NWANKWOALA V THE STATE, [2006] 14 NWLR (PT. 1000) 663

BETWEEN

1.D.S.P. GODSPOWER NWANKWOALA

2.SGT. GIDEON ATIME **APPELLANTS**

AND

THE STATE **RESPONDENT**

TABAI, J.S.C. (Delivering the Leading Judgment):

This appeal is against the judgment of the Jos Division of the Court of Appeal on the 17th of March, 2005 which confirmed the conviction of the appellants by the Benue State High Court. The appellants, GODSPOWER NWANKWOALA (DSP) and Sgt. GIDEON ATIME were charged along with one Cpl. ALPHONSUS EKEYI (since deceased) in a two count

charge of culpable homicide by causing the deaths of Echono Itolo and Robert Inalegwu. At the end of their trial by Hwande, J. at the Benue State High Court holden at Makurdi, each was convicted and sentenced to death. This was on the 31/7/ 2002.

The three convicts appealed against their conviction. But before the appeal was heard at the Jos Division of the Court of Appeal, the 3rd accused/convict died in prison custody. The appeal in respect of the two appellants was heard and dismissed. The two appellants have now come on appeal to this court.

The notice of appeal of the 1st appellant dated 14/4/2005 contains 9 grounds of appeal. He complained of various errors of law and misdirections. That of the 2nd appellant contains 5 grounds of appeal. Before this court each of the appellants has filed a separate brief of argument. The 1st appellant's brief of argument and his reply brief were prepared by G. Ofodile Okafor, SAN. He formulated four issues for determination. The 2nd appellant's brief was prepared by M. K. Aondoakaa who raised therein two issues. The respondent's brief was prepared by Mojisola Sule, Principal State Counci 1 Ministry of Justice Makurdi. She raised only one issue for determination.

The 1st appellant's issue one, the 2nd appellant's issue one and the only issue of the respondent are in substance the same and in my consideration that single issue effectively disposes of the appeal. It is whether from the totality of the evidence in the record the Court of Appeal was right in confirming the conviction of the appellants.

Now, before considering the various questions raised by the appellants, let us see the case of the prosecution which was accepted by the trial court and affirmed by the Court of Appeal. The 1st appellant, D.S.P. GODSPOWER NWANKWOALA was on the 23/ 12/2000 the Divisional Police Officer incharge of the "B" Division Police Station Makurdi. At about 8.15 p.m. of the 23/12/2000, the 1st appellant leading a team of four other policemen in a police Algon Jeep which he himself drove went on anti robbery patrol in the Makurdi metropolis. The others in the team were 2nd appellant Sgt. Gideon Atime, 3rd appellant, Cpl. Alphonsus Ekeyi (late), the PW4, Police Constable Ojogbane Ameh and PW5 Police Constable Perekibina Werigbelegha. The 1st and 2nd appellants and the 3rd accused were armed while the two constables PW4 and PW5 were not armed.

At about 8.15 p.m. while they were along the Inikpi Street High Level, they saw three young men who happened to be the PW3 and the two deceased victims. Upon some suspicion, the 1st appellant stopped the vehicle and ordered their search. The PW3 identified himself as a youth corper and he was released. The two deceased who claimed to be students of Benue State University were on the orders of the 1st appellant arrested and taken to the 'B' Division Police Station for further investigation. At the Police Station the 3rd accused was in the process of recording their statements when later in the night the 1st appellant ordered the team and the two young men who were chained into the vehicle and drove to the Ishaya Bakut Road, Makurdi. Somewhere along the road the 1st appellant stopped the vehicle and ordered everybody to alight. When the two young men alighted from the vehicle the 1st appellant shot each of them on the chest and each fell. He then ordered the 2nd and 3rd accused persons who also shot them. Their corpses were taken into the vehicle and to the police station.

The conviction of the appellants was based on the trial court's acceptance of the entirety of the above case of the prosecution and endorsed by the court below. But the crucial aspect of

the evidence which is the eye witness account of what happened along the Ishaya Bakut Road was given by the 2nd and 3rd co-accused persons and PW4 and PW5 who can be regarded as accomplices. I shall, in the course of this judgment, make references to their evidence to determine the ultimate issue of whether there is such evidence that justifies the conviction of the appellants.

