of the witnesses to decipher some circumstances and suggestions which when analyzed would give the logical result expected in this case.

First I would approach it from the extra judicial statement of the defendant.

Before I proceed further, it is imperative at this juncture to address a fundamental aspect of procedural step in this case. In the course of defense, the defendant did not give evidence in his defense. Let me hasten to reiterate the position of the law as postulated in the case of **ADEKUNLE V STATE (2006) ALL FWLR PT 332 @ PAGE 1453** where the court held:

> **"an accused has the right to remain silent throughout the trial, leaving the burden of proof of his guilt beyond reasonable doubt, to the prosecution. In other words, an accused person is presumed innocent until he is proved guilty. He does not have to prove his innocence, and as such he is not a compellable witness"**

With this authority I need not to say much on this point, but only to add that where a defendant opts or elects not to testify and rests his case on that of the prosecution, he cannot be heard to complain that he was not accorded fair hearing. What it portends is that whatever the prosecution lays before the court remains

unchallenged and the court is bound to act on it. From there the court is duty bound to determine whether the prosecution has proved his case as required by the law. That option open to the defendant is constitutional and allowed by our criminal jurisprudence and given credence by a number of judicial decisions. The only implication of electing to do so is that the defendant cannot be found to complain afterwards that his right of defense was foreclosed or hindered. So, it is a balanced risk on part of the defendant.

It is against this backdrop that the Supreme in **Adekunle v State (supra)** on the right of an accused person to remain silent during the trial said thus:

> **"For the duration of a trial, an accused person, may not utter a word. He is not bound to say anything. It is his constitutional right to remain silent. The duty is on the prosecution, to prove the charge against him as I had said, beyond reasonable doubt. See Uche Williams v. The State (1992) 8 NWLR (Pt.261) 515, (1992) 10 SCNJ 74 at 80. Afterwards, an accused person, is not a compellable witness. See the case of Sugh v. The State (1988) 2 NWLR (Pt. 77) 475; (1988) 1 NSCC 852; (1988) 5 SCNJ 58." Per Ogbuagu, J.S.C. (P.26, Paras.C-E)"**

The bottom line of the foregoing is that the prosecution whether the defendant leads evidence or not is duty bound to prove the case against the defendant beyond every reasonable doubt; therefore, it is inconsequential whether the defendant led evidence or not.

Having said the foregoing, let me reverse back to the issue under consideration to wit; dissection of this case within the perimeters of circumstantial evidence. Circumstantial evidence approach shall be studied by a holistic review of the defendant's extra judicial statement. In his confessional extra judicial statement, the defendant stated as thus:

"in addition to my earlier statement I want to state that I visited Barbara Ana the deceased in her house at Gwarinpa on Friday. Although I don't know the date, but it was last two weeks, she was not at home, then I went to one canteen nearby and ate; after which I came back to her house. It was about 5pm that I first came and met her absence. When I came I met her in the house around after 5pm. I met her in the house with a visitor, a man. She told me that she was about to go out to the Kado Market. The male visitor was still in the house when we left in her car. When I was coming back with the deceased at Chambia Plaza, I saw one of my friends by name Ben. The said Ben told me that he has not seen me for a long time. He asked me where I was staying, I then I told him to follow me in Barbara's car and he followed. We then went back with the deceased to her house at Gwarinpa. The deceased took bucket from bathroom with clean and gave me to wash her car. It was around after 6pm that I washed the deceased car. That my friend Ben and the deceased's visitor were all inside her house with her when I was washing her car. There was one new tenant with his family in their house but they went to the church when I was washing the car. The gateman to the deceased at the period also came out from his security room with a lader green in his hand and he told me he was going out. By then I have finished washing the car and I took the bucket inside the compound and when I reached the partition to her house I saw blood on the floor on the corridor to her room. I then ran away outside of the compound. The blood was that of a human being, I don't know where the two people inside the house with the deceased were at the period. Before I left to wash her car, she gave me bathroom slippers to wash the car and I left my palm sandals at her veranda. I ran to the main road and entered Keke Napep and went to Lokogoma Site Apo. I left

Abuja after two days to Port Harcourt to work because one of my friends Henry called me to come and do POP work"

Above is a version of the defendant statement to the police which I have quoted verbatim. The defendant portends to demonstrate by that statement that he was not the only person in the deceased's house on the day of the incident. Conversely, the defendant did not explain the where about of his friend, Ben who he brought to the deceased house after he discovered that the deceased had been murdered. This statement leaves some gaps and much to be desired in the light of the fact that the defendant brought his stranger-friend to the deceased house.

There is incoherence in that aspect of his testimony. It is mind boggling and very worrisome that the defendant did not bother to enquire about what happened to the deceased but only took to his heels upon discovering the deceased in the pool of her blood. He did not report that incident to a third party, not even the gateman and also did not report to the police, but kept it all to himself and travelled all the way to Port Harcourt without showing any sensitivity to human life. His story has k-leg and cast serious doubt on its credibility.

Whilst the law is trite that a person shall not be criminally responsible for his act or omission if the act or omission is direct and reasonably necessary in order to resist actual and unlawful violence threatened to him or to another person in his presence so far he does not himself commit a crime against anybody. But the doctrine of last seen has evolved in our criminal jurisprudence, consistent with what obtains in other jurisdictions and is to the effect that it is the duty of an accused person who last saw the deceased alive to give an explanation on how the deceased met his death. In the absence of an explanation, the court is entitled to infer in the face of overwhelming circumstantial evidence that the accused person killed the

deceased. See: **Godwin Igabele v. The State (2006) 2 SCNJ 124, Bassey Akpan Archibong v. The State (2006) 5 SCNJ 202." Per OGUNWUMIJU, J.C.A. (P. 63, paras. E-G)**

In the instant case, the defendant did not state his reasons for not reporting or calling the attention of the neighbors to the crime and did not make efforts to assist the deceased get medical attention. Could it be suggested that it was the defendant's friend Ben who he claimed he picked on their way back from market or the male visitor or both that conspired and killed the deceased? The court asks rhetorically; who is Ben, where was he? Where was the male visitor when the incident took place? Were the story of Ben and deceased male friend concocted to overshadow real evidence? These questions boggle the mind of the court.

