**YANOR AND ANOTHER.**

**v.**

**THE STATE**

IN THE SUPREME COURT,

ON THE 11TH DAY OF JUNE, 1965

SC. 165/1965

**LEX (1965) - SC. 165/1965**

OTHER CITATIONS

2PLR/1965/72 (SC)

**BEFORE THEIR LORDSHIPS**

LIONEL BRETT, JSC

GEORGE BAPTIST A. COKER, JSC

CHUKWUNWIKE IDIGBE, J.J.S.C.

**BETWEEN**

YANOR AND ANOTHER – Appellant

AND

THE STATE – Respondent

**ORIGINATING COURT(S)**

HIGH COURT, NORTHERN NIGERIA (Jones, J., Presiding)

**REPRESENTATION**

J. A. COLE for the appellants.

MALLAM BELLO, D.P.P., N.N., for the respondent.

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

CRIMINAL LAW AND PROCEDURE:- Culpable homicide contrary to section 221 of the Penal Code (Northern Nigeria) - Prosecution’s onus to prove the charge beyond reasonable doubt - Murder trial continued though defending counsel absent – Defendant witness difficult to locate for service – Refusal of request for further adjournment to call witness – When proper - Alibi – Relevant considerations - Evidential burden on defendant

CONSTITUTIONAL LAW: - Federal: Constitution of the Federation 1963, s.22 (5) (b) – Fair hearing – Whether prejudiced when trial of accused person continued for one day when his lawyer was inexplicably absent

CHILDREN AND WOMEN LAW: – Indirect victims of Crime - Murder of Tax collector – Son as witness while mobs set upon deceased clobbering him to death

**PRACTICE AND PROCEDURE ISSUES**

INTERPRETATION OF STATUTES: - Northern Nigeria: Criminal Procedure Code s.186 – Meaning and implication for criminal trials

**MAIN JUDGMENT**

**IDIGBE, J.S.C. (delivering the judgment of the Court):-**

The appellants were convicted of the offence of culpable homicide contrary to section 221 of the Penal Code (Northern Nigeria) and each sentenced to death by the High Court, Northern Nigeria (Jones, J.). A summary of the case for the prosecution is as follows. On the 7th July, 1964, an armed crowd entered the premises of the deceased-a tax-collector of Mbavaa in the Tiv Division of Northern Nigeria. The crowd got hold of the deceased, tied a rope around his waist and marched him to a spot near the compound of one Adagba (a “Kindred-head”). As they marched towards the premises of Adagba the deceased pleaded in vain with the crowd for his liberty; and from the crowd there were shouts of. “No, we are going to kill you.” The deceased’s son, P .W.1, pleaded unsuccessfully with the crowd for the liberty of his father and followed them up to the premises of Adagba. There P.W.1 met PW2 and PW3 and together they watched, afraid to interfere, while the appellants-members of the crowd-dealt fatal blows on the deceased with large or heavy clubs. The deceased fell down and the rest of the crowd set upon him and beat him to death. P .W.1, PW2 and PW3 came out from their place of hiding, examined the deceased and being satisfied that he was dead, rushed to the police authorities at Gboko and lodged a report. Later the appellants were arrested. In their defence, each denied the charge and set up an alibi. The learned trial judge, after reviewing the evidence before him, accepted the case for the prosecution and found the appellants guilty as stated above.

In the course of the trial, learned counsel for appellants asked for adjournment of the trial as one of the witnesses for the defence was not available in court. This happened on the 12th December, 1964. The learned trial judge granted the application and adjourned further hearing to the 14th December, when the case was again adjourned to the 1st December as the court had been informed that the defence witness would be produced on that day. On the 15th December, a police constable (Patrick Kwaghmande), giving evidence on oath, told the court of his futile attempts to serve the particular defence witness with a witness summons. At the instance of defence counsel, the case was again adjourned to the 18th January, 1965. Thereafter the case was for the same reason and in the presence of defence counsel, adjourned to the 22nd January, 1965 and later, for the same reason, to the 1st of February, 1965. On the 1st day of February, 1965, police constable Patrick Kwaghmande, giving evidence, told the court of the unsuccessful attempts he made to serve the particular defence witness with a witness summons. He had been to the witness’ village on “several occasions but could not find him.” He had made inquiries about the witness from many people in the village and they had told him that the witness (a man called Usman Iyamegh) “was hiding and came and went secretly” to and from the village. Finally, P C. Kwaghmande said: “I did my best to find him but could not do so.” Although the appellants were present in court, counsel for appellants was absent and the court again adjourned further hearing to the 4th of February, 1965. At the resumed hearing, learned counsel for appellants appeared and after calling one witness for the 1st appellant, made the following observation.