Another crucial aspect of the case is that each of the 2nd accused, 3rd accused, PW4 and PW5 had made a statement to the police the totality of which version is consistent with the defence of the 1st appellant. And this version is that on that fateful night while they were on patrol along the Inikpi Street High Level area of Makurdi, they were attacked by the two deceased and a third boy who opened fire on them. That the team returned fire in the course of which the third boy escaped and the two deceased injured and arrested. And that it was when they were being taken to the Federal Medical Centre Makurdi that they died.

G. Ofodile Okafor, SAN referred to these statements to the police, the evidence of PW8 to the effect that the rifle submitted to the 1st appellant was returned to him with the 30 rounds of ammunition unspent, his evidence that the 2nd accused told him that he expended four rounds of ammunition on robbers who attacked them at Inikpi Street and the evidence that the 1st appellant was driving the jeep when the boys attacked and submitted that the account represented the undiluted truth of the incident. It was also his submission that where a witness makes two inconsistent statements the court cannot pick and choose which to believe and which to reject and that the two statements must be rejected as unreliable. He submitted further that such statements are not admissible against the 1st appellant but against those who made them. He relied on section 27(3) of the Evidence Act and Arnold v. The State (2004) 12 NWLR (Pt. 888) 520 at 552. Learned senior counsel gave various reasons why the inducement and intimidation story paraded by the PW4, PW5, 2nd appellant and 3rd accused cannot be supported. He pointed out a number of contradictions in the story of how the inducement and intimidation was allegedly carried out and submitted that the contradictions have created doubts on a material fact the benefit of which should be given to the 1st appellant. On the effect of contradictions in the evidence of the prosecution which are not satisfactorily explained, he cited Onubogu &Anoi: v. The State (1974) 9 SC 1; Boy Muka v. The State (1976) 9-10 SC 305 at 325; Arehia & Anor. v. State (1982) 4 SC 78 at 88. He submitted that although there are concurrent findings by the two courts below, there are very exceptional circumstances that warrant the interference by this court to reverse such findings as a failure to do so will perpetrate a miscarriage of justice. He relied on Igbi v. The State (2000) 3 NWLR (Pt. 648) 169 at 188.

In her own contention, Mojisola Sule Principal State counsel, submitted that the 1st appellant's defence of a shoot out at Inikpo Street crumbled in the face of the credible and uncontroverted evidence of the PW1, PW2 and PW3. She argued that the PW4 and PW5 were not accomplices and that their evidence needed no corroboration to sustain a conviction. Counsel referred to section 178(1) of the Evidence Act and submitted that they were competent witnesses. In further attempts to discredit the 1st appellant's defence about shoot out along Inikpi Street, the learned Principal State counsel pointed out that there was no explanation as to where the deceased were kept between 8.15 p.m. when they were allegedly shot and arrested and 4 a.m. when they were alleged to have died on their way to the Federal Medical Centre.

Let me now consider the evidence and the findings of the learned trial Judge Hwande, J. endorsed by the Court of Appeal in the attempt to resolve the ultimate issue of whether the conviction of each of the appellants is supported by legal and credible evidence in the record.

I start my deliberation with the case of the 1st appellant. The uncontested facts are that the deceased young men ECHONOITOLO and ROBERT INALEGWU died in the night of 23/12/2000 and 24/ 12/2000 of gun shot injuries from the five man police patrol team led by the 1st appellant. This is contained in the evidence of all members of the team, the PW3, PW6 and PW7. It is also uncontroverted that only the 1st appellant, 2nd appellant and the 3rd accused (since deceased) each had a rifle on the night in question. The other two, PW4 and PW5 who were police constables were not armed. One controversy is as to the person or persons amongst the 1st appellant, 2nd appellant and 3rd accused that killed the deceased persons.

