**DELU LIMAN**

**V.**

**THE STATE**

SUPREME COURT OF NIGERIA

2ND JULY, 1976.

SUIT NO. SC 277/1975.

**LEX (1976) – SC. 277/1976**

**OTHER CITATIONS**

3PLR/1976/80 (SC)

(1976) 7 S.C. (REPRINT) 36.

**BEFORE THEIR LORDSHIPS:**

GEORGE SODEINDE SOWEMIMO, J.S.C.

MUHAMMED BELLO, J.S.C.

ANDREWS OTUTU OBASEKI, J.S.C.

**REPRESENTATION**

L. C. ANOLIETO - for the Appellant

A. OGIRI, Senior State - Counsel for the Respondent

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

CRIMINAL LAW:- Culpable homicide not punishable with death – Proof of

CRIMINAL LAW AND PROCEDURE:- Evidence of accused person – Where it may be a record in brevity in the history of trials for homicide - “I live around Panda. I did not strangle my mate.” – Whether can be effective in exculpating accused of leveled charge

CRIMINAL LAW AND PROCEDURE:- Proof of crime – Murder – Medical report as to cause of death – When court has a duty to secure attendance of doctor who wrote medical report as key witness – When such attendance would not be necessary - relevant considerations – Effect of failure thereto

CHILDREN AND WOMEN LAW: *Women and Justice Administration* – Wife allegedly strangled to death by her co-wife – Failure of prosecution to properly prove cause of death – Effect

CONSTITUTIONAL LAW AND HUMAN RIGHTS:- Right to fair hearing – Failure of court to secure accused person opportunity to cross-examine a key witness – When same can be deemed miscarriage of justice - “A person standing trial is entitled to defend himself and to avail himself of all facilities provided by the law” – Effect

HEALTHCARE AND LAW:- Proof of crime - Report of medical examiner – When securing the attendance of doctor as a witness by court is indispensable – Statutory foundation

ETHICS – LEGAL PRACTITIONER:- Defence of a person accused of murder – Whether brevity can be effective strategy

**PRACTICE AND PROCEDURE ISSUES**

JUDGMENT AND ORDER – PRECEDENT:- When cases at hand may be distinguished from decisions in earlier ones – Effect

INTERPRETATION OF STATUTE:- Section 249(3) of the Criminal Procedure Code – Meaning and effect

**MAIN JUDGEMENT**

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

The Appellant was convicted by Adewuyi J. in the High Court, Makurdi, of culpable homicide not punishable with death under Section 224 of the Penal Code and was sentenced to 4 years imprisonment.

The charge stated that on or about the 11th April 1974, at Panda Village the Appellant caused the death of Chippi Liman by causing her such bodily injuries as was likely to cause her death. There was no eye-witness to the commission of the offence. The husband of the Appellant and of the deceased (Pw1) testified at the trial that on 11th April, 1974, the two wives had gone to the market together and the Appellant later returned home without her mate; that when he asked the appellant of the where about of the mate, the Appellant replied after some silence that he should go and look for her. He stated that as he went to do so he found her dead on the road and he did not see anything around her. He made a report to the police. P.C. Id! Mogaji (PW2) who saw the corpse at the scene on the same day stated that he saw sign of struggling at the scene. The corpse was not removed from the scene until the following day. The police officer (PW2) who conveyed it to Keffi General Hospital testified as follows:

“On receiving the information I left to the place the following morning. I saw the deceased lying down on the ground. I found the accused and the husband at the scene, (PW1) is the husband. I asked what happened. The accused told me that she greeted the deceased but did not answer. Instead the deceased abused her and they started to fight. She rushed the deceased down and she died. At the scene I saw the struggle within the area.”

Upon her arrest the Appellant made a voluntary statement in Hausa, which was admitted at the trial. Its translation in English Is Exhibit 28, which reads:

“I can remember some time in the past. We started from our house for the market. I saw one woman my matrimonial mate by name Kibi standing on the road. I asked if she was waiting for me? She did not reply me, but she abused me that she will have sexual intercourse with my mother and father, but I did not revenged. She came and pushed me. I also pushed her, then we started fighting I pushed her to the ground and climb on her. She stood up and pushed me I also revenge that one, she fell down and she was unable to stand up again. I went home and left her lying on the ground. I told my husband that I fought with my mate on the road, I pushed her down and she was unable to stand up again. After I have finished telling about the fight with my mate, I asked him to go and see whether she woke up, when he went to the place he met her lying dead, then he went and report the matter to the Chief at Panda and the Police were informed.”

The prosecution also put in evidence under section 249(3) of the Criminal Procedure Code a report of the doctor who had examined the corpse and part of the report stated.

‘The neck showed signs of bruised subcutaneous tissues and the arch of the cricoid cartilage was broken from the front concominent of manual strangulation. The lungs showed congestion and Haemorrhage consistent with asphyxia otherwise the tissues showed no pathological changes.

I certify the cause of death in my opinion to be: asphyxia of manual strangulation.”

The doctor was not called as a witness at the trial. The evidence of the Appellant may be a record in brevity in the history of trials for homicide. it is simply:

“I live around Panda. I did not strangle my mate.”

Its glaring aspect is that the State Counsel who represented the prosecution at the trial did not cross-examine the Appellant as a witness.

After having reviewed the evidence in the case and found the cause of death as being due to asphyxia of manual strangulation, the learned trial Judge concluded thus:

“It is evident that the accused was stronger and over-powered the deceased: she held the deceased by the neck until she was completely suffocated. I do not believe the accused that it was mere pushing and fall that caused the death of Chippi Liman. I believe the report of the doctor that Chippi Liman was strangled to death. Accused was very callous to treat her mate that way whatever might have transpired between them.”

and he convicted her of the offence charged.