Having no answer to these questions I am constrained to ask; can the court convict solely on the above state of affairs in absence of substantial evidence bearing in mind the presumption of innocence that inures to a defendant in the Constitution and the requirement in section 138 of the Evidence Act, 2011?

The findings herein under shall be the last nail to seal the coffin in this case.

DW2, Chidike Ejiofor, while testifying for the defense said:

> ***"On 29/7/2011, I was doing some washing together with some environmental weeding when around 1pm; one Mr. Aniete, who was deceased's friend came and we exchanged pleasantries before he entered the deceased's room because he had a spare key. Later in the day about 5pm, the defendant came and asked after the deceased; I told him that the deceased hasn't come back from work. He went out and was hanging around the gate until the deceased came back. The defendant came to me and asked for a bucket to wash the***

deceased's car. I allowed him to take the bucket. He took water from the tap on the perimeter fence; and continued the washing of the car. All these while I kept hearing quarrel between the deceased and Mr. Aniete; the fighting continued until I left the house for church around 6pm. I met the defendant washing Barbara's car and I told him to drop my bucket when he is done. I came back home around 7pm and met a crowd in the house, all I was told the deceased had been killed. I was shocked. The time I left for church, I left Mr. Aniete in the deceased room. This is not the first time I saw the defendant in our compound"

Unfortunately, the investigators did not probe the aspect of this claim, whether there were/was any other person present in the deceased's house when the incident took place and to fill up the missing limb. For the doctrine of last seen to be applicable against the defendant, it must be proved that it was only the defendant that was seen with the deceased.

To further cast doubt on the prosecution's case, the claim of DW2 that he heard the deceased quarrel with one Anietie within the hours of her death was not impugned, challenged or put through the fire of cross examination by the prosecution who had ample opportunity to do so. This is even when the evidence of the PW3 the supposed direct evidence of the crime is still dangling and was neither here nor there.

To buttress and underscore the abysmal failure of prosecution in this case, let me digress a bit to have brief review of the records of this court. After the evidence of DW1 (mother of the deceased) on 14/11/17 the prosecution was not in court and the case was adjourned to 19/12/17 for cross-examination. On the said date, the prosecution was not in court to cross examine the witness. Upon the application of the defendant's counsel, the DW1 was discharged.

On the same date, DW2 was led in evidence in chief and the case was adjourned to 29/1/18 for cross examination of DW2. On that date, A.B Mamman Esq. applied for record of proceedings to enable him cross examine DW2 and despite objection to the application, the court obliged him in the interest of justice and the matter was adjourned to 13/2/18. There was no effort by the prosecution to recall DW1 that had been discharged on 19/12/17 for cross examination; leaving her testimony unchallenged.

Apart from the foregoing remarks, the prosecution did not attend court on the date fixed for adoption of final written addresses to highlight its case. Worst still, the prosecution filed only 4 paragraph final written address in a matter that trial spanned 7 years and six witnesses called across the divide. That notwithstanding, he filed a scanty address when he ought to have comprehensively addressed the court; marrying facts with the law.

Though, it is trite that an address cannot take place of law but it is desirable to do so when the court is confronted with a controversial and complicated case and as weighty as culpable homicide punishable by death, more so that a vital witness was not cross examined.

Be that as it may, in total consideration of the un-contradicted facts and testimony of DW2 that there was another person (Anietie) in the deceased's house on that fateful day, the court is of the firm view that circumstantial evidence has equally failed to link the defendant to the commission of the alleged crime.

The last means of ascertaining whether the defendant killed the deceased is by his confessional statement. By virtue of Section 27(1) of the Evidence Act, a confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.

The law is that if the accused makes a free and voluntary confession which is direct and positive and is properly proved the accused may be convicted on the confession. See **Afolabi v. Commissioner of Police (1961) All NLR 654. Per Amaizu JCA.**

In this guise, the court has reviewed the two extra judicial statements of the defendant herein partly highlighted; there is nothing in the entire statement suggesting the inference that the defendant admitted killing the deceased. Therefore, the said statement cannot be hanger upon which the court can convict the defendant as charged.

In **Udosen v. State [2007] 4 N.W.L.R. (Pt. 1023) 125 at 161 Para.C (CA)** the court held thus:

> ***"A 'doubt' in the mind of a court presupposes that the case against the accused person has not been proved beyond reasonable doubt. In the instant case, the Supreme Court had a big doubt about the guilt of the appellant and accordingly resolved same in favour of the appellant. Namsoh v. State (1993) 5 NWLR (Pt. 292) 129; Nwokedi v. Commissioner of Police (1977) 3 SC 35; Kalu v. State (1988) 4 NWLR (Pt. 90) 503." Per Ogbuagu J.S.C***

It is the duty of the prosecution to prove the charge against an accused person beyond reasonable doubt. If there is any doubt, the doubt must be resolved in favour of the accused as the presumption is that the accused is innocent until proven guilty. See **Williams v. The State (1992) NWLR (Pt. 261) 515: Ogundiyan v. State (1991) 3 NWLR (Pt. 181) 519; Chukwuma v. F.R.N. (2011) LPELR-SC. 253/2007." Per IYIZOBA, J.C.A. (Pp. 37-38, Paras. E-A)**

In view of the foregoing, the court has weighed, dissected and wholly analyzed the case as presented by the prosecution and come to the conclusion that the court cannot manufacture

evidence to nail the defendant or to secure conviction at all cost. In our adversarial jurisprudence as opposed to inquisitorial system applicable in other jurisdictions, the court is bound to remain an independent umpire and precluded from descending into the arena of justice. It is obvious that the prosecution has failed to prove the charge against the defendant. It is also obvious from the way and manner the prosecution handled this case leaves so much to be desired. There is no sense of diligence throughout the prosecution of this case.

