**ABAYOMI ADELENWA**

**V.**

**THE STATE**

SUPREME COURT OF NIGERIA

13TH OCTOBER, 1972.

SUIT NO. SC 275/71.

**LEX (1972) -** SUIT NO. SC 275/71.

**OTHER CITATIONS**

2PLR/1972/4 (SC)

(1972) 7 NSCC 591

**BEFORE THEIR LORDSHIPS:**

ELIAS, C.J.N

COKER, J.S.C

SOWEMIMO, J.S.C.

**ORIGINATING COURT**

HIGH COURT, CALABAR, [Koolresh, J. Presiding]

**REPRESENTATION**

Mr. A. R. A. Noibi for the Appellant.

Mr. A Mbrey-Bassey, Senior State Counsel for South-Eastern State for the Respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

ADMINISTRATIVE LAW AND GOVERNMENT: Police Brutality and criminal behaviour – Alleged use of service rifle to harass households under threat of harm – Death arising therefrom – Proof of criminal liability – How treated

CRIMINAL LAW AND PROCEDURE:- Murder – Charge of – Duty on prosecution to discharge the burden of proof – Where prosecution fails to prove murder – Whether court can substitute murder charged to manslaughter in the absence of evidence to sustain same

CHILDREN AND WOMEN LAW: *Women and Security/Justice Administration* – Murder - Death of woman from gunshots allegedly fired by security operatives unlawfully brutalising her household – Failure of investigating and prosecutorial authorities to discharge the burden of proof – Effect

HEALTHCARE AND LAW:- Evidence of Medical Examiner – Where it materially contradicts evidence of an eye-witness with failing eye-sight – How resolved – Implications for justice administration

**PRACTICE AND PROCEDURE ISSUES**

COURT:- Duty of judge to restrict itself to the consideration of evidence adduced before it – Whether court can reduce a charge of murder to manslaughter without evidence

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The accused, a Policeman, was charged for murder but convicted of manslaughter and sentenced him to a term of 5 years’ imprisonment with hard labour contrary to Section 325 of the Criminal Code of the former Eastern Nigeria. Evidence accepted by the Court showed that the a bullet had injured the deceased person’s head but there was no evidence establishing that it was the accused person who fired the gun or that it was the gunshot that killed the deceased. Yet, after reviewing the evidence and rejecting the testimony of all the nine prosecution witnesses, the trial judge concluded that “it was the rifle carried by the accused at the time that fired the bullet which killed the deceased.The accused gave evidence in his own defence and denied that his gun fired the bul­let that killed the deceased. The medical examination supported the claim that the bullet did not enter or lodge into the head of the deceased person.

DECISION(S) APPEALED AGAINST

“Even though he was there to commit an offence his act which resulted in the death of the deceased is not accompanied by menace aforethought and there­fore does not amount to the offence of murder. I find the accused therefore not guilty of the offence of murder, but as I have already stated accused had be­haved with a police rifle that night as if it was a toy-gun. He was careless in the extreme.”

Thereupon, he convicted the accused of manslaughter.

ISSUE(S) FOR DETERMINATION ON APPEAL

*Whether there was satisfactory evidence that the Accused person killed the deceased person*

DECISION OF SUPREME COURT

We are of the view that the learned trial Judge clearly misdirected himself when, having found that the charge of murder had not been proved, he attributed to the accused mens rea sufficient to justify .a finding of manslaughter in the clear ab­sence of evidence in support. We think it right to point out that it is the duty of the court to consider the evidence produced before it and never to proceed to indulge in speculation as to what might have happened; a Judge should not substitute his own supposition for the testimony of witnesses given on oath before him.

**MAIN JUDGMENT**

**TASLIM ELIAS, C.J.N.** (Delivering the Judgment of the Court):-

This is an appeal from the judgment of Koolresh, J. in the High Court, Calabar, delivered on September 13, 1971, in which he convicted the accused of the manslaughter of Atim Otu committed on June 18, 1970, and sentenced him to a term of 5 years’ imprisonment with hard labour contrary to Section 325 of the Criminal Code of the former Eastern Nigeria, the charge was originally one on information for murder but the accused was convicted of manslaughter only.

