IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRRITORY ABUJA
IN THE GWAGWALADA JUDICIAL DIVISION
HOLDEN AT ZUBA
THIS FRIDAY, THE 3ND DAY OF MAY, 2019

BEFORE HIS LORDSHIP:- THE HON. JUSTICE A. O. EBONG

CASE NO: CR/214/2017
BETWEEN:

COMMISSIONER OF POLICE .... COMPLAINANT

AND

1. JOEL JACOB
2. JONAH SUNDAY } .... DEFENDANTS

JUDGMENT

The two defendants were arraigned in this Court on the 7/7/2017, charged with the offences of conspiracy to commit culpable homicide punishable with death under section 79 of the Penal Code, and culpable homicide punishable with death pursuant to section 221 of the same Code.

The original charge was dated and filed 1/6/2017. It was amended via a motion on notice dated 27/6/2018, which was granted unopposed on the 3/7/2018 with a deeming order. The amended charge is dated and filed the 27/6/2018. Each defendant pleaded *"Not guilty*" to the amended charge when read to him, as they did with the original charge.

At the point of taking their plea to the amended charge, however, the defence counsel had raised an objection, orally, challenging the competence of the amended charge. I took arguments on the objection but reserved ruling thereon until

final judgment as required by Order 3 Rule 3(d) of the Practice Direction (that is, the Practice Direction on Implementation of the Administration of Criminal Justice Act 2015 in the Courts of the Federal Capital Territory, issued by the Chief Judge of the Federal Capital Territory, and effective April 25, 2017). I will deal with that objection later on.

To prove the charge, the prosecution called two witnesses. **PW1**, was one Fidelis Danjuma. He testified as an eye witness. He told the court how he came out of his house early in the morning to go to work and met the two defendants beating the deceased. They were beating him with cable and at a point blood started coming out of his nose and mouth. He said he pleaded with the defendants to leave the boy alone but they refused, insisting that he stole their phone and must produce the SIM card or they would not let him go.

He then further asked them why they did not take the boy to the Police station, but the defendants kept beating the deceased and even stripped him naked. So he went back into his room and got a trouser for the deceased to wear. When he saw the boy's condition and how blood was coming out of his nose and mouth, he became afraid and told the defendants to take him away from his (PW1's) area. He then left to go work in the company of his friend.

On returning from work a few hours later, he met the same boy's corpse behind Christ Embassy Church, with several people gathered around it. The Police thereafter came and took the corpse away. Two days after the boy's death, he saw the 2nd defendant. He recognised him and quickly informed his friend that this is the person that killed the deceased. The 2nd defendant and his master then pleaded with him to cover up the

matter but he refused. They tried to bribe him first with N30,000 and later on with an additional N10,000, but he still would not succumb He instead gathered his friends and took the 2nd defendant to the Police Station.

Under cross-examination, PW1 said it was one Barr. Aisha that met him in December 2017, and invited him to come and tell the Court exactly what he saw that happened in this case. He affirmed that he gave the deceased cloths to wear when he was naked. That at the time he left for work at about 6a.m. the deceased was still alive, and that it was two days after the killing that he saw the 2nd defendant and took him to the Police station.

PW2 was Sgt Istifanus Ataitiya of Jikwoyi Police Station. He was the Investigating Police Officer (IPO). He told of how they received an anonymous phone call about a young man found lying down along Christ Embassy Church at Jikwoyi, suspected to have died. That he went to the scene with a team of detectives and found the young man lying down facing up, with marks of violence suspected to have been from beating. They took photographs of the scene and removed the corpse to the hospital where it was confirmed dead, and was deposited in the mortuary. Two days later, PW1 and another person brought the defendant to the Station as one of those that beat the deceased and dumped him under a mango tree. He interviewed the defendants and took their statements wherein they admitted committing the crime. Thereafter the case was transferred to State Criminal Investigation Department (CID) for investigation. He tendered the statement he made to transfer the case to State CID, as Exhibit P1. His further attempt to tender the alleged confessional statements of the two defendants was met with an objection on grounds of their

involuntariness. A trial-within-trial was then conducted at the end of which I rejected both statements on that ground. That marked the end of PW2's examination-in-chief.