I must say regrettably that the address of the prosecution is of no help to this court. The address portrays counsel as unserious. This case exposes the laxity and lack of seriousness of some prosecutors. I think I am speaking the minds of all engaged in the Administration of Criminal Justice not only in this court but in all the courts in Nigeria.

In sum total therefore, the evidence in this case weighs in favor of setting the defendant free and consequently, the defendant is hereby discharged and acquitted accordingly.

Signed

Judge
01-06-2018

Appearances:
Adegoke Kayode with Fumilayo Aremu for Prosecution
C.C. Ogbonna with Chuma Chukwudi for Defendant.

Signed

Judge
01-06-2018

IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY HOLDEN AT MAITAMA ON THE 14TH DAY OFDECEMBER, 2017. BEFORE HIS LORDSHIP:JUSTICE MARYANN E. ANENIH. PRESIDING JUDGE.

CASE NO: FCT/HC/CR/21/13

BETWEEN

COMMISSIONER OF POLICE.....COMPLAINANT

AND

1. **MAGAJI SUNDAY**
2. **AUSTIN FELIX**
3. **KINSLEY ONOVO**
4. **SUNDAY MOMOH.....DEFENDANTS**

JUDGEMENT.

The defendants, Magaji Sunday, Austin Felix and Sunday Momoh were arraigned before this court on a 4 count charge of the offences of conspiracy, receiving and selling of stolen vehicles. The 2nd defendant is also charged for the offences of unlawful possession of fire arms.

The initial charge against the defendants was filed on 24th September, 2013 but subsequently amended.

The Amended charge was filed on the 30th of April, 2014 against the Defendants.

Amended application for Leave to prefer a criminal charge against the defendants was granted by the court on the 12th of June, 2014 wherein the charge was deemed properly filed.

The 3rd defendant Kingsley Onovo has been at large and never appeared before the court for plea.

The Defendants are charged as follows:

Count One

That you Magaji Sunday "m", Austin Felix "m", Kinsley Onovo "m" and Sunday Momoh "m" on or about the 29th day of November, 2012 at Gwarinpa, Abuja within the Judicial Division of this Honourable Court, did conspire among yourselves to commit an offence to wit: Receiving and selling of vehicle which you knew to be stolen, and hereby have committed an offence contrary to and punishable under section 97 of the Penal Code Law.

Count two

That you Magaji Sunday "m", Austin Felix "m", Kinsley Onovo "m" and Sunday Momoh "m" on or about the 29th day of November, 2012 at Gwarinpa, Abuja within the Judicial Division of this Honourable Court, did dishonestly receive a 2008 Honda Accord which you knew was stolen, and hereby have committed an offence contrary to and punishable under Section 317 of the Penal Code Law.

Court Three

That you Austin Felix male on or about the 29th day of November, 2012 at Kubwa, Abuja, within the Judicial Division of this Honourable Court, did have in your possession fire arms to wit: one Black Gun without lawful authority and you thereby commit an offence contrary to and punishable under section 3 (1) of the Robbery and Firearms (Special Provisions) Act Cap R 11 Laws of the Federation of Nigeria.

Count Four

That you Austin Felix male on or about the 29th day of November, 2012 at Kubwa, Abuja, did rob one Uduak Akpan "F" at gun point, collected her Toyota Rav 4 Jeep, and you hereby committed an offence contrary to and punishable under section 1(1) (2) a & b of the Robbery and Firearms (Special Provisions) Act Cap R 11, Laws of the Federation of Nigeria.

The charge was read and explained to the 1st, 2nd and 4th Defendants in English Language, the language of their election and they all pleaded not guilty to the four count charge on the 12th of June, 2014.

The prosecution in proof of it's case called only one witness (Ahmed Kaura) who testified and gave evidence as PW1 on 26th June, 2015. The evidence is summarised hereunder as follows:

He is the Deputy National Director of Administration PDP National Headquarters Abuja. His address is PDP Michael Opara Street Wuse Zone 5 Abuja. He knows the accused persons standing trial.

On the 24th of October, 2012 at about 9:00PM he was driving his car through Mambolo street Wuse Zone 2 Abuja. He parked at the roadside to answer a phone call but suddenly someone opened his car at the side and he looked to see who opened his car door, then the person pointed a pistol at him and whispered to him to move inside. He refused to move inside, instead he dropped his left leg on the ground. They were both silent in the car, then he stepped out of the car and moved across the other side of the road.

He attempted going back to his car but the person inside fired a shot in the air, he was scared and moved further away. Before then someone else went to the other side of the car and entered the front of the car and they both drove off. He went to the Zone 3 Police station, Wuse and reported the matter. He made a statement to the police. After about 3 or 4 days he went to SARS and lodged a report of the same incident at the Special Anti Robbery Squad. The car is a Toyota Venza, Brown Colour 2009 Model snatched from him at gunpoint. And he had some documents in the car. Some PPD documents, his International Passport with that of his friend Bello Dantata, his driver's license, photocopy of his car particulars including the car , number license bearing the number YDM as a fancy number were also in the car. After about 20 months precisely June/July 2014, he got a phone call from ASP Ewuda from SARS, that SARS had apprehended some stolen vehicles one of which looked like his because when he reported earlier on at SARS he gave them a photocopy picture of the car he snapped with his son behind the vehicle. He said he should send them the chassis number of the vehicle immediately and he did. And that after about 30 minutes he was asked to come and see the vehicle as the chassis number corresponds with the vehicle in their custody. He went to SARS office at Abuja and confirmed that the vehicle is his. He inspected the vehicle, cross checked the chassis number and found that it is the same as that in the particulars of his vehicle.

The police asked him to tender the original papers of the vehicle for further examination which he did. It was all confirmed that it was actually his vehicle and so, it was released to him. He signed an

undertaking that whenever the case comes up in court he would appear to give evidence. That's why he is in court. He said that the two accused persons in court are the ones that robbed him of his car. The 2nd accused person who accosted him was holding a short black pistol.

