IN THE SUPREME COURT OF NIGERIA

Suit No: SC24/1978

Petitioner: Valentine Adie
And
Respondent: The State

Date Delivered: 1980-02-08

Judge(s): George Sodehinde Sowemimo , Chukwunweike Idigbe , Andrews Otutu Obaseki , Augustine Nnamani , Muhamma

Judgment Delivered

The appellant was convicted at the High Court, Ogoja of the murder of Cyril Bishung and was sentenced to death. He appealed to the Federal Court of Appeal against conviction and the appeal was dismissed. He has now appealed to this Court.

The facts before the trial court, which were not in dispute, may be summarised as follows. On 16th December, 1975 both the appellant and the deceased took part in a football match after which there was hot argument between them. The appellant returned to his room at Front Line Hotel, Obudu. Not long afterwards the deceased went to the hotel and met the appellant in the room. A fight ensued between them in the room. The fight, according to the appellant, lasted about ten minutes. The time was about 7 p.m. P.W.2, James Akpagu was an eyewitness to the fight. He said in evidence that he had gone to the \"generator room\" of the hotel to switch on the hotel electric plant when he heard some noise coming from the appellant\'s room. He went to the room and found the deceased and appellant fighting. He attempted separating the fight but in vain. One Godwin Uka came to the room and with his assistance the fight was stopped and the deceased was pushed out of the room. The appellant then got hold of a stick to chase the deceased. P.W.2 tried to stop the appellant, but the appellant shouted at him saying \"let me alone to pursue him\". The appellant then went after the deceased P.W.2 came out of the Front Line Hotel but could not see the appellant. He, on information received, ran to Port Harcourt Street where he found the deceased lying on the ground. The deceased called on him for help and asked the witness to get his (deceased\'s) father to the scene. Meanwhile one Justina Azikpu, P.W.5, who had seen the deceased on the ground requested Timothy Agida, P.W.4, to take the deceased to the hospital. P.W.4 picked the deceased on his motor cycle and took him to the police station instead. The police then took the deceased to the Sacred Heart Hospital, Obudu, where the latter was admitted by a doctor for observation.

The doctor testified as P .W.1 and said:

On 16/12/75 I admitted at about 8.30 p.m. one Cyril Bishung into hospital. Cyril had a small laceration on the bridge of the nose, and another laceration on the right eyebrow. I observed that the right eyelid was grossly swollen. His general condition was good at the time of admission. He was admitted for observation. On 17/12/75 his general condition was satisfactory. On 18/12/75 he had transcient episodes of restlessness and was semi-comatose at times. At 9.40 p.m. of 18/12/75 he died. I next performed a post-mortem examination on 19/12/75 at 8 a.m. I found upon dissection of the skull linear slightly depressed fracture of the frontal bone, just above the nose and another depressed fracture on the right eye brow. There was communited fracture of the right orbital plate, with displacement of splinter fragment, also observed extradural haemorrhage of the frontal orbital bone. In my opinion cause of death was the above-stated injuries on the head.

In his defence, the appellant testified and said that when the deceased tried to run out of his (appellant\'s) room in the Front Line Hotel, he (deceased) knocked his face against the frame of the door. This evidence was earlier mentioned in the appellant\'s statement to police made under caution, which was put in evidence by the prosecution as Exhibit 1 and was subsequently adopted by the appellant in the course of his evidence-in-chief. The relevant portion of Exhibit are ads:

During the struggle, when he got up, and was trying to run out of the house he hit his face on the frame of my door and sustained injury.

The only point taken before us by learned counsel for the appellant was that in view of the inconsistency in the evidence of the doctor that performed the autopsy (P.W.1) there was no sufficient circumstantial evidence which could be said to have irresistibly led to the inference by the learned trial judge that it was the appellant that caused the death of the deceased. In support of this contention learned counsel for the appellant referred us to the evidence of the doctor given under cross-examination, where she said:

All the head injuries are due to heavy direct force; These ones are consistent with injuries caused if a person ran against a heavy object (italics mine).

and also the doctor\'s written report which was tendered for identification by her and later put in evidence by PC Noel Ikpo, P .W. 8, as Exhibit 3. In the report the doctor expressed the following opinion:

I certify the cause of death in my opinion to be due to above head injury due to a heavy blow (Italics mine).

In his judgment the learned trial judge found as follows:

The 1st accused (now appellant) has not also disputed the fact that the deceased had an injury on his head, but explains that the injury was caused when the deceased hit his face on the wooden frame of his door. I do not accept this explanation. The doctor said there were two lacerations on the deceased\'s face, one on the bridge of the nose and the other on the brow of the right eye. Under cross-examination she said the two wounds were due to heavy direct force; in Exhibit 3, her report on the autopsy, she certified that the cause of death was the head injury, (meaning I take it, the two lacerations) due, as she put it, \'to a heavy blow.\' No accidentally self-inflicted injury could, in the circumstances in which the 1st accused said the fight took p lace, result in so grave an injury as those in issue in this case '..I therefore find as a fact that it was the 1st accused who inflicted the injury or injuries on the nose and right eyebrow of the deceased, which injuries occasioned the deceased\'s death on the 18th of December, 1975.

The Federal Court of Appeal which considered the issue of the sufficiency of the circumstantial evidence observed '

In the present case as we have already pointed out, the evidence-in-chief of P.W.2 covered these aspects of the inadmissible evidence now complained of by learned counsel for the appellant and it is our view that in no way was the appellant ever prejudiced. This view also applies to the admission of Exhibit 3 the medical certificate of P.W.1. There was no need to have admitted that exhibit in view of the evidence of P.W. 1 herself. We agree with the submission of learned counsel that the only use to which the report might have been made was for the doctor to have been allowed to refresh her memory with it and the defence would then have been entitled to see it and cross-examine on it, in which case it might have been produced in the doctor\'s evidence-in-chief. See David Ifenado v. The State (1967) N.M.L.R. 200 at page 203 (see also Owanso Agbeyin v. The State 1967 N.M.L.R. 129...