Under cross-examination, PW2 said not being a medical doctor, he could not confirm that at the time they got to the victim of the assault to take him to the hospital he was already dead. He said he had never met the deceased before the incident and so did not know whether or not he was a sickler. He agreed that as human beings, death could occur from different events. He confirmed that they went to pick the deceased on the 27/3/2017 at about 14:00 Hrs along Christ Embassy, Jikwoyi, under a mango tree. He agreed that the location was accessible to the general public. He confirmed that apart from the defendants' alleged confessional statements, he conducted investigations into the case. That he interviewed PW1, the live witness to the incident, together with one Aminu, both of whom brought the defendant to the police station. He agreed that his evidence was based on what these persons told him.

At the conclusion of the prosecution's case, the defence made a no-case submission which I overruled on the 12/10/2018. The two defendants then entered upon their defence, wherein they gave similar testimonies. They claimed that one day they were both sleeping and heard a knock on the door, but they refused to open the door. Then four men broke the door, came into the room and demanded for all they had. The men took all they (defendants) had, as well as their plasma TV and DVD video player. After the men left, they came out shouting "Thief, thief, thief"; then their neighbours and members of the neighbourhood vigilante group came to their rescue. They were told that they would go and write a statement, but that

never happened. Thereafter, one day as they were about to go out to work, they were arrested.

DW1, Joel Jacob, said his arrest was on an allegation he did not know. That he has never seen the person he is being accused of killing; he had no hand in his killing and did not even know that such a thing had happened. He also said he did not know PW1 and had never met him in his life.

DW2, Jonah Sunday, on his part, also claimed not to know either PW1 or the deceased person. He said he was aware of PW1's evidence that his "Oga" (i.e. his boss) came to beg; but that since his arrest, his boss does not know his whereabouts.

Under cross-examination, DW1 affirmed that there was indeed a robbery in his house, but he did not know whether any of the robbers was ever caught. He agreed that because they had lived in the area for about 18 years, a lot of people know his face there. DW2, equally agreed in cross-examination that his neighbours and other people know him in the area where he lives. He denied that he was angry because they came to rob him.

At the close of evidence for the defence, both sides filed and exchanged their final addresses, which they later adopted in Court. In his final address for the defendants dated and filed 27/12/2018, Mr. Stephen Ocheibi John formulated the following two issues for determination:

(i) *From the evidence adduced by the prosecution before this Honourable Court against the defendants, whether or not the prosecution proved its case*

beyond reasonable doubt to warrant the conviction of the defendants?

(ii) *Whether a minimal doubt was casted (sic) on the case of the prosecution?*

For the prosecution, O. M. Atoyebi, Esq, submitted in his final address dated and filed 11/1/2019, that the case can be determined on a sole issue, to wit:

Whether from the circumstances of this case, the prosecution has proved the case of conspiracy and culpable homicide against the defendants beyond reasonable doubt?

I believe that is the real issue arising for determination. Issue 2 framed by the defence is, in my view, a surplusage.

Before taking up the main issue for determination, let me first quickly attend to the question of the competence of the amended charge earlier raised by the defence counsel. It was his submission that the competent authorities to file a criminal charge in court are listed in section 106 of the Administration of Criminal Justice Act (ACJA) 2015, and that O. M. Atoyebi, Esq who filed the amended charge is not one of such authorities; that where a private legal practitioner is briefed to prosecute a case, there is a procedure to follow and his fiat must be shown. He urged me to discharge the defendants as there is no competent charge before the Court.

Responding, Mr. Atoyebi submitted that the objection was misconceived; that Prayer 2 in his motion to amend already granted by the Court was an order deeming the amended

charge as duly filed and served. He relied on the provision of section 106(c) ACJA as well as the case of FRN V. OSAHON, to argue that the police can brief a private legal practitioner to prosecute a matter on its behalf; that the Attorney-General is not the only prosecuting authority, and that the extent of his power is to take over or discontinue a matter initiated by some other prosecuting authority.

Now, what the Supreme Court decided in FRN V. OSAHON (2006) LPELR-3174(SC) is that the Attorney-General is not the only authority recognised by law to prosecute criminal matters in court; and that any other recognised authority, such as the Police, could either prosecute cases through their own legally qualified officers or through private counsel engaged by them for the purpose. The Court also held that the fiat of the Attorney-General is not required for the Police to engage counsel to prosecute matters on their behalf. That decision was an interpretation of the provisions of sections 174 and 211 of the 1999 Constitution which is superior to all other statutes regulating criminal procedure, including the ACJA, and hence it remains relevant till date.