And after several adjournments and at the close of the prosecution's case, the 2nd defendant's counsel made a no case submission on behalf of the 2nd defendant to which no response was made by the complainant. After due consideration of same on 4th October, 2017, the court in it's Ruling ordered the 2nd defendant to be called upon to enter his defence.

At the close of prosecution's case, the 2nd Defendant opened his defence and gave evidence on oath on the 8th of November, 2017 as DW1.

The summary of the evidence of DW1 is as follows:

He doesn't know anything about the allegation in the charge. He was in court when PW1 testified and identified him. He doesn't know PW1 and has never met him. All PW1 said were lies. And that he didn't commit the offence he's charged with.

On 23rd of July, 2013 he went with Mustapha and two friends to Cyber Cafe in Garki. When they were done, some men in plain clothes came around in a Van and started shooting. Everybody started running. They arrested some of them and took them to their van where there was one man who had wounds all over his body and they asked him, who amongst them is called Peter? He looked at them and said Peter is not here. They asked them to enter their van and drove them to SARS Abattoir where they were placed in separate Cells. For over one month, nobody knew where he was. After 4 days in the cell, they brought them out to torture room and asked them what they were doing in the place they were arrested. They told them they went online in the Cyber Cafe and they started beating them. They hanged him and the other corp members.

On 21st of August, 2013 they took them to Magistrate Court Karu where they were granted bail and left to return 30th of October, 2013 to court. He went to Benin and returned on 29th of October, 2013 to attend court on 30th of October, 2013. He was in court but the corper had gone for their posting. The court didn't sit that day and the matter was adjourned to 5th December, 2013. As he was stepping out, different set of Officers in plain clothes came and stopped him. They took him to

Abattoir and brought one Magaji and the man whom he earlier saw with injuries. He told them he doesn't know them and they took him back to the cell.

Three days later they brought him out at night and beat him and the other man who also said that he wasn't Peter. Supol Iliya told him to help them so they too can help free him. They wanted him to stand as a witness against that man and Magaji. He told them he couldn't as he doesn't know them. They beat him again when he refused to testify against Magaji.

He met Sunday Momoh for the first time in this court in the dock. And he has never held any pistol nor attacked anybody.

No case submission was overruled on 4th October 2017.

At close of evidence, Counsel to the 2nd defendant filed, served and adopted his final written address before the court on the 16th November, 2017.

Counsel in his final written address filed on 14th of November, 2017 formulated two issues for determination:

1. *Whether the prosecution was able to present any evidence that linked the 2nd Defendant to the commission of the offence charged that will warrant the 2nd accused to enter defence.(sic).*
2. *Whether the prosecution has proved its case against the 2nd defendant beyond reasonable doubt as required by law.*

On Issue No. 1, Counsel submitted that in criminal cases the law requires the prosecution to prove its case beyond reasonable doubt against the defendant before securing conviction. And that proof of case beyond reasonable doubt must be done by presenting credible evidence before a trial court and that the veracity of such evidence must be tested by the fire of cross examination by the defence counsel to see if it can endure. He referred the court to Section 135(1) of the Evidence Act and the case of IKARIA V. STATE (2014) 1 NWLR (PT.1389) P.639 at 651 Para. D.

He submitted further that in the eyes of the law, there is no evidence before this court same having not been subjected to the heat of cross examination. That the evidence of PW1 ought to be discountenanced and jettisoned as relying on same will be denying the 2nd defendant his right to fair hearing to cross examine the witness of the prosecution either in person or by his

counsel as enshrined in the constitution He referred the court to Section 36(6) (d) of the 1999 constitution of the Federal Republic of Nigeria and the following cases:

ESEU V. THE PEOPLE OF LAGOS STATE (2014) 2 NWLR (PT.1390) P.109 AT 141-142 Paras. G-D.

IKARIA V. STATE (Supra) Page.659 Para. H.

It is counsel's submission that if the evidence of PW1 which is the foundation of the prosecution's case is struck out, there is nothing remaining to show the guilt of the 2nd defendant and that as such, the appropriate order to make is to dismiss this case in it's entirety.

On issue No.2, he submitted that failure of the prosecution to present cogent and positive evidence linking the 2nd defendant to the commission of the offence charged, will only go against the prosecution and in favour of the 2nd defendant. He cited the case of AL-HASSAN V. STATE (2011) 3 NWLR (PT.1234) P.254 at pp.278-279. He argued further that it is on record that the 2nd defendant denied all that the PW1 said in court and that under the criminal justice system, the defendant is not the one to prove his innocence rather it is for the prosecution to prove its case against the defendant. And that the court is bound to consider not only those defences specifically raised by the accused but also the evidence and defence which favourably avails him. He referred to AL-HASSAN V. STATE (2011) (Supra).

In conclusion, he submitted that since the prosecution failed to produce the PW1 for cross examination, his entire evidence ought to be discountenanced and urged the court to dismiss this case and to discharge and acquit the 2nd defendant.

I have considered the case of the prosecution, the defence of 2nd defendant and the final written and oral address of his counsel. And I am of the view that the issue for determination here is:

> *Whether the prosecution has successfully discharged the burden placed on her by law to prove the charges against the three defendantsherein, beyond reasonable doubt.*

The first and second count charge for which all the defendants are standing trial borders on conspiracy to commit the offence of receiving and selling of stolen vehicles and dishonestly receiving a Honda Accord. While the third and

fourth count charge against 2nd defendant only borders on unlawful possession of fire arms and Robbery.

It is important to state here that the 2nd defendant is the only person standing trial in counts (3) three and (4) four of the charge which borders on unlawful possession of firearms and robbery at gun point.

Now, since the first and second count charge involves all the defendants, the court will first and foremost deal with the 1st count charge of conspiracy before other charges.

The law is trite that for the Prosecution to secure conviction in a charge of conspiracy, all that is required is evidence of agreement of the parties express or implied. There must be a meeting of two or more minds. The offence of conspiracy is complete if there are acts on the part of thedefendant which would lead the court to the conclusion that he and others were engaged in actions aimed at accomplishing a common unlawful intention and goal. See

NGUMA V. AG, IMO STATE(2014) LPELR-22252 (SC) Pp.39-40,paras. G-C.