What happened was that the accused was a police officer who was on the day of the incident scheduled for duty with certain customs preventive officers in the vicinity of the house where the deceased was shot dead. Before the accused left he and another policeman in the team obtained a rifle and ten rounds of ammunition each, the object of the expedition being the usual night raid by the customs officers against smugglers; for this they needed and were given the protection of armed police guards in case they met with armed resistance from the smugglers. The initial sear­ches did not disclose any smuggled goods. The accused was then left behind with two others to look after the land-rover in which the team had been brought there, while the others carried further searches in other streets in the area. During this period, the premises known as No. 9 Fitzgibbon Street, Calabar, was broken into and Jacob Otun (P.W.2) and his wife were beaten up and made to give £20 to their assailants, the wife also received a fatal head injury from which she later died. Esenowo Johnson Esenowo (P.W.1), the Medical Officer, who performed the post­mortem examination on the body of the deceased, reported his findings as fol­lows:

“External: There was a wound about 3 inches long on the scalp of the right lat­eral side of the skull. The wound contained fractures. On the body were bruises of the left shoulder and buttocks.

Internal Examination of the head revealed a roughened depressed area on the right declined of the skull. On opening the skull there was a large blood clot occupying the right side of the brain tissue and also on the depressed side of the skull bone was a large blood clot attached to it. I decided to photograph these areas. The pictures were tendered in the lower court.

Abdominal examination showed that the:

“lungs, heart and spleen were normal. The wound on the head could have been caused by an object under a high velocity. The object that I am thinking of was in the form of a bullet hitting the target rather then penetrating the object. The bruises could have been caused by intra-cranial haemorrhage resulting from damage to artery of the brain. The deceased died in the hospital after she had been admitted and treated. She died on the 29th of June, 1970:”

Under cross-examination, P.W.1 said:

“I recorded my findings in a form which was provided. It is true that the police asked me to look to a bullet which they thought lodged itself in the head of the lady. I did a complete post-mortem examination from the head to the abdomen. The deceased did not gain consciousness before she died. I could not tell from what angle the bullet got the head. It is possible that the wound I saw on the head to have been caused by a stray bullet. I found no bullet in the brain or in the head cavity. The bullet did not enter the brain. It merely scrapped the scalp.”

The learned trial Judge then reviewed the evidence, rejected the testimony of all the nine prosecution witnesses, and concluded that “it was the rifle carried by the accused at the time that fired the bullet which killed the deceased. He then pro­ceeded to ask: Was the firing therefore deliberate or intentional? Did the act of the accused which caused the death of the deceased amount to murder? Although the accused gave evidence in his own defence, denied that his gun fired the bul­let that killed the deceased and made no special plea.

The learned trial Judge said that it was his duty to consider points favourable to the accused case. He pre-occupied himself with a consideration of whether the firing was intentional or negligent on the part of the accused whom, in the absence of supporting evidence, he presumed to have fired the fatal shot. It is necessary to quote the learned trial Judge at some length on this vital point. He said:

“Although P.W. 2 stated that the accused came into his house, beat him up and took his money and also said that accused shot his wife when she tried to ask him to give them part of the £20 (twenty pounds) he took, I have no reason to say that this witness deliberately told a lie, but having regards to his relation­ship with the deceased and his failing eyesight, 1 have to accept his evidence with some caution. The accused must have been brutal to both him and his wife, and must have even threatened them with his gun, but I find it hard to be­lieve that portion of his evidence that accused pointed the gun at the deceased and fired her on the head. This showed the avowed intention of the accused to kill the deceased with the gun. This is not borne out by the evidence of the doc­tor whose evidence is next best after that of the P.W. 2.”