The defence counsel's objection in this case was made *ex tempore*, not formally, making it inconvenient for the prosecution to react appropriately. Nonetheless, Mr. Atoyebi did provide the Court with a copy of his letter of instruction from the Commissioner of Police of the FCT in respect of this case. He forwarded the document from the Bar in open court, and same is in the Court's file. Besides, from the onset he had indicated to this Court that he was an external counsel engaged to handle this case on behalf of the Police; and he conducted the trial throughout on that footing, without any challenge from the defence. He signed the amended charge as counsel for the

prosecution. In my view, the amended charge is valid on the authority of FRN V. OSAHON, supra. The objection is consequently overruled.

On the main issue for determination, it is submitted for the defence that the prosecution has the burden under section 135 of the Evidence Act to prove the ingredients of the offences of criminal conspiracy and culpable homicide punishable with death, beyond reasonable doubt. However, in the view of learned defence counsel, the prosecution has failed woefully to lead cogent, compelling and credible evidence to prove that the defendants committed the crime alleged.

Learned counsel analysed the conditions under which conspiracy could be said to exist. He submitted that the facts to be relied upon by the court for conviction for conspiracy must be consistent, cogent and must irresistibly lead to the guilt of the accused person. He then asked whether in the instant case it can safely be concluded that the defendants agreed to kill the deceased.

Referring to the testimony of PW1 that he saw the defendants beating the deceased and when he told them to stop they refused and said the deceased must give them their SIM card, counsel submitted that the prosecution nowhere established either by direct or circumstantial evidence that the defendants agreed to kill the deceased. He also argued that although common intention could be inferred from the surrounding circumstances of a case, such inference should not be readily or easily applied to find the accused persons guilty, as doing so would deflate if not totally remove the long-standing presumption of innocence conferred by the constitution on the defendants. He relied on OSMUND ONUOHA V. STATE

(1998) 5 NWLR (Pt.548). He urged me to dismiss the charge of conspiracy.

On the charge of culpable homicide punishable with death, learned counsel listed the ingredients of the offence as stated by the court in SHEIDU V. STATE (2014) 15 NWLR (Pt.1429). He submitted that the said ingredients must coexist and must be proved by the prosecution with credible evidence. He argued that one of the ingredients is whether the accused caused the death of the deceased intentionally or with knowledge that death or grievous bodily harm was its probable consequence, citing NJOKU V. STATE (2013) 2 NWLR (Pt.1339). On how to determine whether the accused really had the intention to murder, he referred to the decision in ADAMU V. STATE (2014) 10 NWLR (Pt.1461), and then queried whether it can safely be said that the death of the deceased resulted from the beating he received from the defendants. While conceding that there is no particular number of witnesses required to prove any fact, and that a person may be convicted on the evidence of a single adult witness, counsel urged that the Court ought to be careful in convicting on the evidence of a lone witness especially in a serious offence like murder.

The defence counsel referred to the evidence of PW1 that the defendants were beating the deceased when he left for work, and when he was returning he saw the deceased lying somewhere else; but noted that under cross-examination the said witness had stated that the deceased was in perfect condition at the time he left for work. Counsel contended that PW1 left for work without inviting the police or anyone to rescue the deceased because the deceased was in perfect condition at the material time. He submitted that PW1's further evidence

that the defendants were beating the deceased with stick and cable and that when the beating became too much he told the defendants to leave his place, was the product of tutorial received from one Barrister Aisha and or the prosecution team. Learned counsel branded the said evidence as unreliable.

He contended further that if a stick or cable was used, the prosecution would have tendered it or any evidence of the marks on the body of the deceased. He noted that curiously the prosecution had listed and annexed pictures of the deceased in the proof of evidence, but failed to tender it in evidence. He said perhaps the pictures would have revealed the truth to the court, and urged the Court to invoke the presumption of withholding evidence under section 167(d) of the Evidence Act.

Counsel continued his argument by stating that for a finding of guilt to be made, both the physical and the mental elements of the offence must be established; that it is not sufficient to show that the bodily injury caused resulted in death in the ordinary course of nature, but there must proof that the act which led to death was done with the intention of causing death or bodily injury capable of resulting in death. Learned counsel submitted that in the totality of the evidence led by the prosecution, it was not established that the injury sustained from the beating led to the death of the deceased. That both prosecution witnesses admitted they had not met the deceased before the incident and did not know if he was sick, and that death can result through various means. He submitted that the whole trial was based on suspicion, and that suspicion, no matter how grave or strong, cannot amount to proof of commission of crime. He cited the cases of ONAH V. STATE (1981) 3 NWLR (Pt.12)

236, and BOZIN V. STATE (1985) 2 NWLR (Pt.8) 465 in support of the argument.