GARBA V. C.O.P. (2007) 16 NWLR (Pt. 1060) 378 at 405 Paras.A - B (CA)

The supreme court in the case of **YAKUBU V. STATE(2014) LPELR-22401(SC)(P.12, Paras. E-G)**enumerated the essential ingredients the prosecution must prove in an offence of conspiracy as follows:-

1. *"an agreement between two or more persons to do or cause to be done some illegal act or some act which is not illegal by illegal means.*
2. *where the agreement is other than an agreement to commit an offence, that some act besides the agreement was done by one or more of the parties in furtherance of the agreement.*
3. *Specifically that each of the accused persons individually participated in the conspiracy".*

Now having said that, it is imperative to look at the meaning of the word "conspiracy".

The Black's law Dictionary Seventh Edition at page 305 defines conspiracy as:

> *"An agreement by two or more persons to commit an unlawful act; a combination of an unlawful purpose".*

While Chambers 21st Century Dictionary Revised Edition at page 293 defines Conspiracy as :

"the act of plotting in secret".

It is important to also state that the Penal Code of the Northern Region ofNigeria, Cap. 89, Laws of Northern Nigeria (1963)under which the defendantsare charged in counts 1 and 2, particularly section96 thereof defines "conspiracy" as follows:

"(1) when two or more persons agree to do orcause to be done -

(a) an illegal act; or

(b) An act which is not illegal by illegal means..."

As earlier observed above, the 1st and 2nd Count charge against the defendants are conspiracy to commit the offence of receiving and selling of stolen vehicles. The offences for which the defendants are standing trial before the court, requires the court to carefully scrutinise the evidence before it and then come back to the specific and relevant laws for proper guidance to determine the culpability or otherwise of the defendants.

It is trite that the overt act or omission which evidencesconspiracy is the actus reus.And the actus reus ofeach and every conspirator must be referrableand very often is the only proof of the criminalagreement which is called conspiracy.

See
ODUNEYE V. STATE (2001) 2 NWLR (PT. 697) 311 or LPELR-2245(SC) pg. 36 Para C-E.

In criminal trials the guilt of a defendant can be established by either or all of several ways including by Confessional Statement of the defendant, Circumstantial evidence and evidence of an eye witness. See

IGBELE V. STATE (2006) 6 NWLR (PT. 975) Pg.100 or LPELR-1441(SC) pg 34 paras F-G

And in order to secure a conviction of defendants in respect of an offence, the onus is always on the prosecution to establish the guilt of the accused person beyond reasonable doubt. And the prosecution would achieve this by ensuring that all the vital ingredients of the offence charged are proved by the evidence adduced. See

YONGO & ANOR V. COP(1992) NWLR (PT. 257) 36 or LPELR-3528(SC) pg 14 paras D-F

IGBELE V. STATE (Supra) pg 30-31 paras E-A

OKORO V. THE STATE(1988)

Thus in order to secure a conviction for the offence of conspiracy against the defendant, the prosecution must establish the existence of the above mentioned ingredients of the offence of conspiracy in the conduct of the defendants.

The prosecution under the circumstance has the burden to establish both the joint criminal act (actus reus) and the criminal intention (mens rea) of knowledge by each of the defendants. See

ONYENYE V. THE STATE(2012) LPELR-7866(SC)(P 36,Paras C-F) where the Supreme court postulated as follows:

> *Section 8 of theCriminal Code CAP 38 Laws of Oyo State 2000 defined Common intention. The test of the presenceof Common intention under Section 8 of theCriminal Code Law of Oyo State is whether the actcomplained of is a probable consequence of the prosecution of their joint intention to carry out anunlawful act and that it is irrelevant who actuallyheld the gun becausè once one of them was inpossession of a gun, his hand is deemed to be thehand of all of them."*

See also

YARO V. STATE(2007) 18 NWLR (Pt.1066) 215 or LPELR-3518(SC) (Pp. 14-15,paras. D-A).

THE STATE V. FATAI AZEEZ & 4ORS. (2008) All FWLR (Pt. 424) 1423 at Pp. 1461 - 1462, paras F - B. where his lordship Mohammed JSC held that:

> *"Where there is a joint criminal act, an accused has nothing to rebut until the prosecution has established criminal intention or knowledge on the part of each and every accused person. The measure of liability is the extent of intention or knowledge of each accused. If several persons join in an act, each having a different intention or knowledge, each is liable according to his own intention and knowledge and not further. The onus of leading direct and positive evidence to show that all the accused persons had common intention squarely rests on the*

shoulders of the prosecution that all the accused persons had common intention tocommit the offences they were charged for..."

In this instance there's neither a confessional statement, circumstantial evidence nor eye witness evidence from which conspiracy as charged may be inferred or established. It is elementary that the crux of the offence of conspiracy is the meeting of the mind of the conspirators. The offence of conspiracy is therefore complete by the agreement to do the act, albeit this is hardly capable of direct proof. I find support for this in **IGBELE V. THE STATE (Supra) and YONGO V THE STATE (Supra)**

See also;
THE STATE V. SALAWU(2011) LPELR-8252(SC)(Pp. 41-42, paras. C-G)where his lordship Per MUHAMMAD, J.S.C. held that:

"The general principle of law enunciated in these cases is that a charge of conspiracy is proved either by leading direct evidence in proof of the common criminal design or it can be proved by inference derived from the commission of the substantive offence. As there was no direct, cogent, convincing and compelling evidence to warrant the trial court to convict the appellant, the call on the trial court to draw inference from the offence of armed robbery (which was not proved beyond reasonable doubt against the respondent) and to convict him on conspiracy must fail as there is no evidence to prove either of the two offences. There was no nexus connecting the respondent with the two offences charged. So, the charge of conspiracy, as found by the trial court, has no legs to stand. The evidence required in this kind of criminal offence is of such quality that irresistibly compels the court to draw such inferences as to the guilt of the accused. In otherwords, there must be the criminal intention (actus reus) of two or more persons, ACTUS CONTRA ACTUM which is punishable where it is translated into achieving a criminal objective through a criminal means. See: Njovens v. The State (1973) 5 SC 17; Dabo v. The State (1977) 5 SC 197. A charge of conspiracy in a criminal trial, in my view, is by no means periphery. Commission of grievous offences in most cases lay their eggs on that fertile ground for the offence to germinate. Where that offence is established as required by law, the offender must be ready to accept the punitive result of his nefarious act."