The other controversy surrounds the two hotly contested versions of the venue and circumstances of their death. Were they killed as a result of injuries they sustained when they allegedly engaged the police team in a gun battle along Inikpi Street at about 8.15 p.m. on the night in question' Or were they killed much later that night at about 4 a.m. from gun shot injuries inflicted on them along Ishaya Bakut Road' The first version represents the very defence of the 1st appellant. He maintained it in all his statements to the police and in his evidence in court. And his version is supported by the very first statement made to the police by each of the 2nd appellant, 3rd accused, the PW4 and PW5. But in their subsequent statements and in evidence, each of them denied the truth of the first statement and alleged that he was induced by the 1st appellant his D.P.O. to make it.

On these allegations of inducements the learned trial Judge had this to say:

"I believe the evidence of 2nd and 3rd accused and also PW4 and PW5 that they were induced to make the statements in December to the police. I have compared it with the existing evidence in the case and I am satisfied that they were instructed to say what they said. 1st accused was in authority as the Divisional Police Officer at the time he assured them that he would help end their case. I consider the statement Police in December 2000 as unreliable on the basis of inducement this is in line with section 28 of the Evidence Act."

And the said section 28 provides:

"A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature."

The 1st appellant, a Deputy Superintendent of Police and the Divisional Police Officer in charge of the "B" Division Makurdi was to the 2nd appellant, 3rd accused the PW4 and PW5 a person in authority whose inducement, threat or promise was sufficient for their supposing that by making the statement as he wanted they would gain some advantage or avoid some evil. The question therefore is whether there was such evidence before the learned trial Judge to justify his finding that the 1st statement of each of these four persons was induced by the 1st appellant' In the first place, no reason was suggested in the course of the trial why the

four police officers would conspire to tell a false story against their boss. There is no evidence that he punished any of them. They were all positive and unequivocal about the assertion that no exchange of gun fire occurred at Inikpi Street between the two deceased and the PW3 on the one hand and the police team on the other.

Besides there was the strong eye witness account of the PW1, PW2 and PW3 who asserted that there was no exchange of gun fire at the time the deceased were arrested. The PW1 and PW2 were the persons by whose shops the arrests of the two deceased were made. The PW3 was a friend of Echono Itolo who was with the deceased at the time of their arrest. He gave a detailed account of how the deceased were arrested. None of these witnesses was shaken in cross-examination.

Furthermore, there was no evidence that the deceased were committing any crime. Is it probable that they would attack the armed policemen with their only locally made pistol when the police did not offer any threat to their supposed criminal activities. I do not think so. The learned Principal State Counsel posed yet another question which further rendered the story about the shoot out along Inikpi Street incredible. The deceased were allegedly injured and arrested at about 8.15 p.m. The story of the 1st appellant is that they died at about 4 a.m. of the 24/12/2000 when they were being taken to the Federal Medical Centre for treatment. There is no evidence of where they were kept between 8.15 p.m. and 4 a.m. when they died.

There is yet another piece of evidence which tends to have further discredited the story about the shoot out at Inikpi Street. This is contained in the evidence of the 2nd appellant and the 3rd accused person. At page 96 lines 14-18 of the record, the 2nd appellant said:

"The 1st accused directed the 3rd accused to record the statements of the suspects. We moved on for the patrol. I mean the rest of us moved on apart from 3rd accused who was recording the statements of the suspects."

If this evidence about the 3rd accused person's recording of the statements of the suspects/deceased is believed, it means that the story of the 1st appellant about their injury in the course of exchange of gun battle along Inikpi Street is false. Because the 3rd accused could not have recorded the statements of the two boys if they had been critically or fatally injured and at the point of death. Curiously this witness was not cross-examined on this vital aspect of the evidence.

Still on the question of the 3rd accused recording of the statements of the deceased suspects, the 3rd accused himself had this to say:

"When the other members of our group were going back for the patrol the 1st accused directed me to record the statements of the two suspects. I record the statement of the 1st suspect who is Echono Itolo. He was the one who threw the gun into the gutter. He claimed he was a student of Benue State University that the gun was offered to him by one Francis Obi living in Imo State an ex student of the University. That he is a member of Bucaneer Axe. The 1st accused came back and collected the statement from me …" (see page 104 lines 6-15 of the record)

The above is a devastating piece of evidence against the 1st appellant's claim of a shoot out and injury of the suspects along Inikpi Street. Yet,this evidence was not contested on cross-examination by the 1st appellant's counsel.