‘The next witness for 1st accused is Usman Iyamegh who would not be served. Accused wants him to give evidence, so I ask for an adjournment to have this man served. (underline supplied).

Counsel gave no indication as to when this witness was likely to be served with the witness summons.

Learned counsel appearing for the State opposed the application saying:-

”Every effort to find this witness has been unsuccessful. There is no likelihood that he will ever be found. The court has complied with section 177 C.P.C. The law does not require an impossibility ... Further delay would not be in the interest of justice. It is not known whether this witness is even alive.”

In the course of his ruling refusing this application, the learned judge observed:-

“Every effort has been made to trace this witness. P.C. Patrick Kwaghmande has given evidence that he went several times to find this witness but failed. PC. Patrick has produced the other witnesses and I am satisfied that when he said `I did my best to find him (Usman)’ he spoke the truth. The law does not demand an impossibility, nor can justice best be served by an indefinite adjournment in these circumstances . . .” (Underline supplied).

Thereafter, no more was heard of this application and the trial proceeded to conclusion and counsel for appellants addressed the court and it is significant that no complaint was made, in the address of counsel for appellants, of the refusal by the trial judge of the application for adjournment on 4th February, 1965. In this Court, the main ground of appeal argued before us reads:-

“The 1st appellant was prejudiced upon his trial in that he was not defended by a legal practitioner when PC. Patrick . . . gave evidence on 1-2-65 to the effect that a witness for the defence of 1st appellant could not be traced.

The refusal of the learned trial judge to grant an adjournment enabling the 1st appellant ... to call a witness for his defence is prejudicial to his fair trial.”

In support of this ground of appeal learned counsel for appellants referred to the provisions of subsection 5(b) of section 22 of the Constitution of the Federation and also to section 186 of the Northern Nigeria Criminal Procedure Code and submitted that the proceedings of the 4th day of February, 1965 were carried out in disregard of the provisions of those sections of the law. We think it desirable to set out in detail the provisions of the sections of the law referred to by learned counsel for appellants. Section 186 of the Criminal Procedure Code (Northern Nigeria) reads:-

“Where a person is accused of an offence punishable with death if the accused is not defended by a legal practitioner the Court shall assign a legal practitioner for his defence.”

Subsection 5 (b) of section 22 of the Constitution of the Federation reads:-

“5(b) Every person who is charged with a criminal offence shall be entitled to be given adequate time and facilities for the preparation of his defence.”

In this case, the appellants from the commencement of the hearing of the charge against them had the benefit of learned counsel assigned to them by the State for their defence and save for the proceedings in court on the 4th day of February, 1965, they were in fact defended by counsel throughout the trial. When on the 1st February, 1965 the court adjourned further hearing in the case to the 4th of February, the appellants and their counsel were in court. No reason was given to the court on the 4th of February, 1965 for the absence of their counsel by anyone. The appellants themselves did not ask for an adjournment or postponement of further hearing. We take the view that the proceedings of the 4th day of February, 1965 did not in those circumstances offend the provisions of section 186 of the Criminal Procedure Code (Northern Nigeria) and section 22(5)(b) of the Constitution of the Federation. As was said by Humphreys J. in R. v. Mary Kingston:

“If he (counsel) was unable for any good reason to attend (court), his duty, as everybody knows, was to see that some other member of the Bar held his brief and was in a position to represent the accused person ... In those circumstances we think it right to say that in our opinion the Assistant Recorder was perfectly justified in continuing the trial of a person although she was unrepresented . . . “ (Brackets supplied)-See 32 Cr. App. R. 183 at 187-188.