In spite of the learned trial judges reference to Exhibit 3 from the evidence-in-chief of P.W. 1, we are satisfied that it was proper for him to draw the irresistible inference that the fractures as described could not have been caused by the deceased hitting his face on a wooden door-frame.\"

It is significant to observe that the medical report was not, strictly speaking, put in evidence by the doctor, as it was admitted during her testimony for identification only. P.W.8 was the witness who tendered the report when it was admitted as Exhibit 3. So that the present case is distinguishable from the cases of David Ifenado and Owanso Agbeyin (supra) where the medical reports were put in evidence as exhibits proper in the course of the evidence-in-cliief of the medical officers who testified in those cases. In the present case it was not necessary for P.W.8 to tender the medical report since the doctor testified by herself; and furthermore in view of the decisions of this Court in the cases of David Ifenado and Owanso Agbeyin, the effort by the prosecution to put in the report as an exhibit for identification only was an exercise in futility that ought not to have been embarked upon.

Be that as it may, since the report was put in evidence by P.W.8 and not the doctor, and it was not challenged as superfluous when so tendered, it was open to the learned trial judge to rely on its contents as he did.

Now to return to the submissions of learned counsel for the appellant. In Exhibit 3, as already shown, the doctor stated that the injuries suffered by the deceased were caused by a heavy blow. She made no mention of the cause of the injuries in her evidence-in-chief, except under cross-examination when she said that the injuries were consistent with those caused when a person runs against a heavy object. The divergence of the opinion expressed by the doctor is significant in the light of the case for the prosecution and that for the defence. If the injuries were caused by a heavy blow, that is consistent with the prosecution\'s case, but if on the other hand they correspond with injuries caused by running against a heavy object, that would be in support of the appellant\'s defence that the deceased collided with the frame of the door to the appellant\'s room.

The case for the prosecution rests on circumstantial evidence and as Lord Hewart, Lord Chief Justice of England observed in P. L. Taylor & Ors. v. R. 21 Cr. App. R20 at p.21:

It has been said that the evidence against the applicants is circumstantial: so it is but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics.

The prosecution omitted to adduce any evidence about the size and shape of the stick carried by the appellant when he pursued the deceased. Consequently, it cannot be said with any degree of certainty that the stick was capable of causing the injuries sustained by the deceased, if it were to be held, as indeed the learned trial judge did hold and the Federal Court of Appeal affirmed, that the appellant was responsible for causing the death of the deceased by striking the latter with the stick.

In any case with the ambiguity in the testimony of the doctor unresolved it is difficult for me to see how the case for the prosecution, which is based on circumstantial evidence, could be said to have been so conclusive as to irresistibly lead to the guilt of the appellant.

In conclusion the appeal succeeds and I will allow it. The decision of the Federal Court of Appeal is set aside and the conviction and sentence imposed by the trial High Court are quashed. The appellant is acquitted and discharged.

Judgment delivered by
Sowemimo J.S.C.(Presiding)

I agree with the judgment of my learned brother Uwais on the facts and on the application of the law to those facts. It would appear that both courts of trial and the Federal Court of Appeal in Enugu did not grasp correctly that in dealing with circumstantial evidence they must appreciate that the principle governing such a case is that from the facts accepted or found the only irresistible conclusion should be that an accused person and no other inflicted the injuries and thereby caused the death of the deceased.

There is also the novel proposition that when a witness gives expert evidence in chief, the report he issued to the police must also be tendered. This in my view is contrary to the provisions of the law of evidence of the former Eastern Nigeria applicable in the Cross River State. The D .D P P. said that the procedure he adopted was in conformity with an Edict of the Cross River State but was unable to cite it as he had no copy, and in fact does not know the number of the Gazette notice or the date. He was speaking from memory. It is not for this court to embark on a research for him. My learned brother Uwais has taken the trouble to make the research but did not come across such an Edict. I should have thought that the Ministry of Justice in the Cross River State especially the D.D.P.P. for that matter should not have treated the Supreme Court in such a manner. I agree that the appeal should be allowed not only because the doctor\'s evidence in court contradicts her report as to the probable cause of the injuries which led to the death of the deceased, but, also, there was no other evidence to lead to the irresistible conclusions that the appellant caused the injuries that led to the death of the deceased. The appeal is allowed and the conviction and sentence set aside. It is ordered that the appellant is discharged and acquitted.

Judgment delivered by
Idigbe J.S.C.

I have had the opportunity of reading in draft the judgment just delivered by my learned brother My Lord, Uwais J.S.C. and I agree with him that this appeal should succeed, but I would like to add a few words on the important subject of circumstantial evidence which is the principal point raised in the appeal. My Lords, the background to this case and all the relevant facts have been fully recounted in the judgment of the trial court (Esin J.), that of Douglas J. C.A. (as he then was) delivered the unanimous decision of the Federal Court of Appeal holden at Enugu (hereinafter referred to simply as \"the Court of Appeal\") and finally in the judgment just delivered by my learned brother, Uwais J.S. C. I think I need not repeat them save only to the extent that it may be necessary to recall certain aspects of the facts in addressing myself to what I consider the major issues which confront us and on which only I seek by this judgment to add a footnote to the leading judgment just read. I have considered it relevant to make this addition because we disagree with the considered and unanimous judgment of the Court of Appeal on a rather difficult, if not elusive, aspect of the criminal law in general and the law of evidence, in particular, which is the subject of conviction for an offence based solely upon circumstantial evidence.

The learned trial Judge has found, and the Court of Appeal, in my view, quite rightly agrees with him that there is no direct or \"eye-witness\" evidence as to how the deceased received the injuries which caused his death. Both the trial court and the Court of Appeal, however, appear to attach undue, if not erroneous, weight to the evidence of James Akpagu (P.W.2); both courts, in my respectful view, equally made erroneous and improper, if not \"illegal\", use of Exhibit 3 [the medical report issued by Dr. Pia Parlato (P.W.1)] which document was, in the opinion of the Court of Appeal, \"improperly admitted in evidence.\"

That exhibit (i.e. Exhibit 3), be it noted, was put in evidence through Noel Ikpo (P.W.8) when he testified in chief, and NOT by the doctor (P.W.1) who was never asked any questions on the patent inconsistency between the opinion she expressed in her testimony under cross-examination and that given in the report (Exhibit 3) as to the manner the injuries she observed on the deceased had been received or inflicted.