From the foregoing, a charge of conspiracy is proved either by leading direct evidence in proof of the common criminal intention or it can be proved by inference derived from the commission of the substantive offence.

I have found no direct nor circumstantial evidence, cogent, convincing and compelling enough to believe that the defendants conspired amongst themselves to commit the offence of receiving and selling of vehicle which they knew to be stolen. Thus and pursuant to the foregoing I find without further ado that the prosecution has not successfully discharged the burden to prove beyond reasonable doubt that the defendantsconspired among themselves to commit the offence of receiving and selling of stolen vehicles.

It is in the light of the foregoing that I am of the view that the charge for conspiracy to commit the offence of receiving and selling of vehiclescannot succeed. Count one of the charge therefore fails.

The second count is for the offence of dishonestly receiving a stolen vehicle contrary and punishable under section 317 of the Penal Code Law. It is trite that the essential ingredients of the offence of dishonestly receiving stolen property which the prosecution is required to prove in order to secure a conviction under section 317 of the Penal Code Law are:-

"1. That the property in question is stolen property.

2. That the accused received or retained such property.

3. That he did so dishonestly.

*4. That he knew or had reason to believe that the property was stolen property."*See

YONGO & ANOR. V. C.O.P(1992) NWLR (Pt. 257)36 or (1992) LPELR-3528(SC)(P. 36, paras. E-G) (supra) Per KARIBI-WHYTE, J.S.C.

It is also trite law that in order to prove the offences of stealing and receiving stolen property knowing it to be stolen against a defendant(s), there must be evidence that the property in question was stolen. It must also be proved in the case of the offence of receiving stolen property knowing it to be stolen that the defendant, when he came into possession of the stolen property, knew that it was stolen. See

THE STATE V. NNOLIM & ANOR.(1994) 5 NWLR (Pt.345) 394 or (1994) LPELR-3222(SC) (Pp. 21-22, paras. G-A).

In the instant case, the prosecution only called one witness Mr. Ahmed Sanne Kaura who testified as PW1 on 9th of June, 2015. The prosecution failed to produce the said witness to further attend court for cross examination. The prosecution also

failed to call other witnesses as reflected in their Proof of Evidence dated 29th April, 2014 for reason best known to them.

The 2nd defendant's Counsel argued that the prosecution has failed to prove the case beyond reasonable doubt against the defendant. And that the evidence of PW1 was not subjected to the fire of cross examination and as such, the evidence should be discountenanced and the case should be dismissed.

It is imperative to point out that outside the evidence of the PW1 identifying the defendants, there's no other piece of evidence from any other witness(es) as highlighted in the proof of Evidence.

The PW1 in his evidence on oath on 9th of June. 2015 testified that he made a written statement to the police and that he gave photograph of the car and the original car particulars to the police for examination and confirmation. But surprisingly, the prosecution did not tender the written statement of the PW1 nor any of the aforementioned documents before the court. The prosecution did not call any other witness nor lead evidence to tender the written statements of defendants as contained in the proof of evidence and Charge Sheet. For purpose of clarity, hereunder is an excerpt of the evidence on oath of the PW1:

> *"...After about 20 months precisely June/June last year I got a phone call from ASP Ewuda from SARS, an Officer, that SARS had apprehended and arrested some stolen vehicles one of them looked like mine because when I reported earlier on given SARS a photograph of the car I snapped with my son behind the vehicle..."*

It is also observed from the evidence of the PW1, that the car purportedly stolen at gun point was a TOYOTA VENZA, brown colour 2009 model but this is quite different from what reflects in Count two and count 4 of the charge sheet before the court. From Counts 2 and Count 4 of the charge before the court, the car dishonestly received was a 2008 Honda Accord car and a Toyota RAV4 Jeep. For better understanding, the evidence of PW1 reads in part:

> *"On the 24/10/12 at about 9:00PM I was riding my car through Mambolo Street Wuse Zone 2 Abuja. I parked by the road side to answer a phone call. Suddenly somebody opened my door at my side and I looked to see who was opening my door. Then the person pointed a pistol at me and whispered to me to move inside...*
> *I made a statement with the police. After about 3/4 days I went to SARS and lodged a report of same incident at the Special Anti Robbery*

proved beyond reasonable doubt, any iota of doubt must be resolved in favour of the defendant.

It is in the light of the forgoing that I am of the view that the charge for dishonestly receiving a 2008 Honda Accord car will under the circumstance not succeed. Count 2 of the charge also fails.

Count 3 of the charge is only against the 2nd defendant and it is for possession of firearms to wit: one Black Gun without lawful authority, an offence contrary to and punishable under section 3 (1) of the Robbery and Firearms (Special Provisions) Act Cap R 11 Laws of the Federation of Nigeria.

The said section 3(1) of the Robbery and Firearms SpecialProvisions Act Cap RII, 2004 Laws of the Federationof Nigeria Vol. 14 provides as follows:

"Any person having a firearm in his possession orunder his control in contravention of the FirearmsAct or any order made thereunder shall be guilty ofan offence under this Act and shall upon convictionunder this Act be sentenced to a fine of TwentyThousand Naira or to imprisonment for a period ofnot less than ten years or to both."