On the submission that the 1st appellant was not given adequate opportunity to produce his witness, we take the view that in the circumstances of the trial in the lower court, the submission lacks any merit. If in the course of hearing of a criminal case an accused person applies to the court for postponement of the trial on the ground that a witness for the defence was not available to give evidence, he should normally satisfy the court on three important issues, and they are: (1) that the witness sought to be produced is a material witness for his defence, (2) that he (the applicant) has not been guilty of laches or neglect in procuring the attendance in court of the witness, and (3) that there is reasonable expectation of his being able to procure the attendance in court of the witness at the future time to which he prays the trial to be postponed. See also R. v. Le Chavalier D’Eon (1764) 97 E.R. 955, in which case the court (King’s Bench) refused an application of counsel on behalf of an accused person for postponement of a trial on account of the absence of several material witnesses, specified in the affidavit in support of the application, who were not only foreigners but were also at the time of the application outside England, and whom “he had hopes and expectation of procuring their attendance by next Michaelmas term.” In that case, the court observed:-

... neither does it appear, that there has been the least endeavour used by this gentleman (the applicant) or on his behalf to get them (the witnesses) over (from outside, into England). And as to any expectations of their returning to England by the next Michaelmas term or any future time, there does not seem to be any probability of it; nor does the defendant lay before the court any grounds of such expectation . . .” (underline supplied See 97 E.R. at 956.

The court can only decide a case on the evidence actually before it, but where the court is satisfied that an accused person has made a genuine effort to secure the attendance of a witness who could give material evidence and has failed to do so for reasons outside his own control, the court should bear the fact in mind when assessing the evidence before it, and give it such weight as justice seems to require. The situation in the case in hand, however, is almost identical to that in the case of D’Eon. The 1st appellant has insisted on having the evidence of the witness, Usman; no doubt, it would seem Usman was a material witness. Previous unsuccessful efforts have been made, at the request of the 1st appellant, to produce this witness in court, and the application of defence counsel on 4th February, 1965 failed to show any likelihood of the witness being produced at any particular period, or at all: on the contrary the evidence before the lower court suggests that he reverse was highly probable, and-as was said in the case of D’Eon-”the putting off the trial could not tend to advance justice, but on the contrary would delay It.” In our view the learned trial judge, in those circumstances, rightly refused the application for postponement of trial, made on behalf of the 1st appellant on the 4th of February, 1965.

The other ground of appeal argued before us attacked a passage in the judgment of the learned judge in which he described the defence of alibi put forward by the appellants as “very weak”. Learned counsel for appellants submitted that this view of the alibi put forward by the appellants implied that the learned judge did not in fact disbelieve the defence of alibi; alternatively, he argued that the learned judge had taken the view that the onus was on the appellants to prove their alibi or their innocence and this view, he submitted, was erroneous in law. On the defence of alibi, the law is that the jury should be directed that they should not disregard evidence of alibi unless there is stronger evidence against it.-see Chadwick (1917)12 Cr. App. R. 247. Therefore while the onus is on the prosecution to prove the charge against an accused person the latter has, however, the duty of bringing the evidence on which he relies for his defence of alibi; when such evidence has been adduced the court should consider it in the light of the evidence adduced by the prosecution in support of the charge against the accused and if in the end the court is unable to reach a decision on the question whether the evidence in support of the case for the prosecution is stronger than that produced in support of the alibi, the accused must be acquitted. In the case in hand, the learned judge observed—

“1st accused’s statement to the police ... shows that he was away from his own compound from the 29th June, 1964 to 14th July, 1964. In his evidence in court he claims he returned at the end of June. I am satisfied that his statement Exhibit (1) was voluntary. It completely nullifies the evidence of his wife D.W4 who maintains that he worked on the farm in her presence throughout this period. He has adduced no evidence to support his own statement that he stayed at his father-in-law’s compound at Kunav, nor of what he did at Bur. As an alibi it is very weak and in my view only serves to confirm that he was not in his own village at the material time.

“2nd accused claims that he was attending hospital at Mkar at the material time. He has brought no witness from the hospital to confirm this ... I accept that he has some pain in his belly and testicle but it cannot have been very severe if he could regularly, as he claims, travel 10 miles each way on alternate days on a bicycle. His alibi is then also very weak.”

The learned judge finally accepted the evidence of the prosecution witnesses (1st P .W., 2nd P .W. and 3rd P .W.) who claimed that they each saw the appellants in the crowd which attacked the deceased and that they each saw the appellants strike the deceased to death with clubs. It was clear that the learned judge having weighed the evidence produced by the prosecution against the “weak” evidence of alibi adduced by the appellants, considered that the “stronger” evidence adduced in support of the case for the prosecution established beyond reasonable doubt the charge preferred against the appellants and we cannot therefore accept the submission that in rejecting the defence alibi he had placed the burden of establishing their innocence on the appellants. In the event, there is no merit in the appeals which are hereby dismissed.