Under cross-examination Dr. Parlato said:

All the head injuries are due to a heavy direct force. These ones are consistent with injuries caused if a person ran against a heavy object. (Emphasis by me)

In her report (Exhibit 3), however, Dr. Parlato stated:

I certify the cause of death in my opinion to be due to above head (sic) injury due to a heavy blow. (Italics supplied by me)

Now, it is apparent from the foregoing underlined passages in the testimony and medical report (Exhibit 3) of Dr. Parlato that the deceased could have sustained the injuries which caused his death either (1) by \"running his head or face against a heavy object\" or (2) as a result of \"a heavy blow\"; but while theory (1) could be consistent with the evidence in the proceedings that the deceased hit (or butted) his face (or frontal region of the head) against the frame of the door of the room while trying to escape from that room, theory (2) is not only inconsistent with that evidence but could also be consistent with the deceased having been struck \"a heavy blow\" on the head with an object (which evidence was never given by any witness in these proceedings). The appellant in his evidence said that the deceased butted the frontal region of his face against the frame of the door of the room wherein they were engaged in a fight while trying to escape from the combat.

It is true that the learned trial Judge disbelieved this evidence of the appellant but a close examination of the learned trial Judge\'s observations on this aspect of the case shows, quite clearly, that this explanation as to what happened between him and the deceased during the combat in his room was disbelieved not only out-of-hand but also as a result of the learned trial Judge\'s wrongful admission and application of the opinion of Dr. Parlato in Exhibit 3 (earlier on

referred to by me) as to the manner in which the deceased received the injuries which caused his death. I pause to advert to the relevant aspect of the judgment of the learned trial Judge; and it reads:

The 1st accused has not disputed the fact that the deceased had an injury on his head, but explains that the injury was caused when the deceased hit his face on the wooden frame of the door. I do not accept this explanation. The doctor said there were two lacerations on the deceased\'s face, one on the bridge of the nose, and the other on the brow of the eye. Under cross-examination she said the two wounds were due to a heavy direct force; in Exhibit 3, her report on the autopsy, she certified the cause of death was the head injury (meaning, I take it, the two lacerations), due as she put it \'to a heavy blow\'. No accidentally self-inflicted injury, could in the circumstances in which the 1st accused said the fight took place, result in so grave an injury as those in issue in this case... (Emphasis by me).

I pause, once again, to observe that it is clear that the learned trial Judge erroneously entertained the impression that on the evidence of the appellant it is impossible to imagine that the injuries on the deceased could be \"self-inflicted\". This impression must, in view of the evidence of Dr. Parlato that the injuries were consistent with the deceased having ran \"against a heavy object\", be erroneous. It is clear that in the circumstances, the learned trial Judge failed to take sufficiently into consideration that aspect of the evidence, which tells in favour of the story of the appellant, and in the circumstances his assessment of the evidence of the appellant, must be considered inadequate.

Let us now examine the evidence of James Akpagu (P.W.2) on which the learned trial Judge convicted the appellant; it was to this effect: \"when on 16/12/75 about 7 p.m. he was about to enter the room where the electrical generating plant was stored in the Front Line Hotel at Obudu, he was attracted by the noise from the appellant\'s room and upon entering found the deceased and the appellant engaged in a combat. With the help of a third party (i.e. 3rd accused in these proceedings who was discharged by the trial court for want of evidence) he successfully separated the appellant from the deceased whom they later pushed out of the room. Appellant took a stick and pursued the deceased. There is no evidence as to the size or length of this \"stick\". Witness tried unsuccessfully to stop the appellant in his chase of the deceased. When eventually witness came out of the room, he was informed by some members of the public that appellant had followed the deceased in the direction of Port Harcourt Road (sometimes referred to in these proceedings as Port Harcourt Street) at Obudu. Later he found the deceased lying on the ground at a spot along Port Harcourt Road Obudu. Such, in a nutshell is the evidence, apart from the conflicting opinion of Dr. Parlato, on which the trial court convicted the appellant.

Once again, I pause to observe that (a) there is no evidence of the size of the stick picked up by the appellant; and (b) there is no evidence 5 to how close the pursuit of the deceased by the appellant was, nor (c) is there any evidence as to the distance between the Front Line Hotel and the spot where the deceased was later found lying on the ground. There is, however, evidence from Noel Ikpo (P.W.8) that Port Harcourt Road at Obudu is not only situated opposite the market\" but also \"a busy thoroughfare at all times\". There is also the evidence of P.W.8 (the police officer who investigated in detail the complaint which led to those proceedings) that he \"never came across any witness who saw the 1st accused i.e. appellant) with a stick along Port Harcourt Street on 16/12/75 at 6:40 p.m.

The resultant position, therefore: is that save for the evidence of James Akpagu (P.W.2) which amounts only to this: that the appellant having fought with the deceased was seen to pick up a stick- the size of which is unknown to the trial court - and followed the direction of Port Harcourt Road (where the deceased was later found lying on the ground) in apparent pursuit of the deceased. No one testified that he saw the deceased run away from the Front Line Hotel and along Port Harcourt Road up to the point where he was obliged to lie on the ground. All we know from the totality of the evidence before the court is that the deceased was seen to leave the room of the appellant at the Front Line Hotel but was next found lying on the ground at Port Harcourt Road, Ogoja. Appellant was seen to pick up a stick near or within his room at the hotel in apparent pursuit of the deceased as the latter left the hotel room; P.W.2 James Akpagu (whose evidence on this point was, really, hearsay) was told by \"some children who were selling cigarettes\" just outside the hotel that they saw the appellant \"running towards Port Harcourt Street\".