The said Act also defined 'firearms' to include *"anycannon, gun, rifle, carbine, machine-gun, cap-gun,flint lock gun, revolver, pistol, explosive orammunition or other firearm whether whole or indetached pieces".*

Unlike conspiracy which has to do with the meeting of two or more minds to establish both the joint criminal act (actus reus) and the criminal intention (mens rea) of knowledge by each of the defendants, the offence of being inan unlawful possession of firearms does not requireproof of mens res and actus reus. It is a strict liabilityoffence. See

STEPHEN V. THE STATE (2008) LPELR-8360 (CA) Pg. 20-21, Paras. D-D. where his lordship ORJI-ABADUA, J.C.A postulated as follows:

> *"It is imperative to state that the offence of being in an unlawful possession of firearms does not require proof of mens res and actus reus as contended by the Appellant's Counsel. It is a strict liability offence. The elements do not contain the need for criminal intent or mens rea..."*

In order to prove the offence of illegal possession of firearms The law requires the prosecution to establish the following ingredients:

1. That the accused was found in possession of firearms.

2. That the firearms were within the meaning of the act.

3. That the accused had no license to possess firearms.

See the case of

BELLO OKASHETU V. THE STATE (2016) LPELR-40611(SC) pg. 16 - 17 Para E-A.

SUNDAY AZOGOR v. THE STATE(2014) LPELR-24414(CA) pg.16 paras C-E

See also
STATE V. OLADOTUN (2011) Vol. 199 LRCN pg 66 or LPELR- 3226 (SC) pg 20-21 Para E-A

EKANEM JOSEPH STEPHEN V. THE STATE (2008) LPELR-8360(CA) pg 20 -21 Para D-D.

The most crucial condition for consideration here is whether the 2nd defendant was found in possession of the firearms and the black gun under reference in the charge.

From the totality of the evidence before the court, there's no credible evidence before the court that establishes that the 2nd defendant was found or seen with firearms nor a black gun without lawful authority. The defendant in his evidence on oath of 8th of November, 2017 denied any involvement in the offence being charged. No gun was presented before the court as Exhibit. The cardinal principle of law is that the commissionof a crime by a party must be proved beyondreasonable doubt. The burden of proving that anyperson is guilty of a crime rests on the prosecution.See Section 138 of the Evidence Act. The prosecution has not succeeded in proving the essential ingredients of the offence of unlawful possession of fire arms against the 2nd defendant.

It is in view of the foregoing that count 3 of the charge will as well not succeed.

Count 4 is also a charge for which only the 2nd defendant is standing trial for the offence of robbery at gun point. It is trite that for the prosecution to succeed in a case of armed robbery contrary to section 1(1) (2) (a) of the Robbery and Firearms (Special Provisions) Act Cap R11, laws of the

Federation of Nigeria, the prosecution must prove the following beyond reasonable doubt:

a. That there was a robbery or series of robberies.

b. That each of the robberies was an armed robbery.

c. That the accused person was one of those who took part in the armed robbery.

See
OKANLAWON v. STATE (2015) LPELR-24838(SC) (Pp. 36-37, paras. F-B).

OSUAGWU V. STATE (2013) LPELR-19823(SC)(P 25,Paras A-D)per RHODES-VIVOUR J.S.C

Though the PW1 in his evidence in chief on 9th June, 2015 testified that the 2nd and 4th accused persons are the ones that robbed him of his Toyota Venza, it is imperative to re-state that from the charge before the court, what was said to be robbed are Honda Accord 2008 model and Toyota Rav4 jeep. As earlier stated in this judgement, the 2nd defendant denied any participation in the offence charged against him and stated that his first time of meeting the 4th defendant was in this court. The prosecution stopped attending court since 26th June, 2016 thereby preventing the PW1 from being cross examined by the defendants.

The prosecution did not produce any other witness and even the(PW1) who gave evidence in court on 9th of June, 2015 was never produced by the prosecution for cross examination by the defendants. Despite several adjournments for the continuation and cross examination of PW1, the Complainant, Commissioner of Police failed to produce him, thereby denying the defendants the opportunity to cross examine him and test the veracity of his testimony. This is a serious omission which affects the fabric of the testimony of PW1 as it bothers on the defendant's right to fair hearing. The effect of this situation was amplified by the court of Appeal in;

MAJOR AL MUSTAPHA V. THE STATE(2013) 17 NWLR (PT. 1383) Pg. 350 at Pg 409 Para D-E & 423 Para D-H or (2013) LPELR-20995(CA)(Pp. 102-104, paras. F-E)where the court canvassed that:

> *"...it is settled law that a Court cannot act on the evidence of a witness that cannot be produced or located for cross-examination after he had been examined in chief - see Isiaka v. The state (2011) All FWLR (pt. 583) 1966, wherein it was held -*

"...The platform on which the lower Court placed his reasoning for the conviction is weak and unjustifiable. A Court or Tribunal should never act on the evidence of a witness whom the other party wants to cross-examine, but cannot be reproduced or located for cross-examination after he must have been examined-in-chief.

The most honourable thing for the lower Court would have been that the evidence of PW3, who tendered Exhibit 5 should have been expunged from the record of the Court or the lower court should not have attached any weight to it because the essence of cross-examination is to test the veracity and accuracy of the witness and not just a jamboree or merry making. A witness who fails to make himself available for cross-examination should know that all his evidence goes to naught."

See also the unreported Judgment of this Court delivered on 10/12/12 in Appeal No. CA/J/71C/2009 - Shehu Shegun v. The state, wherein it was held -

"The aim of cross-examination is to enable the cross-examining party to demolish or weaken the case of the party being cross-examined to also allow the cross-examining party the opportunity of stating or representing its case through the witness of its opponents. In ensuring that an accused person's right to fair hearing is manifestly protected, such accused person must be given the opportunity to examine either in person or by his legal practitioner the witnesses called by the Prosecution. The entire trial process revolves around this art of cross-examination. The Evidence Act actually underscores the purposes of cross-examination in Section 200, which provides inter alia

"When a witness is cross-examined, he may in addition to the questions referred to be asked questions which tend -

(a) To rest his accuracy, veracity or credibility, or

(b) To discover who he is and what is his position in life, or

(c) To shake his credit by injuring his character.

To deprive an accused person of this opportunity amounts to gross violation of his constitutional right to fair hearing".