Defence counsel submitted further that there is no onus on a defendant to prove his innocence, but only to create doubt by his evidence. That in this case the defendants gave uncontradicted evidence which has cast doubt on the case of the prosecution, warranting their discharge and acquittal. He finally urged me to find for the defendants, as the prosecution has failed to prove any of the offences against them beyond reasonable doubt.

Learned counsel for the prosecution opened his argument with the count of conspiracy. He referred to the ingredients of the offence as declared in KAZA V. THE STATE (2008) 32 WRN 46, and AGUGUA V. STATE (2017) 10 NWLR (Pt.1573) 254 at 278 B-D. He said in view of the difficulties in convicting for conspiracy through direct evidence, the courts rely on inferences deduced from the actions of the parties to the offence charged. He cited on this the cases of ADEYEMO V. THE STATE (2010)LPELR-3622(CA) at 30 C-D, ARIBIGBOLA AWOSIKA V. THE STATE (2018) LPELR-44351(SC) at 30E-31F. He argued that in this case, apart from the operative circumstances from which the offence of conspiracy can be inferred, there was the direct and cogent evidence of PW1, an eye witness who saw the defendants subjecting the deceased to grave torture by using cable and stick on his body to the extent that blood was emitting from his mouth and nostrils. He submitted that this clearly showed that conspiracy was at play between the defendants.

The fact that the defendants refused to release the deceased despite his condition and PW1's pleas, according to counsel,

was indicative that the defendants agreed to subject the deceased to torture until death. Added to this, counsel said, is the uncontroverted testimony of PW1 that the 1st defendant and his master begged him to cover up the matter. He submitted that this evidence was not contested in any way by the defence under cross-examination and must be deemed as admitted. He also referred to the evidence before the Court that the defendants alleged that the deceased stole their phone, as meaning that the defendants were in agreement to beat and torture the deceased which eventually led to his death. He urged the Court to convict the defendants on count 1 as charged.

On count 2, Mr. Atoyebi cited HASSAN V. STATE (2017) 5 NWLR (Pt.1557) 1 at 34; and STATE V. JOHN (2013) 1 NWLR (Pt.1368) 337, on the ingredients of culpable homicide punishable with death under section 221 of the Penal Code. He further cited the case of AJAEGBO V. STATE (2018) LPELR-44531(SC), among other decisions, on how the burden of prove may be discharged by the prosecution. He submitted that the first ingredient of the offence (i.e. death of the deceased) has been proved beyond reasonable doubt through the evidence of the two prosecution witnesses who both saw the corpse of the deceased, and testified to other surrounding circumstances of the death.

On the second element of the offence (i.e. that the deceased died as a result of the act of the accused person), he submitted that this is also proved by the evidence of PW1 who witnessed the grave beating of the deceased by the defendants at about 6:00am and by the time he returned from work at about 12:00 pm, he met the corpse of the deceased lying dead. He submitted that the only reasonable and safe deduction from

these facts is that the death of the deceased resulted from the beating he received from the defendants. That there was no break in the chain of events from when PW1 saw the defendants beating the deceased with sticks and cables and when he died, to allow for any other possibility as to the cause of his death. That PW2 also testified that when he saw the deceased, there were marks of violence on him suspected to have been from beating. He argued that having regard to the circumstances of the death of the deceased the absence of medical evidence as to the cause of death was of no moment, relying on MAIWADA V. THE STATE (2015) LPELR-40413(CA) at 22B-23C, BABUGA V. STATE (1996) 7 NWLR (Pt.460) 279, etc.

On the third and final element of the offence, i.e. that the act of the accused was intentional, learned prosecuting counsel pointed to the evidence of PW1 who told the defendants not to kill the deceased in front of his house, because of the gravity of the beating meted on the deceased by them. He said this shows the manifest intent of the defendants to bring about the death of the deceased because he allegedly stole their phone and threw the SIM card away. Relying on the authorities of IBIKUNLE V. STATE (2007) 2 NWLR (Pt.1019) 546 at 577 E-F, and GARBA V. THE STATE (2000) 6 NWLR (Pt.661) 378, the prosecution submitted that it is trite that every person intends the natural and probable consequence of his acts. In this case, according to the prosecution, there is uncontroverted evidence that the defendants used stick and cable to beat the deceased to the extent that blood was emitting from his mouth and nostrils; that the only reasonable inference to be drawn is that the defendants intended to bring about the death of the deceased as punishment for the alleged theft done by him. He

urged the Court to hold that the third element has been proved beyond reasonable doubt.