The only ground of any substance argued before us on appeal was that upon the admission in evidence of the medical report, the learned trial Judge failed to comply with the provisions of section 249(3)(b) of the Criminal Procedure Code and thereby occasioned actual miscarriage of justice. The learned Counsel for the Appellant contended that the Appellant was not asked by the trial Judge whether she disagreed with anything in the report as required by the said paragraph of the subsection, and therefore the necessary conditions for the admission of the report in evidence were not satisfied. He relied on Ganganma Bukar Terade v. Bornu Native Authority (1967) N.N.L.R. 15. He further contended that if the report had been excluded as being inadmissible, there would have been no evidence of cause of death and for this reason the conviction of the Appellant is unsupportable.

Now section 249(3) of the Criminal Procedure Code provides as follows:

“(3) (a) A written report by any medical officer or registered medical practitioner after he has examined any person or the body of any person may at the discretion of the court be admitted in evidence for the purpose of proving the nature of any injuries received by such person or, where such person has died, the nature of the injuries received by such person and, where possible, the physical cause of his death.

(b) On the admission of such report the same shall be read over to the accused and he shall be asked whether he disagrees with any statement therein and any such disagreement shall be recorded by the court.

(c) If by reason of any such disagreement or otherwise it appears desirable for the ends of justice that such medical officer or registered medical practitioner shall attend and give evidence in person the court shall summon such medical officer or registered practitioner to appear as a witness.”

This Court had the opportunity to interprete the provisions of section 249(3)(c) in Yahaya Idirisu v. The State (1967) 1 All N.L.R. 12 where upon the admission in evidence of a medical report at the trial, the accused when the report was read to him expressed disagreement with it and applied to the Judge that the maker of the report be called as a witness and the Judge refused the application, Coker J.S.C. delivering the judgment of the Court stated at p.16:

“A person standing trial is entitled to defend himself and to avail himself of all facilities provided by the law. Section 249(3)(c) gives to such a person the right to have the maker of a report received in evidence by virtue of this section attend and give evidence in person in the court where the accused person will at least have the opportunity of cross-examining him and where it is manifest from the disagreement over the written report that a chance of defending himself had been denied to the accused it would be difficult to resist the conclusion that a miscarriage of justice had occurred.

In the particular instance, however, we think that the evidence accepted by the learned trial Judge involving the way and manner in which Asibi was killed; the fact that she died on the spot and the repeated confessions of the appellant himself to several of the prosecution witnesses, put beyond doubt the question not only of his complicity but also of the cause of death of the woman, Asibi.”

The appeal was dismissed in that case because there was other evidence of the cause of death upon the exclusion of the medical report. We may add that the interpretation of section 249(3)(c) which we have quoted was reiterated by this Court in Audu Tanko Juwa v. The State (1969) 1 All N.L.R. 264 at p. 267.

In Nimvem Miki AND Others v. The State (1968) 1 All N.L.R. 55, the medical re-port of the doctor who examined the body of the deceased was admitted at the trial under section 249(3) after the Appellant who was unrepresented at the trial had been duly asked, in accordance with section 249(3)(b), whether he disagreed with any statement in the report and he had indicated that he did not. In his judgment the trial Judge considered the medical report vital in the determination of the case. It was contended on appeal to this Court that under the circumstances of that case, section 249(3)(c) contemplates in the use of the words “or otherwise” the need for the trial Judge to summon the doctor to give evidence in person. The court did not find it necessary to determine that issue as there was other evidence which the trial Judge accepted, upon which the cause of death could be inferred without having resort to the medical report and for that reason the report did not seem to this Court as vital as it did to the trial Judge and the conviction could be sustained without it.

The case in hand differs from the above mentioned case and Yahaya Idirisu v. The State (Supra). In the two former cases there was evidence independent of the medical report showing the cause of death while in the present case the cause of death was solely established by the report.

We now revert to the contention of the counsel for the Appellant. The records of appeal show that the learned trial Judge, after he had admitted the report under section 249(3)(a) and had it read and interpreted it to the Appellant in accordance with the first limb of section 249(3)(b), failed to ask the Appellant whether she disagreed with any statement in it as he was required to do by the second limb of section 249(3) (b). It is pertinent to point out that the Appellant was not represented by a counsel at the trial.

In her evidence, which we have quoted earlier on, the Appellant denied having strangled the deceased. The trial Judge must therefore have known from her evidence and her statement Exhibit 2 that she disagreed with the crucial statement in the report that death was caused by strangulation. Under the circumstances, it seems to us that the trial Judge ought to have called the doctor as a witness under section 249(3)(c) to enable the Appellant to cross-examine him. By his failure to call the doctor the trial Judge deprived the Appellant of her right to a fair trial as enunciated in Yahaya Idirisu v. The State (Supra). We think the failure of the trial Judge to call the doctor and the fact that there is no other evidence showing the cause of death and the reliance placed by the trial Judge on the medical report have occasioned actual miscarriage of justice. For these reasons the conviction cannot be sustained.

The principles upon which an appeal court may order a re-trial has been stated by the Federal Supreme Court in the Queen v. Yusufu Abodudu AND Others (1959) 4 FSC 70. One of the principles being that the evidence taken as a whole disclosed a substantial case against the Appellant. In the case on appeal before us, the evidence as to the cause of death according to the medical report was strangulation. The Appellant in her evidence denied having strangled the deceased. There is no evidence at all in the record showing that the Appellant did in fact strangle the deceased. The probability therefore that someone else strangled the deceased after the Appellant had parted with her company has not been excluded by the prosecution. It seems the case against the Appellant is not substantial and is not a proper case to order a re-trial.

We accordingly allow this appeal, set aside the conviction and sentence and order that the Appellant be acquitted and discharged.

Appeal allowed.