**MUSA ATEJI**

**V**

**THE STATE**

SUPREME COURT OF NIGERIA

27TH FEBRUARY, 1976.

SUIT NO. SC 74/1975

**LEX (1976) - SC 74/1975**

**OTHER CITATIONS**

3PLR/1976/25 (SC)

(1976) 2 S.C. 43

**BEFORE THEIR LORDSHIPS:**

DARNLEY ARTHUR ALEXANDER, C.J.N.

MAMMAN NASIR, J.S.C.

GEORGE SODEINDE SOWEMIMO, J.S.C.

**ORIGINATING COURT**

HIGH COURT OF OYO STATE, ILESHA JUDICIAL DIVISION (Adesiyun, J. Presiding)

**REPRESENTATION**

Mr. F. O. AKINRELE - for Appellant

Mr. I. A. SALAMI, Ag. Director of Public Prosecutions (with him S. B. A. LARO, State Counsel Grade I) - for the Respondent

**ISSUES FROM THE CAUSE OF ACTION**

CRIMINAL LAW AND PROCEDURE:- Culpable homicide punishable with death contrary to section 221(b) of the Penal Code of Kwara State of Nigeria – Need to prove cause of death - How proved – Effect of failure thereof

HEALTHCARE AND LAW:- Evidence of Medical examiner – Autopsy/Medical Report – Erroneous or incomplete making of same – Implication for justice administration

CHILDREN AND WOMEN LAW: *Women in Business* – Murder of woman due to quarrel arising from payment for kerosene delivered to neighbour/customer – *Children and justice administration* - Evidence of children/young people who were eye-witness to assault and death of mother – Material contradictions therein – How treated by Court

**PRACTICE AND PROCEDUREISSUES**

EVIDENCE:- Medical Report - proof of cause of death relying on Medical Report – Essential ingredients – When failure to call the doctor as a witness could be fatal to case of prosecution

EVIDENCE:– Material contradictions in evidence of two key witnesses - When fatal

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellant was challenged by the deceased person for sending her child on his errands. A quarrel and fight ensued. After they were separated, the Appellant was alleged to have gone back through the backyard to hit the deceased person on the back of his neck with a hoe handle and the deceased fell and died. Relying on the evidence of eye-witnesses, including those of the children of the deceased, and in spite of some material contradictions in their disparate testimony, the trial court convicted the accused/appellant of murder. Trial court disbelieved the testimony of the accused regarding injury sustained for not being disclosed at the earliest opportunity

DECISION(S) APPEALED AGAINST

The trial court held among others that -

1. “I have no doubt in my mind about the evidence of all the prosecution witnesses and I believe them.”

2. “The accused denied hitting the deceased with Exhibit B. Rather, he said it was the deceased who threw Exhibit B at his forehead the wound thereby caused with hot water. If this was true, why did the accused fail to call as witnesses the people who treated the wound at his forehead for him? Why didn’t he show the wound to the police at the police station, Idah, where he went on his own accord or show to this court the scar-mark left there? I do not believe the accused.”

ISSUE(S) FOR DETERMINATION ON APPEAL

“]Whether the decision of the trial court] was unwarranted and unreasonable and could not be supported having regard to the evidence.”

DECISION OF THE SUPREME

1. While it is legitimate in a suitable case for a trial court to make observations on the failure of the accused person to disclose his line of defence at the earliest opportunity, nevertheless, the observations should be made with care and fairness to the accused person in all the circumstances of the case. In this case, the appellant in his written statement did tell the police of his injury one day after the incident. He was also not cross-examined at all on this evidence when he gave evidence on oath in his own defence. We hold that the learned trial judge erred in disbelieving the appellant on the issue of the injury on the forehead as P.W1, who was believed by the learned trial judge, had herself stated that the injury was there.

2. We are of the view that if the learned trial judge had considered the whole evidence in this case with care and in the light of the defects discussed in this judgment, he would not have come to the erroneous conclusion that the prosecution’s case had been proved beyond reasonable doubt.