There was still another piece of evidence which tends to have negated the story of any shoot out along Inikpi Street. It is the evidence of the PW9 that in the course of the investigation, he was taken to a spot along Ishaya Bakut Road where the deceased were allegedly shot. There they saw blood stain on the road and they took photograph of same (see page 79 lines 19-24 of the record). While the said piece of evidence discredits the story about any shoot out at Inikpi Street, it lays credence to the version that the killings took place along Ishaya Bakut Road.

The totality from all the above is that the 1st statement of each of the 2nd appellant, 3rd accused, PW4 and PW5 which is consistent with the defence of the 1st appellant was the result of inducement from the 1st appellant. There is therefore ample evidence in support of the trial court's finding about inducement and which was rightly endorsed by the Court of Appeal. In the face of all the above, I have no cause whatsoever to disturb the finding about inducement. Rather, I also endorse the finding that the deceased were killed along Ishaya Bakut Road. The story of the 1st appellant that the deceased died as a result of injuries they sustained in their exchange of gun fire with the police team along Inikpi Street is completely false and was rightly rejected.

Let me, at this juncture, treat the issue of the effect of the contradictions between the 1st statement of each of the 2nd appellant, 3rd accused, the PW4 and PW5 on the one hand and their subsequent statements and evidence on the other. The settled principle is that where the evidence of a witness is materially contradictory of his earlier statement to the police, the witness should be regarded as unreliable and his evidence ignored. Such evidence can however be accepted and relied upon if the contradiction is explained to the satisfaction of the court. See Augustine Duru v. The State (1993) 3 NWLR (Pt. 281) 283 at 290 – 291; Christopher Onubogu v. The State (1974) 9 SC 1; Agwu & Ors v. The State (1965) NMLR 18; Jonathan Igbi & Anor v. The State (2000) 3 NWLR (Pt. 648) 169 at 197. There is no doubt that the first statement of each of the 2nd appellant, 3rd accused, PW4 and PW5 were contradicted by their subsequent statements and their evidence in court and the evidence of each therefore ought ordinarily to be discountenanced in the absence of a satisfactory explanation. In this case however, there is, in my view, plausible explanation offered by each of the witnesses to the satisfaction of the trial court. In the circumstances, I hold that the contradictions notwithstanding, the evidence of each of these witnesses about the location and circumstances of the killings was credible legal evidence upon which the trial Judge rightly relied. Next is the danger of relying solely on the evidence of these four eye witnesses because of their status either as co-accused persons or accomplices. The 2nd appellant and 3rd accused are co-accused persons. They repeated in evidence all they stated in their subsequent statement to the police. By virtue of the provisions of section 178(2) of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990, their evidence against the 1st appellant can, without more, be used against him. All the court need to do is to exercise caution in relying solely on such evidence. The PW4 and PW5 are regarded as accomplices and a conviction based on their uncorroborated testimonies is not, by virtue of section 178(1) of the Evidence Act. illegal. It is however safer for the court to insist on some corroboration. See Danlami Ozaki & Anor. v. The State (1990) 1 NWLR (Pt. 124) 92 at 113 and 117; Christopher Okosi & Anor. u The State (1989) 1 NWLR (Pt. 100) 642 at 657 – 658. In this case therefore, the trial court could convict the 1st appellant on the uncorroborated evidence of these four eye witnesses. Even if there was need for corroboration, there was sufficient corroboration from the evidence of the PW1, PW2, PW3 and PW9.

As regards to what happened at the scene of the killings along Ishaya Bakut Road, all the 2nd appellant, the 3rd accused, the PW4 and PW5 were categorical and consistent to the effect that it was the 1st appellant that shot the two deceased on their chests and they fell. The trial court accepted their evidence and made a finding in respect thereof. And in view of the ample credible evidence in support of the finding, and its endorsement by the Court of Appeal, I do not find any reason to interfere. I also endorse the finding that the 1st appellant shot the two deceased young men at Ishaya Bakut Road, Makurdi at about 4 a.m. of the 24/12/2000. His defence left lots of credibility gaps and was rightly rejected by the trial court and also rightly endorsed by the Court of Appeal. I hold on the totality of the evidence before the court that the guilt of the 1st appellant in the two count charge of culpable homicide is established beyond reasonable doubt. The result is that his appeal lacks merit and is liable to be dismissed.