The prosecuting counsel then responded to certain specific contentions made by the defence in their final address, relating to (i) the effect of PW1's evidence given after he went out to meet with the prosecution team while the court was on recess; (ii) whether the evidence of PW1 was tutored; (iii) whether the entire evidence of PW2 is hearsay evidence; (iv) the applicability of the presumption of withholding evidence; and (v) the correct standard of proof required of the prosecution in a criminal trial. He urged the Court to overrule the argument of the defence on all these points. He added that even assuming (though without conceding) that the evidence of PW2 is inadmissible as submitted for the defence, the guilt of the defendants has been abundantly established by the compelling and conclusive eyewitness evidence of PW1. He prayed the Court to convict the defendants on the two counts charged.

The defence counsel filed a reply on points of law on the 17/1/2019 in which he more or less reargued or re-emphasised the arguments made in his final written address.

RESOLUTION

In a criminal trial, the duty of the prosecution is to prove the guilt of the defendant beyond reasonable doubt. See section 135 of the Evidence Act. This requires that the prosecution must prove all the ingredients of the offence by that same standard, i.e. beyond reasonable doubt. But proof beyond reasonable doubt does not mean proof beyond all doubt or all shadow of doubt. It simply means establishing the guilt of the

accused person with compelling and conclusive evidence: SMART V. THE STATE (2016) LPELR-40827(SC) at 27B-D.

In AFOLALU V. THE STATE (2010) 16 NWLR (Pt.1220) 584 it was held by the Supreme Court that 'proof beyond reasonable doubt' means proof to moral certainty; such proof as satisfies the judgment and conscience of a judge as a reasonable man, and applying his reason to the evidence before him that the crime charged has been committed by the defendant. See also DAIRO V. THE STATE (2017) LPELR-43724(SC) at 23G-24B, per Kekere-Ekun, JSC.

The charge against the two defendants involve conspiracy to commit culpable homicide punishable with death, and culpable homicide punishable with death. The guilt of the defendants for these offences can be proved either through the evidence of an eyewitness, or by confessional statement or by circumstantial evidence; or by any combination of these methods. See TAIYE V. THE STATE (2018) LPELR-44466(SC). With the rejection of the alleged confessional statements of the defendants, the prosecution relied in this case upon the eyewitness account of PW1 and on relevant circumstantial evidence. The task now is to see whether the evidence adduced is of the standard required for their conviction.

To prove culpable homicide punishable with death, the prosecution must establish the following ingredients:

(i) The death of the deceased;
(ii) That it was caused by the accused; and
(iii) That the accused knew that his act will result in death or did not care whether death resulted from it.

See THE STATE V. DANJUMA (1997) 5NWLR (Pt.506) 512 SC.

From my assessment of the available evidence, I firmly believe that the death of the deceased is established beyond reasonable doubt. PW1 stated that he saw the deceased being beaten by the defendants as he was leaving for work, and later returned from work to meet people gathered around the corpse of the deceased, and that the Police later came and took the corpse away. His evidence on this was neither challenged or discredited. PW2, the IPO, also testified that he led a team of detectives to the scene where they found the deceased lying face up with marks of violence suspected to have been beaten; he spoke of how they took the corpse to the Asokoro General Hospital where death was confirmed and the corpse was deposited in the mortuary. There is no argument on these facts that the death of the deceased has been fully established.

The next question is whether the death was caused by the defendants. PW1 gave graphic and uncontradicted evidence as an eyewitness, of how he came out in the morning to meet the defendants beating the deceased close to his house. They beat the deceased and stripped him naked on the allegation that he stole their phone. He pleaded with them to leave the boy alone but they rejected all entreaties and kept beating the deceased with cable until blood gushed from his nose and mouth. They insisted that they would not leave the deceased until he produced their SIM card. When PW1 saw blood coming out of his mouth and nostrils, he became afraid and told the defendants to move away from his area. He found the boy dead a few hours later. PW2 confirmed that when they came to evacuate the corpse, he found marks of violence on him suspected to be from beating.