The learned trial Judge considered that he had enough evidence in the circumstances set out above to come to the conclusion (to use his own words) \"that it was the 1st accused (i.e. the appellant) who inflicted the injury or injuries on the nose and right eyebrow of the deceased which injuries occasioned (sic) the death of the deceased on the 18th

December, 1975\"; he then sentenced the appellant to death. The Court of Appeal after a review of the case of Stephen Ukorah v. The State (1977) 4S. C. 167 to which they were referred came to the conclusion (again to use their own language) that the facts of that case (i.e. Ukorah) \"are quite different from the circumstances of the present,\" and adopting the hearsay evidence of the children who sold cigarettes outside the hotel, supported the erroneous findings of the trial court that the appellant in fact pursued the deceased, holding a stick, as he did, along Port Harcourt Road until he found him and struck him down. The Court of Appeal then came to the conclusion (in manifest contradiction of Dr. Parlato\'s testimony) that, in spite of the learned trial Judge\'s reference to Exhibit 3 (which they earlier on held to have been wrongly admitted in evidence), they were satisfied that it was proper for the trial court to \"draw the irresistible inference that the fractures as described could not have been caused by the deceased hitting his face on the wooden door frame.\"

My Lords, I am persuaded to the view that the learned Judges of the Court of Appeal were manifestly carried away by the hearsay evidence of the cigarette sellers outside the hotel and like the trial Judge, also by their Patent reluctance, if not failure, to apply to the facts in this case the testimony (under cross-examination) of Dr. Parlato as to the manner the injuries on the deceased could have been received together with the wrong application by them of the principles of law relating to circumstantial evidence as stated by this court in Stephen Ukorah v. The State (Supra at p.176), patently misdirected themselves in law and your Lordships, in the circumstances must depart from their findings.

As was stated in a passage in Emperor vs. Browning 39 I.C. 322 cited in Wills on Circumstantial Evidence; Seventh Edition (1936) at p.324 [approved by this court in Ukorah (Supra)]:

In a case where there is no direct evidence against the prisoner but only the kind of evidence that is called circumstantial, you have a two-fold task; you must first make up your minds as to what portions of the circumstantial evidence have been established, and then when you have got that quite clear you must ask yourselves, is this sufficient proof' It is not sufficient to say (as it seems to me, with very great respect, both the Court of Appeal and the trial court have done in these proceedings) \'if the accused is not the murderer, I know of no one else who is. There is some evidence against him, and none against anyone else. Therefore, I will find him guilty. Such line of reasoning as this is (on the law applicable to circumstantial evidence manifestly) unsound . . . (Italics and brackets supplied by me).

As we indicated in Ukorah (Supra) there is great need for a trial court to tread cautiously in the application of circumstantial evidence for the conviction of an accused for any offence with which he is charged. The Romans - we pointed out, with approval, in Ukorah (Supra at p .177) - had a maxim that it is better for a guilty person to go unpunished than for an innocent one to be condemned: and Sir Edward Seymour speaking on a Bill of Attainder in 1696 laid greater emphasis on this maxim when he stated that he would rather \"that ten guilty persons should escape than one innocent should suffer.\" That also was our view in Ukorah (Supra). In my judgment, the decisions of both the trial court and the Court of Appeal in these proceedings are erroneous, and I agree with my learned brother, My Lord, Uwais J.S.C., that this appeal be allowed. Accordingly, I concur in the order proposed by My Lord, Sowemimo J.S.C. The appellant is hereby discharge and acquitted.

Judgment delivered by
Obaseki J.S.C.

I have had the pleasure and the privilege of reading the judgments of Sowemimo, J.S.C., Idigbe, J.S.C. and Uwais, J.S.C. delivered a short while ago and I agree entirely with their opinions on the question raised before us on the appeal.

The short point in this appeal, which is against conviction for murder, relates to the discharge by the prosecution of the burden of proof to entitle it to a conviction against the appellant.

The appellant was tried and convicted of the murder of Cyril Bishung by the Ogoja High Court (Esin, J.) on the 9th of June, 1977. His appeal to the Federal Court of Appeal (Douglas J.C.A. delivering the judgment) was unsuccessful and the conviction was affirmed. This is a further appeal the main ground being that:

The learned Appeal Court Judges were wrong to have upheld the judgment of the lower Court to find the appellant guilty

of murder on the mere circumstantial evidence not cogent and compelling to warrant a conviction for murder in the circumstances.

The facts which have been fully set out in the judgment of my learned brother Uwais, J.S.C. will not be repeated herein save briefly as follows that there was a fight between the appellant and the deceased in the appellant\'s room at Front Line Hotel, Obudu at about 7.00 p.m. on the 16th day of June, 1976. The struggle in the room attracted James Akpagu (P.W.2) and with the help of Godwin Uka (who was earlier on charged along with the appellant but discharged and acquitted at the trial) separated the two combatants and pushed the deceased out ofthe room. The appellant then armed himself with a stick and as he attempted to pursue the deceased, he was restrained by P.W.2. He struggled to free himself and in the course of the struggle, he shouted at P.W.2 \"let me alone to pursue him\". He broke loose from the arms of P.W.2 and left ostensibly in pursuit of the deceased two minutes after the deceased ran out. It was dark, P.W.2 decided to follow. When he did follow and came out of the hotel P.W.2 did not know the direction the appellant went but some children selling cigarettes, following his enquiry from them, told him \"Port Harcourt Street direction.\" P.W.2 then ran to Port Harcourt Street, Obudu and there saw the deceased alone lying down with an injury - a wound on his forehead asking for help. The deceased did not tell him the person who attacked him but asked him to get his father.

Under cross-examination, part of P.W.2\'s testimony reads:

\"At the time the deceased ran out of the house, I was engaged in trying to restrain the first accused. I did not know what happened to the deceased at the door\" I do not know whether the injury I saw on the deceased head was caused by his knocking his head against a door. \" (Emphasis mine)

These answers are significant because the appellant in his testimony in court and indeed also in his statement made to the police on the same day as the incident alleged that during the struggle in his room when the deceased tried to run out of the house, he hit his face against the frame of my room door.\" He admitted that he tried to pursue the deceased but was stopped by P.W.2. I wish to observe that in his evidence-in-chief P.W.2 gave the impression that they pushed the deceased out of the room but this evidence under cross-examination gives the different impression that the deceased ran out of the house. what is surprising is that P.W.2 did not endeavour to give the deceased first aid or rush him to the police but left him in agony to procure the attention of his father.