3. The conviction of the appellant cannot be supported having regard to the evidence. The appeal therefore succeeds. The conviction and sentence of the appellant are hereby set aside. We order a verdict of acquittal to be entered and the appellant is discharged.

**MAIN JUDGEMENT**

**NASIR, J.S.C. (Delivering the Judgment of the Court):**

This is an appeal from the decision of Adesiyun, J. sitting at the High Court of Lokoja convicting the appellant of the offence of culpable homicide punishable with death contrary to section 221(b) of the Penal Code of Kwara State of Nigeria. There was only one ground of appeal filed by the appellant himself. It was that the decision was unwarranted and unreasonable and could not be supported having regard to the evidence. When the appeal come up for hearing, the learned counsel for the appellant stated that he had nothing useful to urge in favour of the appellant.

We however wanted to hear arguments of counsel on both sides on a number of issues. The arguments of learned counsel have been taken into consideration in this judgment.

The facts were as follows: The appellant requested Agnes John to deliver one bottle of kerosene to him. She did. A little time later, the appellant called her again in order to pay her the 10k for the bottle of kerosene. The deceased challenged the appellant as to why he was calling her daughter. This resulted in a quarrel between the appellant and the deceased. Agnes John (P.W.1) [and PW2] - both children of the deceased - testified that the appellant caned the deceased with a cane and the deceased took another cane (Exhibit A) and retaliated. Agnes John shouted for help and one Jacob Edime came and separated the appellant and the deceased. These two witnesses also testified that the appellant came back through the backyard and hit the deceased with a hoe handle (Exhibit B) on the back of her neck and that the deceased fell and died. The deceased was taken to the hospital and there was an autopsy by a doctor. The doctor submitted a report in which he gave an alleged cause of death.

The appellant admitted that he had a quarrel with the deceased and had hit her with the small cane (Exhibit A) but denied going to the deceased’s house and further denied hitting her with the hoe handle. There were a number of flaws, how-ever, in the evidence.

The prosecution’s case rested on (a) the evidence of P.W.1 and P.W.2, (b) whether in fact and when was it that the appellant went through the backyard into the house of the deceased and hit her with a hoe handle, and (c) the medical report. The testimonies of P.W.1 and P.W.2 are in many respects similar but they differ in some important respect. Part of the evidence of P.W.1 in examination in chief, reads:

“He collected a bottle of kerosene of 10k from me and I returned to my house; he did not give me the money for the kerosene ... When I was preparing meal for lunch, the accused stood between his house and mine and called me. My mother challenged the accused as to why he was calling me. This resulted into exchange of words between the accused and my mother.”

Under cross-examination on this point, she said:

“The accused walked about 40 feet from his house to the spot where I received the 10k from him ... The accused never dragged me when he was paying me ... Exhibit “B” does not belong to my father. I saw a cut wound on the fore-head of the accused... I saw Exhibit “B” when the accused brought it to hit my mother.”

In respect of these points, P.W.2, a boy of seven years of age, said in examination in chief:

“When the accused hit my mother with the hoe handle, I saw the hoe handle very well.”

He continued under cross-examination to say:-

“I saw the accused dragging P.W.1 into the shop where he is sewing... I did not see any wound at the head of the accused .... Exhibit B was at the backyard of our house. The hoe handle formerly belonged to my father. It got burnt on the farm. We then brought it home and removed the iron point and threw the handle at the back yard.”

There are at least three material contradictions in the evidence of these two principal witnesses. Firstly, P.W.1 denied being dragged by the appellant. P.W2 said she was dragged. Secondly, P.W.1 said Exhibit “B” was not in their house and did not belong to their father but P.W.2 said it belonged to their father and explained how it came to be in the house. Thirdly, P.W.1 said that the appellant had a cut “Wound” on the forehead but P.W.2 said he saw no wound at all. In his assessment of the facts of this case, the learned trial judge made no mention of these contradictions. As a result he made no finding on these relevant contradictions. The learned trial judge simply said:

“I have no doubt in my mind about the evidence of all the prosecution witnesses and I believe them.”