His summary was as follows:

“From this evidence of the doctor, it is clear that the gun when it was fired was not aimed at the deceased. Had it been so aimed at the distance of the parties in the same room the brain would have been penetrated by the bullet. A mere injury to the scalp did not seem to have shown that the gun went off because accused did not exercise the necessary care. In any case, for the accused to be convicted it must be proved that this negligent act of the accused killed the deceased.”

He then observed:

“On the whole, I am not satisfied that the prosecution has succeeded in prov­ing beyond all reasonable doubt that the gun shot which produced the injury which caused the death of the deceased was intentional or that it was the beat­ing which produced the injuries which resulted in death of the deceased.”

In the absence of any evidence, the learned trial Judge then embarked on speculation as follows:

“But accused left where he was stationed for the night and went on a frolic of his own, which was to steal by threat. He went there with loaded rifle which was part of his equipment that night. He did not take the rifle because he wanted to steal with it even though its presence must have emboldened him. He knew that the gun was loaded and that he did not apply safety catch yet he pointed it at the deceased as he did to the P.W. 2. While he was exchanging words with the husband and wife ‘without intending to do so, he lost his nerves, and the trigger must have been pushed because the gun suddenly went off’ leaving the deceased a corpse soon after. Accused is a trained police officer and he was dealing with police rifle, which he knows to be very dangerous. Considering how accused behaved with that rifle, I am satisfied that he was reckless with­out due regard for his life or safety.”

His surprising conclusion was:

“Even though he was there to commit an offence his act which resulted in the death of the deceased is not accompanied by menace aforethought and there­fore does not amount to the offence of murder. I find the accused therefore not guilty of the offence of murder, but as I have already stated accused had be­haved with a police rifle that night as if it was a toy-gun. He was careless in the extreme.”

Thereupon, he convicted the accused of manslaughter.

Before us, Mr. A. R. A. Noibi, learned counsel was based entirely on facts, the Court ought to have regard to this ruling in Okezie v. The Queen (1963) All N.L.R. 2, at p.3:

“It is clear that unless there is some evidence to support it, the verdict in a crimi­nal case cannot stand. The other test is whether a reasonable tribunal or jury, if they appreciated the evidence rightly and applied the law appropriate to the case, could have returned the verdict. This is the light on which a criminal ap­peal on the facts should be argued and approached.”

Mr. Noibi argued that there was no satisfactory evidence as to the identity of the killer of the deceased. P.W. 2, the deceased’s husband, said that the “soldiers” came in and fired a gun at his wife’s head, and later that the person who shot his wife was a policeman who wore khaki whereas the accused person was proven to have worn the Nigerian Police uniform of grey short over dark blue trousers; P.W. 2 had a defective eyesight and the trial Judge himself was not satisfied about this part of P. W. 2’s testimony. Learned counsel also stressed that prosecution wit­nesses testified to the fact that the same ten rounds of ammunition issued to the accused at the outset of the expedition were found to be intact when the latter re­turned to base and the rounds of ammunition were duly checked and finally that whoever it was that fired the fatal bullet could not have been the accused, as the doctor’s own finding was to the effect that the injury to the head of the deceased could have been caused by “a stray bullet” by, according to the defence counsel in the court below, a smuggler in retreat.

We are of the view that the learned trial Judge clearly misdirected himself when, having found that the charge of murder had not been proved, he attributed to the accused mens rea sufficient to justify .a finding of manslaughter in the clear ab­sence of evidence in support. We think it right to point out that it is the duty of the court to consider the evidence produced before it and never to proceed to indulge in speculation as to what might have happened; a Judge should not substitute his own supposition for the testimony of witnesses given on oath before him.

Mr. Mbrey-Bassey, Senior State Counsel who appeared for the respondent, conceded that he could not support the verdict of the learned trial Judge.

We came to the conclusion that the decision of the court below in convicting the accused of manslaughter was unreasonable and unwarranted having regard to the evidence adduced before him; we therefore, discharged and acquitted the accused when we heard the appeal on August 15, 1972.

Appeal allowed.