Subsequently, Timothy Agida (P.W.4) at the request of Justina Azikpu (P.W.5) (both of whom met the deceased in agony on the road after P.W.2 had rushed to the house of the father of the deceased with information about the condition and request of the deceased) conveyed the deceased to the police station where the deceased found the appellant lodging a complaint of malicious damage. The police recorded the complaint of the deceased and took him to hospital for treatment. Dr. Pia Parlato saw him and admitted him for observation. This was in the night of 16/12/75. On examination before admission, Dr. Pia Parlato P.W. 1 observed the following injuries on the deceased -

(1) a small laceration on the bridge of the nose;
(2) another laceration on the right eyebrow;
(3) a grossly swollen right eyelid.

The evidence of P.W. 1 shows that the deceased\'s general condition was allegedly good at the time of admission and he was admitted for observation\" (italics mine).

The evidence revealed further that on 17/12/75, his general condition was satisfactory, then on the 18/12/75 it took surprisingly serious turn for the worst. He had transient episodes of restlessness and was semi-comatose at times and he died at about 9:40p.m.

On performing the autopsy on the 19/12/75 at 8.00 a.m. P.W.1 found, upon dissection of the skull -

(1) linear slightly depressed fracture of the frontal bone just above the nose
(2) and another depressed fracture on the right eyebrow
(3) there was comminuted fracture of the right orbital plate with displacement of splinter fragment

(4) also observed extradural haemorrhage on the frontal orbital bone.

The doctor expressed the opinion that death was due to the above injuries. It was only under cross-examination that she gave the possible causes of those injuries. She ascribed them to a heavy direct force. This was expressedly stated in her evidence under cross-examination which reads:

All the head injuries are due to heavy direct force. These are consistent with injuries caused if a person ran against a heavy object. (italics mine)

The learned trial judge after a detailed analysis of the evidence before him correctly stated the task (issue) before him when he said:

What I have to determine is whether these injuries were inflicted by the 1st accused.

He also appreciated the magnitude of the task when he said:

There is no direct, eye witness evidence of how the deceased received the injuries on his head. There has been some argument by counsel as to whether the answers elicited by questions put to the deceased by P.W.3, P.W.4 and P.W.8 IPC and Exhibit 2 a statement signed by the deceased the night before his death, are admissible as dying declarations or not. Mr. Agabi learned counsel for the accused person says they are not, but the learned Senior State Counsel, Mr. Ekanem, submits they are. As this judgment is not in any way affected or influenced by these sources of evidence, it is quite unnecessary to resolve the issue here.

The learned trial judge also rejected the evidence of the appellant on the issue that the deceased ran against his door frame; but he did not reject the evidence of P.W.1 that the injuries were consistent with injuries from running against heavy object. Having excluded or rejected the appellant\'s evidence as the source of the injury, the learned trial judge must of necessity explore the whole world for source of \"heavy direct force\" to get an answer. Even then, since the doctor did not testify as to other possible causes of the injury besides \"running against a heavy object\" he is left without any other compass to assist him in the sea of forces.

It was therefore, surprising to observe the jubilant conclusion of the learned trial judge when he said in his judgment -

Although no one saw how the injuries which caused the deceased\'s death were brought about or inflicted, yet there is strong circumstantial evidence as to how they were caused and as to who caused them. (italics mine)

Concluding, he said:

In both his evidence in court and in Exhibit 10, his statement to the police, P.W.2 James Okpaku said the first accused person got hold of a stick and pursued the deceased. The witness said he tried to stop the 1st accused but the latter shouted at him and said \'let me alone to pursue him\' and threatened to hit him with the stick. He said the 1st accused then ran out of the Hotel and followed the deceased, about two minutes after the deceased had himself left the place. He said he came outside and asked some children in what direction the deceased and 1st accused ran, and on being told Port Harcourt Street, he ran to the street. There he found the deceased lying on the ground and observed a wound on his head. . . \"I therefore find that it was the 1st accused who inflicted the injury or injuries . . . which injuries occasioned death.\" (italics mine)

Of this aspect of the case, the learned Justices of the Court of Appeal observed:

From the evidence of P.W.2 as to how the appellant picked up a stick and pursued the deceased who had run out from his room P. W.2 himself following the appellant almost immediately after and then finding the deceased lying down helpless on the ground with injuries on his head with severe bleeding (see evidence of P.W.4) there can be no other reasonable conclusion which a trial court could have reached than that those injuries were inflicted by the appellant on the head of the deceased. (italics mine)

If, with P.W.2 closely following, the appellant had stopped to use the stick on the deceased P.W.2 would have caught up with him and seen him use the stick on the deceased.

The only medical evidence before the court described those injuries as being consistent with injuries caused if a person ran against a heavy object. There is no evidence that these injuries are consistent with injuries caused if one is beaten with a stick. The appellant\'s counsel\'s submission on the only ground argued was therefore in the light of the evidence short and to the point.

It is \"that there is no irresistible conclusion from the evidence as a whole that it was the appellant that hit the deceased and inflicted the injuries which caused the death\". Learned counsel drew our attention to the evidence of P.W.2 for a close study and reappraisal to see if it was really as strong circumstantial evidence as the learned trial judge concluded. He pointed out that there was no evidence that the appellant and the deceased ever met on the road and that the evidence of the source of the injury given by the doctor P.W.1 in court though contradictory to Exhibit 3 does not support the judgment of the High Court and Federal Court of Appeal.

It is, with the greatest respect to the learned trial judge and the learned justices of the Federal Court of Appeal, that I say that the evidence of P.W.2 cannot and does not answer the question of the source of the heavy direct force that caused the injuries. The position was not improved by Exhibit 3 (Report of Post Medical Mortem examination issued by P.W.1 and wrongly admitted through P.W.7).

In it P.W.1 certified as follows:

I certify the cause of death in my opinion to be due to above head injuries due to an heavy blow.

What is a heavy blow' Was it a heavy blow with a fist, a plank, a stick, an iron, a rock, from a falling object, from a car, a motor cycle or what' There is no indication from the evidence on record. The absence of this vital link from the evidence of P.W. 1 goes to show the weakness in the chain of circumstantial evidence, which the learned trial judge regarded as strong. The chain of evidence was therefore not complete to link the crime with the stick allegedly held by the appellant when he decided to pursue the deceased. There is no evidence circumstantial or otherwise, which conclusively established that the injuries, which caused the death, was attributable to the application of the stick. Of course the stick was not described. Was it a big stick, a small stick, a thin stick; was it a strong or weak stick' There was no answer.