Further, PW1 testified that when he saw the 2nd defendant two days later and identified him to his friend as the person that killed the deceased, the 2nd defendant pleaded with him to cover the issue. That the 2nd defendant's master even offered him up to N40,000.00 as bribe to cover up the 2nd defendant but he refused and handed over the 2nd defendant to the police. In his own testimony, PW2 confirmed that the 2nd defendant was brought to them by PW1 and one Amana Audu.

It is noteworthy that none of these pieces of evidence was either contradicted or discredited in cross-examination. They are relevant, cogent and credible, and are entitled to the fullest weight in law. This indisputable chain of evidence clearly points to the defendants as being responsible for the death of the deceased, thereby supporting the second ingredient of the offence.

A crucial point to note from the evidence of the prosecution witnesses, particularly PW1, is that the deceased was last seen alive in the hands of the defendants, who were beating him with cable with blood flowing from his mouth and nostrils; and that despite his precarious condition the defendants had refused all entreaties to let him go. In such circumstances, the law places the burden on the defendants to explain what happened to the deceased. That is the purport of the doctrine or theory of "*last seen.*" The Supreme Court explained when the doctrine comes into play in the following pronouncement in KOLADE V. THE STATE (2017) LPELR-42362(SC) at 53F-54C:

> *"The Last Seen doctrine indicates that any accused charged with murder would be required to offer some explanation as to how the deceased met his death. ... The doctrine of 'last seen' means that the law presumes that*

the person last seen with the deceased bears full responsibility for his death. Thus, where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal."

In this case, the defendants were the persons last seen with the deceased who was in a very critical condition. They have a duty to explain what happened to him after PW1 left them. Throughout the trial, no explanation whatever was advanced by either of them as to what happened to the deceased beside the severe beating that they are shown to have dealt on him. Their evidence which the defence counsel was busy celebrating in his final address as being uncontradicted, exact, direct and credible, did not achieve that purpose. If anything, it rather suggests a motive for the offences alleged, assuming it was at all established that the deceased was among the four men that allegedly broke into the defendants' room.

This leaves the Court with the overwhelming circumstantial evidence adduced by the prosecution, pointing irresistibly to the defendants as the architectS of the death of the deceased. For the avoidance of doubt, the circumstantial evidence I refer to in this regard include the brutal beating given the deceased by the defendants as witnessed by PW1; the fact that the deceased was found dead just a few hours after the said beating, with marks of violence on him; and also the uncontradicted evidence that the 2nd defendant and his master attempted to cover up the 2nd defendant's involvement in the death of the deceased by offering a bribe to PW1. In my view, this is sufficient to satisfy the second element of the offence in question. The absence of medical evidence of the cause of death makes no difference.

The defence counsel contended that it was not established that it was the injury sustained from the beating that led to the death of the deceased; that the two prosecution witnesses had admitted that they had not met the deceased before the incident and did not know whether he was sick before; that they also admitted that death could result through various means. He submitted further that under cross-examination PW1 admitted that at the time he left the defendants to go to work, the deceased was in perfect condition, and that this had to be so otherwise PW1 would not have left them but would either have invited the police or some other person(s) to rescue the deceased. He contended that PW1's further evidence that when the beating became too much or when he saw blood coming out of the deceased's mouth and nostrils, he asked the defendants to move away from his place, must have been tutored by one Barr. Aisha who invited PW1 in December 2017 to testify in this case, or by the prosecution team during the Court's recess on 6/2/2018 while PW1 was giving his evidence.

My view on these arguments is that:

(1) the defendants had a duty to explain what happened to the deceased; they made no explanation at all, even if to place some other likely cause of death for consideration before the court. The Court cannot engage in fanciful conjectures on what else could have happened to the deceased, in the face of the overwhelming circumstantial evidence already presented by the prosecution showing that the defendants killed the deceased.

(2) The purport of PW1's evidence under cross-examination on the condition of the deceased at the time he left for work, was no more than that the deceased was still alive. He could not

have been in perfect condition as canvassed by the defence counsel, when by the unchallenged evidence before the Court blood was flowing from his mouth and nostrils as a result of the beatings.

(3) It cannot be inferred from the evidence of PW1 that he was tutored by Barr. Aisha on what to tell the Court. The witness was clear that Aisha told him to come and tell the court exactly what he saw that happened in the case.