At no time in the judgment was there any assessment of the reliability of the evidence of these two witnesses (P.W.1 and P.W.2) in the light of the contradictions in their evidence. (See Christopher Onubogu & Another v. The State (1974) 9 s.c.1). The evidence of the appellant that it was the deceased who threw Exhibit B at him should have been considered in the light of the evidence of P.W 2 at least in assessing who had the best opportunity to use Exhibit “B” first.

The learned trial judge dealt with the evidence of P.W4 as regard the interval between the time P.W.4 separated the quarrel and the time P.W4 was asked to come again to see the condition of the deceased. The learned trial judge said:

“P.W.4 said that about one hour after he had separated them, P.W.1 ran to him and asked him to come and look at her mother who lay on the ground.”

None of the witnesses gave evidence to show that P.W 4 was asked to come to see the condition of the deceased after she fell down. It was only P.W.4 who gave evidence on this issue. The issue was whether in fact P.W.4 was recalled immediately after the deceased was hit with Exhibit B or whether he was called one hour later. There is no evidence to show how long this gap - this important time lag - was between the hitting of deceased with Exhibit B and the second arrival of P.W 4 on the scene. The learned trial judge made his finding on this issue by relying on the evidence of P.W. 4 to conclude that the appellant came back to hit the deceased with Exhibit “B” one hour after the first incident. This erroneous finding of “one hour as sufficient cooling time” was used to exclude the possible defence of provocation.

We now consider the cause of death of the deceased in relation to the act of the appellant and the medical report.

Police Corporal Abel Idakwoji (P.W.7) said in his evidence that a post mortem examination was performed on the deceased and he tendered a medical report, Exhibit C, paragraph 11 of which reads:

“Medical Report:

Woman beaten by a stick on the neck, fell down and died. Body in a state of rigor mortis at the time of autopsy. No injuries seen on the body. I certify that cause of death in my opinion to be shock (Nemogenic) due to blow on the “solar plexus” in the neck.”

There was nothing in the report to show whether the doctor had looked for any cause of death or examined any part of the body.

There was no evidence to show that the beating referred to on the neck by the doctor was that alleged given by the appellant.

There was no evidence to show how the doctor knew that the deceased was hit on the neck.

There was no injury on the body to show which place was hit. There was nothing in evidence to show where on the neck the solar plexus was. Indeed, solar plexus is normally associated with the nerves of the stomach. The doctor should have been called to explain what his report was about and how he came to his conclusion. The report has only succeeded in confusing the issue as to the cause of death.

A point worth mentioning in this judgment is that learned trial judge’s comment in respect of the injury on the forehead of the appellant. He said:

“The accused denied hitting the deceased with Exhibit B. Rather, he said it was the deceased who threw Exhibit B at his forehead the wound thereby caused with hot water. If this was true, why did the accused fail to call as witnesses the people who treated the wound at his forehead for him? Why didn’t he show the wound to the police at the police station, Idah, where he went on his own accord or show to this court the scar-mark left there? I do not believe the accused.”

While it is legitimate in a suitable case for a trial court to make observations on the failure of the accused person to disclose his line of defence at the earliest opportunity, nevertheless, the observations should be made with care and fairness to the accused person in all the circumstances of the case. In this case, the appellant in his written statement did tell the police of his injury one day after the incident. He was also not cross-examined at all on this evidence when he gave evidence on oath in his own defence. We hold that the learned trial judge erred in disbelieving the appellant on the issue of the injury on the forehead as P.W1, who was believed by the learned trial judge, had herself stated that the injury was there.

We are of the view that if the learned trial judge had considered the whole evidence in this case with care and in the light of the defects discussed in this judgment, he would not have come to the erroneous conclusion that the prosecution’s case had been proved beyond reasonable doubt. We are of the opinion that the conviction of the appellant cannot be supported having regard to the evidence.

The appeal therefore succeeds. The conviction and sentence of the appellant are hereby set aside. We order a verdict of acquittal to be entered and the appellant is discharged.

Appeal allowed.