On circumstantial evidence, Lord Normand, delivering the reasons for the judgment of the Privy Council, in the case of Lejzor Teper v. The Queen (1952) A.C.480 (an appeal from the Supreme Court of British Guyana) said at p.489

Another result is that the Crown has to rely on circumstantial evidence only to connect the appellant with the commission of the crime\' Circumstantial evidence may sometimes be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion of another. Joseph commanded the steward of his house: \'put my cup the silver cup in the sack\'s mouth of the youngest\'

and when the cup was found there, Benjamin\'s brethren too hastily assumed that he must have stolen it.\' It is also necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. (italics is mine)

I would repeat these warnings for they are very apposite in this case on appeal. Be it noted that the superficial injuries observed by P.W. 1 on the deceased when admitted on 16/12/75 were not the cause of the deceased\'s death although the learned trial judge\'s judgment seemed to suggest they were. The cause of death were the deep-seated injuries of fractures of the cranial bones or skull bones disclosed only when the skull was dissected and the cause of which was a heavy direct force.

The ascription of these injuries to the application of a stick, which was not produced, the size of which was not testified to or ascertained, and which was not acknowledged by the doctor P.W.1 as capable of causing the injuries is a serious

misapplication of facts and miscarriage of justice. The chain of evidence necessary to lead irresistibly to the guilt of the appellant is not complete in this case. It may well be helpful to remind ourselves what circumstantial evidence is -

Circumstantial evidence is as good as, sometimes better than any other sort of evidence, and what is meant by it is that there is a number of circumstances which are accepted so as to make a complete unbroken chain of evidence. If that is established to the satisfaction of the jury, they may well and properly act upon such circumstantial evidence.

This dictum of Humphrey J. in Rex V. Miao cited in Wills on Circumstantial Evidence 7th Edition(1936)p.224 which defines circumstantial evidence was adopted with a p proval by this court in the case of Stephen Ukarah v. The State (1977) S.C .167 delivered by Idigbe, J.S.C., at page 174 - our most recent authority on circumstantial evidence.

Apart from the failure to tie up the causation of the type of injuries found on the skull of the deceased at post mortem with the stick, the appellant was alleged to have armed himself with, there is the fact that P.W.2 never knew the direction the appellant traveled after breaking loose from his grip. The information he acted on was received from the children selling cigarettes outside the hotel. The children were not named and were not called to testify. P.W.2 never met the appellant at any point along Port Harcourt Street and there is no other evidence accepted by the learned trial judge to connect the appellant with Port Harcourt Street where the deceased was found mortally wounded on the head. The evidence that the appellant pursued the deceased along Port Harcourt Street was hearsay, inadmissible and highly prejudicial. It did not lead to the discovery of the appellant in the street but was used to link the injury found on the deceased with the appellant\'s take-off from the arms of P.W.2 in the hotel room. The best that can be said of it was that it cast serious suspicion on the appellant. In his search for the answer to the question whether the injuries were inflicted on the deceased by the 1st accused appellant, the learned trial judge acted on it to the detriment of the appellant as is evident from the passage in his judgment already set out above but which for convenience and clarity is reproduced again. It reads -

There is no direct (i.e. eye witness) evidence of how the deceased received the injuries on his head.....

In both his evidence in court and in Exhibit 10, his statement to the police, P .W.2 James Okpaku said the first accused got hold of a stick and pursued the deceased. The witness said he tried to stop the 1st accused but the latter shouted at him and said \'let me alone to pursue him\' and threatened to hit him with the stick. He said the 1st accused ran out of the hotel and followed the deceased about two minutes after the deceased had himself left the place. He said he came outside and asked some children in what direction the deceased and the 1st accused ran and on being told Port Harcourt Street, he ran to that street There he found the deceased lying on the ground and observed a wound on his head.'.

The 1st accused has not also disputed the fact that the deceased had an injury on his head but explains that the injury was caused when the deceased hit his face on the wooden frame of his door. I do not accept this explanation. The doctor said there were two lacerations on the deceased\'s face, one on the bridge of the nose and the other on the brow of the right eye. Under cross examination, she said the two wounds were due to \'heavy direct force\'. (This is not the correct impression conveyed by the doctor\'s evidence.) In Exhibit 3 her report on the autopsy, she certified that the cause of death was the head injury (meaning I take it, the two lacerations) due as she puts it \'to an heavy force\'. No . . . accidentally self-inflicted injury could in the circumstances in which the 1st accused said the fight took place result in so grave an injury as those in this case

Neither he (D .W .3) nor any of the other accused persons impressed me as a person with any . . . appreciation of the value or virtue of veracity in court proceedings. I therefore find that it was the 1st accused who inflicted the injury or injuries on the nose, and right eyebrow of the deceased which injuries occasioned the deceased\'s death on the . . .18th of December, 1975.\" (italics mine)

It cannot be doubted that the evidence that the appellant went the same direction as and in hot pursuit of the deceased was highly prejudicial and influenced the trial judge.

It is my opinion that the learned trial judge and the learned justices of the Court of Appeal were misled by this piece of

hearsay evidence. Such hearsay evidence featured prominently in the case of Lejzor Teper v. The Queen (1952) A. C. 480 which I find very much on all fours with the present case. That was a case of Arson. The head note from the Report reads:

At the trial of the appellant on a charge of maliciously and with intent setting fire to a shop in which he carried on the business of a dry goods store evidence given by a police constable was admitted for the purpose of identification and without objection that '

I heard a woman\'s voice shouting, your place burning and you going away from the fire; immediately \'then a black car, came from the direction of the fire and in the car was a fair-man resembling the accused. I did not observe the number of the car. I could not see the face from where I was standing.\' In cross-examination he said that he did not know who or where the woman was. She was not a witness at the trial and it was common ground that the incident took place at a distance of more than a furlong from the site of the fire and that it happened not less than 26 minutes after the fire was started

Held: that the words spoken by the woman did not form part of the res gestae and were not therefore excepted from the fundamental rule against admission of hearsay evidence. The evidence was wrongly admitted, and there being no other evidence of identification which was of any value and the circumstantial evidence which alone the Crown had to rely on to connect the appellant with the commission of the crime being inconclusive the purpose, the conviction was set aside.

