

*Culpability of an accused*  
*Need to be proven beyond reasonable doubt*  
*Propriety of conviction based on conjecture*

IN THE COURT OF APPEAL OF NIGERIA  
HOLDEN AT LAGOS  
ON FRIDAY THE 12<sup>TH</sup> DAY OF JULY, 2013  
BEFORE THEIR LORDSHIPS

AMINA ADAMU AUGIE  
RITA NOSAKHARE PEMU  
FATIMO OMORO AKINBAMI

JUSTICE, COURT OF APPEAL  
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APPEAL NO: CA/L/469A/2012

BETWEEN:

MAJOR HAMZA AL-MUSTAPHA ... .. APPELLANT

V.

THE STATE ... .. RESPONDENT

*"No matter the suspicion and its degree, no matter the grievance or grouse, no matter the height of conjecture, no matter the depth of hatred, even the strongest SUSPICION can never found a conviction in law. There is the duty, not discretion of the Prosecution to prove its case beyond reasonable doubt."*

The appellant and others namely Mohammed Abacha, Rabo Lawal and one Mohammed Abdul were charged and arraigned at the High Court of Lagos for the offences of conspiracy to murder and murder of Alhaja Kudirat Abiola on 4<sup>th</sup> June 1996, along Lagos-Ibadan Expressway. Mohammed Abacha was later discharged by the Supreme Court on the ground of non culpability. Chief Superintendent of Police, Rabo Lawal, was also discharged on a no-case submission. At the shooting of the deceased, there was no eye witness to the crime except for one Dr. Mark Adesina who was not called as a witness. The Prosecution called four (4) witnesses while the Appellant called two (2) witnesses and testified for himself.

PW1 was one Dr. Falomo, a personal Physician to the late Chief MKO Abiola. PW 2 was Barnabas Jubila (alias Sergeant Rogers), a trained peashooter Antitank Commander, who testified to shooting the deceased on the instruction of the Appellant. He narrated how the Appellant ordered him to eliminate the deceased because “she was doing some bad thing against the State”. However, during cross examination, he retracted his testimony regarding the alleged involvement of the Appellant, saying he was instructed to testify as such by the Federal and the Lagos State Government on the promise of a house, job for himself and his wife, security for his family and a foreign posting. He stated that his statement of 29<sup>th</sup> September, 1999 was made under threat of being killed.

PW3 was one Mohammed Abdul (Alias Katako), a soldier who joined the Nigerian Army in 1998. He gave his testimony as a driver instructed by late Ibrahim Abacha to drive PW2 while he carried out the murder of the deceased. Under cross-examination, he reneged on his earlier evidence saying he was offered some promises including the gift of a house by both the Federal and Lagos State Governments to give the evidence-in-chief. He stated further that on the fateful day, he was not at the scene of the crime as he had his first marriage at Azare in Bauchi State. PW4, Ahmed Fari Yusuf, was a Police officer. He knew the Appellant in 1999, when he was brought to the Force CID for the alleged murder of the deceased, the burning of Guardian House and attempted murder of Alex Ibru. He testified to the fact that the Appellant made a statement under caution. After a trial-within-trial which lasted about twelve (12) months, PW4 disappeared into thin air and was never available for cross-examination. Appellant testified on his behalf and called witnesses denying all the allegations made against him.

At the close of the proceedings, the learned trial Judge, DADA J., delivered her judgment; she convicted the Appellant as charged and sentenced him to death. Dissatisfied with the judgment, the Appellant filed the instant appeal. Amongst the issues for determination were: (i) Whether in light of the available evidence, the offence of conspiracy to murder was established against the Appellant; and (ii) Whether there has been established against the Appellant, the charge of murder of Late Alhaja Kudirat Abiola.

Appellant’s counsel contended that the evidence of prosecution witnesses contradicted their respective testimonies made during examination-in-chief. He noted that the

contradictions strike at the root of the Prosecution's case and therefore, urged the Court to regard the evidence as unreliable. He submitted that the Learned Trial Judge not only descended into the arena, but went further to adduce reasons for accepting the evidence of Prosecution witnesses in spite of the contradictions noted and acting on same. The Appellant queried if there was any evidence outside the testimony of the Prosecution witnesses to sustain the charge. On the requirement of proof beyond reasonable doubt, Counsel submitted that the entire trial was a mere persecution as the Prosecution failed to prove the charges against the Appellant beyond reasonable doubt.

Counsel for the prosecution, in support of his position, submitted that conspiracy need not be proved by positive direct evidence; it may be inferred from the conduct of the parties. He stated further that the degree of proof required need not reach certainty.

In their decisions, the appellate court opined that conspiracy is complete upon an agreement by the conspirators and in most cases, agreement is inferred or presumed. There must be evidence of complicity of the accused person in the offence and a chain of causation which must not be broken. Like all criminal cases, it must be proved beyond reasonable doubt and the burden is on the Prosecution. Analyzing the evidence of the Prosecution witnesses, the Court concluded that they were so discredited under cross-examination that no reasonable Court can convict on the evidence. *"It is foolhardy and indeed preposterous to say that the contradictions in the evidence of the prosecution witnesses were not material, as the learned trial Judge observed. They were very material and I so hold. Where evidence of witnesses are contradictory of each other, it is the duty of the Judge to discountenance same and treat the entire evidence as unreliable. It is a duty in law, not one marked by discretion (Per PEMU JCA).* The appellate Court admonished the trial Court for its failure to expunge the evidence of PW2, PW3 and PW4 which were obviously laden with contradictions.

On the reliance of the Respondent on Section 7 of the Criminal Code (relating to principal offenders), His Lordship held that the success of any charge lies in its ingredient being established, coupled with credible and cogent evidence to buttress same. Where the offence charged lacks any of these, then it is not established and the accused person shall, of right, enjoy the benefit of this lacuna. In this case, there is no evidence that the Appellant pulled the trigger resulting in the death of the deceased.

The Prosecution failed to provide direct or circumstantial evidence pinning the Appellant to the commission of the crime.

Considering the issue of proof of the crime by the Prosecution, the Court listed the ingredients to be established to prove murder. A court can convict on the basis of circumstantial evidence where it is strong, cogent and leads to the irresistible conclusion that the accused person committed the crime he is accused of. There is no evidence in the instant case, whether direct or circumstantial, which pins the commission of the crime to the Appellant. More importantly, the Nigerian Police Force did not promptly and wholly investigate the matter. Though the trial judge is a master of the facts of the case, the inferences deduced from the facts of the case must accord with common sense and good judgment.

On this note, the appellate Court found that the Prosecution did not establish commission of the crime by the Appellant. The appeal succeeded. Appellant was discharged and acquitted. Conviction and sentence set aside.

COUNSEL:

J.B. DAUDA (SAN) WITH HABEEB OREDOLA ESQ., ADEDAYO ADEDEJI ESQ., E. YELWA (MISS) AND A. AINA (MISS) FOR THE APPELLANT

LAWAL PEDRO (SAN) WITH FEMI ADAMSON (ACSC) FOR THE RESPONDENT.