See also
IKARIA V. STATE 2014 1 NWLR (PT.1389) PG.639 at pp.659 paras.G-H.(SC)

See also;
ESEU V. THE PEOPLE OF LAGOS STATE (2014) 2 NWLR (PT.1390) PG.109 PP.141-142, PARAS. A-C (CA) where his lordship NWEZE J.C.A) held :

> *"The Lower court's error becomes even more glaring when it is realized that the act of cross - examination is, perhaps, the greatest weapon ever fashioned by our adversarial system of jurisprudence for devastating an adversary. It is, therefore, the pivot, the hub, on which the entire trial gravitates, Ubani v. state (2003) 18 NWLR (PT.851) 224. According to the apex court, the act of cross examination "constitutes a lethal weapon in the hands of the adversary to enable him effect the demolition of the case of the opposing party" Oforlete v. state (2002) 12 NWLR (PT.681) 415, 436. It is against this background that we fault the above conclusion of the lower court. Surely, to deprive the appellant of the opportunity of, possibly, effecting the demolition of the evidence of the PW2, is to deny him of the right of fair hearing".*

Pursuant to above excerpt from the decisions of the court of Appeal cited above, where the evidenceadduced by the prosecution in a criminal case is not tested as it is in the instant case when the prosecution failed to produce the PW1 for cross examination and thereafter failed to produce other witnesses, at least to cast a reasonable doubt on the prosecution's case, the court will have no option but to properly examine only the credible evidence before it for the just determination of the case.

It is in the light of the foregoing that I am of the humble view that it would be against the rule of fair hearing to convict the defendants based solely on evidence which was elicited through a witness they never had the opportunity to cross examine. It is settled that cross examination is to, inter alia test the credibility and correctness of the testimony of the witness. And in my view justice would not be complete where opportunity is not given for this: See

ANTHONY OKORO V. THE STATE (2012) LPELR -7846 (SC) PG. 31-32 PARA D - A

AL MUSTAPHA V. THE STATE (Supra)

In the same vein it would not be in the interest of justice to make the defendants to bear the brunt of the negligence of the Complainant who abandoned his case midway into the trial. The prosecution also failed to cross examine the 2nd defendant despite opportunity given to do so. It is settled law that the burden of proving the guilt of an accused person beyond reasonable doubt rests squarely on the prosecution.

See
THE STATE V. JOHN OGBUBUNJU & 1OR (2001) 1 SCNJ Pg. 86 at 102 - 103 or LPELR- (SC) Pg 51 Para D-F where the Supreme Court per Ogundare JSC reiterated that:

> *" In law an accused person is under no obligation to prove his innocence. The burden of establishing his guilt beyond reasonable doubt rests throughout on the prosecution. See Patrick Njoven & Ors V. The State(1973) 1 NMLR 331. Failure to do so would lead to the discharge of the accused person."*

Where the prosecution fails to adduce evidence sufficient to establish the guilt of the defendants, then the court would under such circumstance have no option than to absolve them of guilt. This is in line with the time honoured principle that it is better that ten guilty persons escape Justice than for one innocent man to be punished for an offence he did not commit. See

SHINA OKETAOLEGUN V. THE STATE (2015) LPELR -24836 (SC) PG. 27 Para A.

and

SHEHU V. THE STATE (2010) 8 NWLR (PT. 1195) S.C PG. 112 or LPELR-3041 Pg. 25-27 PARA G C.
Where his lordship Ogbuagu JSC reiterated while applying this principle as follows:

> *" ...It is now firmly settled that it is an elementary proposition, that suspicion however strong will not found or lead to a conviction. In other words, it cannot take the place of legal proof. See .....*
> *I agree with the submission in paragraph 5.6 page 10 of the Appellant's Brief of Argument and this is also now firmly settled in a line of decided authorities, that it is better for ten guilty persons to escape than one innocent person to or should suffer.*
> *In other words, it is better to acquit ten guilty men, than to convict an innocent man. See ..... In the case of Saidu v.The State (1982) 4 SC 41@ 69-70, Obaseki, JSC stated inter alia, as follows:*
> *"It does not give the court any joy to see offenders escape the penalty they richly deserve but until they are proved guilty under the appropriate law in our law courts, they are entitled to walk about in the streets and tread the Nigerian soil and breathe the Nigerian air as free and innocent men and women."*
> *On his part Sir Matthew Hale is quoted as remarking that:*
> *"It is better that 5 criminals escape Justice rather than one innocent person to be punished for an offense he did not commit."*

"So be it with the appellant."

In line with the above position of the law this court cannot rely on the evidence of PW1 as the veracity of same wasn't tested under cross examination and the charge before the court given the circumstance.

Suffice to say therefore that the prosecution has not successfully proved the offence of possession of firearms and robbery at gun point beyond reasonable doubt against the 2nd defendant. The 3rd and 4th Counts would also have to fail.

In the final analysis and pursuant to the above findings and particularly in line with the case of **THE STATE V. OGBUBUNJO & ANOR(Supra) particularly at page 21 Para E- G**the defendants standing trial before thecourt are hereby found not guilty in all the Counts as Charged.

Consequently and in line with Section 309 of the Administration of Criminal Justice Act 2015, the defendants Magaji Sunday, Austin Felix and Sunday Momoh areaccordingly discharged and acquitted of the Charge against them.

(SIGNED)

Hon. Judge.

Appearances:

John Ijagbemi Esq for prosecution

A. Dangara Esq for 2nd Defendant

S.A. Igwe with K.O. Fatai Oso Esq and Z.A. Nwosu Esq for the Defendant.

This is for future use since it wasn't included here in this judgement.

The importance and relevant of cross-examination under our adversarial jurisprudence cannot be overstated or over emphasised given the position of the law and the principles of natural justice, equity and good conscience which are in tandem with this Rule.

Even the Holy Bible underscores and resonates the importance of cross examination in the book of proverbs 18 verse 17 where King Solomon postulated that:

> *"He that is first in his own cause seemeth just ; but his neighbour cometh and searcheth him".*

KJV.