Lord Normand at p.491 observed -

The circumstantial evidence falls short of ..... conclusiveness and a properly instructed jury having it alone before it would have had a more than usually difficult decision to make .....

It is now necessary to consider whether admission of Catos hearsay evidence was having regard to the weakness of the other evidence \"something which deprived the accused of the substance of a fair trial and the \"protection of the law. Ibrahim v. The King (1914) A.C. 599; Renouf v. Attorney-General for Jersey (1936) A.C. 445; Dharmasena v. The King (1951)A.C. 1.

It is a principle of the proceedings of the Board that it is for the appellant in a criminal appeal to satisfy the Board that a real miscarriage of justice has occurred.

The dominant question before us is the broad one of whether substantial justice has been done and whether looking at the proceedings as a whole and taking into account what has properly been proved the conclusion come to by the learned trial judge and the justices of the Court of Appeal has been a just one. (Dal Sing v. The King (1917) L.R. 44 I.A. 137, 146.) I have in the end to decide whether the appellant has shown that the improper admission of the hearsay evidence of P.W.2 regarding pursuit of the deceased by appellant along Port Harcourt Street was prejudicial to the appellant where the rest of the evidence was weak that the proceedings as a whole have not resulted in a fair trial. I am satisfied that the hearsay evidence was in a high degree prejudicial. The effect may be gauged by considering what P.W.2\'s evidence would have amounted to if it had been excluded. He could then have said that in consequence of what the children told him he went along Port Harcourt Street. This evidence would have been worthless for the purpose of establishing that the appellant pursued the deceased along Port Harcourt Street in view of the evidence that the appellant went to the police station and was at the police station long before the deceased arrived.

It is impossible to avoid the conclusion that the learned trial judge might well and probably did regard P.W.2 hearsay evidence as the only vital link.

It may be said that the fact that no objection was taken to it at the trial should be allowed to have some bearing whether the accused was really prejudiced (Stirland v. Director of Public Prosecution (1944) A.C. 315). That is a consideration which weighs in a case where the evidence improperly admitted would not by its nature cause serious prejudice or where the other evidence left little or no reasonable doubt of the appellant\'s guilt. It is of no real moment in the present case.

The highly prejudicial nature of the hearsay evidence of P.W.2 together with the failure of the prosecution positively to establish that the head injuries which caused the death were capable of being inflicted with the stick the appellant was alleged to have armed himself with shows conclusively that the prosecution failed to discharge the onus of proof cast on them by our law. It was not for the appellant to prove that the stick he held did not and could not cause the injuries. It is for the prosecution to p rove that its use caused the injuries. The burden does not shift. The standard of proof required is very high. On this point, Lord Diplock says '

In criminal proceedings, by an exception to the general rule founded upon considerations of public policy. If the consequence of a finding that a particular fact is proved will be the conviction of the defendant the degree of probability must be so high as to exclude any reasonable doubt that that fact exists.

Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact; it is sufficient for his acquittal if any of the acts, which, if they existed, would constitute the offence with which he is charged are 'not proved' Per Lord Diplock in Public Prosecutor v. Yuvavaj (1970) A.C. 913 at 921. (italics mine)

In my view, the evidence on record falls short of proving conclusively that the appellant inflicted the injuries which terminated the life of the deceased.

For the above reasons, I agree with my learned brother the Hon. Justice Uwais, J.S. C. that this appeal be allowed and I hereby allow it. The judgment of the High Court, Ogoja (Esin J.) dated 9th June, 1977 together with the judgment of the Federal Court of Appeal dated 1st day of June, 1978 affirming the conviction of the appellant and the sentence of death passed on him are hereby set aside and a verdict of \"Not Guilty\" and acquittal is hereby entered in favour of the Appellant.

The Appellant is hereby discharged and acquitted in concurrence with the order proposed by Sowemimo, J.S.C.

Judgment delivered by
Nnamani J.S.C.

On the 9th day of June 1977, Esin J. sitting at the Ogoja High Court convicted the appellant of murder contrary to Section 319 of the Criminal code. The Appellant appealed to the Federal Court of Appeal Enugu Judicial Division which, after a full examination of the facts of the case and the law, held on 1st June, 1978 that \"there is no merit in this appeal and it is accordingly dismissed\" It is from that judgment that the appellant has appealed to this Court. I must pause here to state that I agree with the leading judgment of my learned brother Uwais J. S.C. just delivered.

I wish, however, respectfully to take the liberty of making a few remarks on some of the areas in which I agree the Federal Court of Appeal erred. This appeal has turned on the question of the conclusiveness or otherwise of the circumstantial evidence. The Federal Court of Appeal reviewed the evidence and the law extensively with regard to the issue of circumstantial evidence, but in my view came to the wrong conclusion. That there was some evidence before the trial Judge pointing to the appellant as the possible culprit cannot be doubted. Without reviewing the facts of the case, I may just refer to some of them for purposes of argument. There is the fact, that this tragedy started on the fateful day with the quarrel between the deceased and the appellant in the football field; then there was the fight between both of them in the Front Line Hotel, Obudu - a fight in which the appellant, according to his statement to the police Exhibit 1, received several blows and had his property damaged; then there was the testimony of James Akpagu P.W.2 that the appellant got hold of a stick and pursued the deceased. This was contained in P.W.2\'s evidence-in-chief in court which was accepted by the trial Judge) and in Exhibit 10 his statement to the police. In fact under cross examination the appellant had stated -

I wanted to pursue the deceased because he came and fought me in my house and destroyed my property. I wanted to fight the deceased when I tried to pursue him. I did not see the deceased after he left the house

Both P.W.4 and P.W.5 testified that they found the deceased lying seriously injured in Port Harcourt Street, Obudu.