(4) It is not a requirement of law that a witness must remain in the witness box when the Court has risen. The situation is akin to a matter being adjourned before a witness concludes his evidence; he cannot be tied down in the witness box until such time as he will complete his evidence, in order to prevent him from interacting with other members of the prosecution team. No breach of legal procedure or any actual prejudice to the defendants is disclosed in counsel's argument regarding what transpired during the Court's recess in question. Furthermore, failure to re-swear PW1 or remind him of his earlier affirmation before he continued with his testimony does not in law invalidate his evidence. See OBISI V. CHIEF OF NAVAL STAFF (2004) LPELR-2184(SC).

(5) The law does not insist that all documents pleaded or front-loaded by a party must be tendered in evidence. A party is at liberty to tender only as much as he requires to succeed in his case. See BAMGBEGBIM V. ORIARE (2009) LPELR-733(SC). At any rate, the argument of the defence is that the Court should invoke the presumption of withholding evidence against the prosecution for their failure to tender the pictures of the deceased in evidence, as same could possibly have revealed the truth. This contention is in relation to the marks of violence

which PW2 said he saw on the body of the deceased. But when the said evidence was given, the defence did not cross-examine PW2 on it. It is trite that evidence which is not cross-examined is deemed admitted: see OFORLETE V. THE STATE (2000) 12 NWLR (Pt.681) 415 SC. Having thus accepted PW2's evidence on the issue, the photographs became of no moment. Their non-tendering in the circumstances does not call for the application of section 167(d) Evidence Act. The second element of the offence is duly established.

As regards the third element of the offence, i.e, that the accused killed the deceased intentionally, this would be satisfied where the evidence shows that the accused knew that his act will result in death or that he did not care whether death resulted from it: THE STATE V. DANJUMA, supra. In this case, PW1's uncontradicted evidence that the defendants persisted in beating the deceased in spite of his precarious condition, and despite his plea that they should let him go, clearly shows that they did not care what happened to the deceased. That, in my view, satisfies the third element of the offence. Our law is that a man is presumed to intend the natural and probable consequences of his action. One natural and foreseeable consequence of the relentless, brutal beating of the deceased by the defendants even after blood had started gushing from his mouth and nostrils, is that he would slump and die. For the defendants to have persisted in their vicious assault on the deceased in the circumstances of this case, despite all pleas by PW1 that they should leave the deceased alone, is clear proof that they not care whether the deceased died from the beating. That made their action intentional. See BAYO ADELUMOLA V. THE STATE (1988) 1 NWLR (Pt.73) 683 SC.

I hold therefore that the offence of culpable homicide punishable with death has been proved against the defendants beyond reasonable doubt.

The elements of criminal conspiracy which the prosecution needs to establish, are as follows:

(i) That there was an agreement between two or more persons to do an illegal act or to do a legal act by illegal means;

(ii) That the illegal act was done in furtherance of the agreement;

(iii) That each of the accused persons participated in the conspiracy. See AGUGUA V. THE STATE (2017) LPELR-42021(SC) at 19E-20A.

As conspiracies are normally hatched in secret, it is rare in real life to ever find direct evidence of it. Accordingly, conspiracy is usually proved by circumstantial evidence of overt acts done by the accused persons towards achieving their common goal. See GBADAMOSI V. THE STATE (1991) 6 NWLR (Pt.196) 204. In cases where the main offence has been shown to have been committed by the defendants, the court would easily rely on that fact as establishing the existence of a conspiracy between the defendants to commit the offence: ISLAM RAFIQUL V. FRN (2018) LPELR-44520(CA) at 32B et seq. In the instant case, the facts proved in support of the main offence of culpable homicide have conclusively established the charge of conspiracy laid in count 1 of the amended charge.

Based on the foregoing, I find each of the defendants guilty on both counts of the charge and I convict them accordingly.

The Penal Code prescribes a mandatory death sentence for both offences. In the circumstances, there is no need for an *allocutus*. The sentence of the Court on the defendants, therefore, is that each of you shall be hanged by the neck until you are dead, and may the good Lord have mercy upon your soul.

(SGD)

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HON. JUSTICE A. O. EBONG
(03/05/2019)

Legal Representation:

(1) O. M. ATOYEBI, ESQ., with A. T. Ngada, Esq, H. K. Usman, Esq, and I. H. Abia, Esq, for the Prosecution.

(2) STEPHEN OCHEIBI JOHN, ESQ. for the Defendants.