There is also no doubt that the deceased died from head injuries, which could have been caused by a stick as appears to be the contention of the prosecution or by the deceased hitting his head on the frame of a door as put up by the appellant in his defence. My learned brother Uwais J.S.C. has dealt with all the evidence in greater detail (including the medical evidence) and I agree with him that when all the circumstantial evidence is taken together they do not lead to the irresistible conclusion that the appellant, and no one else, was the murderer. In Majekodunmi v. The Queen 14 W.A.C.A. 64. Foster-Sutton P. (as he then was), dealing with circumstantial evidence stated at p.69

In view of the conflict and discrepancies in the evidence of the prosecution can it be said that the case against the appellant was proved with that certainty which is necessary in order to justify a verdict of guilty' " Moreoever we are not satisfied that the only inference that can be drawn from the evidence given at the trial is one of guilt".

See also Spiff v. Commissioner of Police 19 N.L.R. 81 and the views of this Court in Stephen Ukorah v. The State (1977) 4S.C. 167 at pp.176 et seq, and Udo Akpan Essien v. The State (1966) N.M.L.R. 229.

The other matter that I wish to add in my remarks is on the admission of the medical report exhibit 3 and its prejudicial effect on case of the appellant. Dr. Pia Parlato gave evidence at the trial as P .W.1. In the course of her testimony a medical report which she issued on the cause of death of the deceased and which she handed to the police was tendered as identification A. She was not cross-examined in relation to this report. The report was tendered by Noel Ikpo P.W.8 in his evidence-in-chief. Before us the Deputy Director of Public Prosecutions, Cross River State conceded that the medical report was wrongly admitted. He referred to an Edict of the Cross River State, which makes such a report admissible. The Edict was not produced before us and I am unable to find it. In any case, learned counsel for the respondent had said that the instant case occurred before the said Edict came into effect. In their judgment, the Federal Court of Appeal reviewed the evidence which they held were clearly inadmissible. These included the hearsay evidence of P.W.3, P.W.4, P.W.8 and Exhibit 2 the statement of the deceased to the police. They obviously intended to include Exhibit 3 in this class but about it they merely said:

There was no need to have admitted that exhibit in view of the evidence of P.W.1 herself. We agree with the submission of learned counsel that the only use to which the report might have been made was for the doctor to have been allowed to refresh her memory with it and the defence would then have been entitled to see it and cross examine on it, in which case it might have been produced in the doctor\'s evidence-in-chief. (italics mine)

In my view this was putting the issue rather mildly. The medical report was wrongly or improperly admitted in evidence and the trial Judge should not have had recourse to it. In David Ifenado v. The State (1967) N.M.L.R. 200, a decision of this Court which was relied on by the Federal Court of Appeal, the doctor after his evidence in chief produced a medical report which was received in evidence. Brett, J.S. C. (delivering the judgment of the Court) held that

It was clearly inadmissible at that stage. The Doctor might properly have been allowed to refresh his memory from the report under Section 215 of the Evidence Act and the defence would then have been entitled to see it and cross-examine on it, in which case it might have been produced in evidence but it ought not to have been admitted at the trial in the evidence-in-chief. (italics mine)

This case was followed in Owanso Agbeyin v. The State (1966) N.M.L.R. 129. In the cases of Suwa and Another v. The State (1965) N.M.L.R. 405 and Idirisu v. The State (1968) N.M.L.R. 88 where the issue of admissibility of medical reports came before this court, the decisions turned on other matters as the reports were properly admitted under section 249(3) of the Criminal Procedure Code Cap. 30 Laws of Northern Nigeria. It is true that in the Ifenado and Agbeyin cases (supra) the offending medical reports were tendered after the evidence-in-chief of the doctor while in the instant case the report was tendered by P.W.8. The medical re p ort was as stated supra taken in for identification during the evidence-in-chief of the doctor but if the P.W.8 had to tender it, it would only be as something he obtained in the course of his investigation. I think that it can be deduced from Ifenado\'s case that in the circumstances it is at the stage when the defence counsel has to cross-examine on the report that it can be received in evidence. There will be of course other circumstances in the course of the trial in which the report can be properly received in evidence.

On the effect on the appellant\'s case of the wrongful admission of evidence, the Federal Court of Appeal, erroneously in

my view, came to the conclusion that the appellant was not prejudiced. They stated at p.6 of their judgment

In the present case as we have already pointed out the evidence in chief of P.W.2 covered these aspects of inadmissible evidence now complained of by the learned counsel for the appellant and it is our view that in no way was the appellant ever prejudiced. This view also applied to the admission of Exhibit 3 i.e. the medical certificate of P.W. 1..... (italics mine).

There is no doubt in my mind that the appellant was prejudiced by the admission of Exhibit 3. In her evidence in court P.W.1 in cross-examination stated

All the head injuries are due to heavy direct force, these ones are consistent with injuries caused if a person ran against a heavy object.

This evidence would have been more consistent with the appellant\'s story that at the end of the fight in his room in the hotel on the fateful day the deceased in trying to run out hit his head on the panel of appellant\'s door. This evidence was disbelieved by the Judge. But in exhibit 3, the medical certificate, the doctor said

I certify the cause of death in my opinion to be due to above head injury, due to an heavy blow.

This was clearly the version, which the trial Judge accepted for in his judgment, he said in part

In Exhibit 3 her report of the autopsy, she certified that the cause of death was the head injury (meaning I take it the two lacerations) due, as she put it, \"to an heavy blow\". No accidentally self inflicted injury could, in the circumstances m which the first accused said the fight took place result in so grave an injury as those in issue in this case . . .I therefore find as a fact that the first accused inflicted the injuries on the nose and right eyebrow of the deceased which injuries occasioned the deceased\'s death on the 18th December, 1975.

The medical certificate made a great difference to the decision, which the learned trial Judge reached. If Exhibit 3 had not been in evidence before him, he may well have given more credence to the defence of the appellant, which was more consistent with the medical opinion given by the doctor in her evidence-in-chief. The Federal Court of Appeal referred to but wrongly applied section 226(1) of the Evidence Law, which enacts:

The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted.

For the reasons already given I am not convinced that the decision would not have been different if Exhibit 3 had not been received in evidence. See Queen v. Olubunmi Thomas (1958)3 F.S.C. 8.

I agree with my Lord Uwais, J.S.C. that the appeal should be allowed. It is hereby allowed. I concur with the order proposed in the judgment of the Presiding Justice, my Lord, Sowemimo J.S.C. The appellant is discharged and acquitted.

Appeal allowed.