I now come to the case of the 2nd appellant part and whose case forms part of the case of the prosecution against the 1st appellant. The evidence against him and accepted by the two courts below is that after the 1st appellant had shot each of the deceased on the chest, he also shot each of them on the orders of the 1st appellant. He denied ever shooting any of the deceased persons. The issue is whether the totality of the evidence before the court also established beyond reasonable doubt that he also shot the deceased persons. 1 start with the incidents of common intention resorted to by the court below. Where more than one person are accused of joint commission of a crime, it is enough to prove that they all participated in the crime. What each did in furtherance of the commission of the crime is immaterial. The mere fact of the common intention manifesting in the execution of the common object is enough to render each of the accused persons in the group guilty of the offence. See Patrick Ikemson & 7 Ors. v The State (1989) 3 NWLR (Pt. 110) 455 at 466. Where common intention is established, a fatal blow or gun shot though given by one of the party, is deemed in the eyes of the law to have been given by all those present and participating. The person who actually delivered the fatal blow is, in such a case, no more than the hand by which others also struck. See Ofor v. Queen (1955)15 WACA4 at 5; Adekunle v. The State (1989) 5 NWLR (Pt. 123) 505 at 518. And in practical terms, common intention is incapable of positive prove. Its existence can only be inferred from the circumstances disclosed.

In this case however, there are no facts and circumstances from which common intention could reasonably be inferred. The police team led by the 1st appellant left on lawful security patrol. They probably had reasonable suspicion that the deceased were about to commit a crime and they were arrested and taken to the police station. They were, on the orders of the 1st appellant, being interrogated by the 3rd accused person, when they were ordered to be taken into the vehicle. The 1st appellant was credited to have stated that they were being taken for further investigation and it was the 1st appellant who was in charge that also drove the vehicle to the Ishaya Bakut scene. There is surely no evidence from which it can be inferred that the 1 st appellant, 2nd appellant, 3rd accused, the PW4 and PW5 had a common intention to take the deceased to the Ishaya Bakut scene to have their lives terminated. The clear scenario from the available evidence is that the 1st appellant took decisions without consulting with the other members of the team but instructed their execution of these decisions. That is compatible with normal police routine and practices. There is in my view no evidence leading to the inference of common intention and it is therefore not surprising that the learned trial Judge made no specific finding of the existence of common intention.

Surprisingly, the Court of Appeal made a specific finding of the proof of common intention. After references to some authorities on the effect of common intention the Court, per Sanusi, JCA stated:

"The evidence before the trial court shows clearly that there was a common intention to cause death or at least to do grievous harm to the two deceased students and therefore the 1 st appellant and the 2nd appellant as well as 3rd accused person were rightly held liable and convicted by the lower court." (See page 339 lines 6-10 of the record)

This finding was, with respect, unfortunate. As I stated earlier, common intention is incapable of positive proof. Its proof is a matter of inference from the facts and surrounding circumstances of every given case. Now, are there in this case, such circumstances from which common intention could reasonably be inferred' I shall answer this question in the negative. The uncontroverted evidence is that the statements of the deceased persons were being recorded by the 3rd accused person when the 1st appellant ordered the team back into the vehicle with the two deceased young men. There was further evidence that 1 st appellant said they were being taken out for further investigation. And the 1st appellant was the driver. The evidence shows that the 2nd appellant, 3rd accused, PW4 and PW5 were not even aware of the Ishaya Bakut destination, let alone their mission. Clearly, no common intention was established. The danger of this finding of common intention at the Court below is that from the established guilt of the 1st appellant, the law would, without more, also presume the guilt of every member of the team. There would have been no need to ascertain the role played by every member of the team on the killing of the two young men. That would have been disastrous. Fortunately the learned trial Judge was focused on ascertaining the role played by each of the three persons charged. I think it is appropriate, at this juncture, to advise that in matters of group actions like this, the courts should not too readily draw inferences of common intention which might whittle down the demands of burden and standard of proof and jeopardise defences otherwise available to one or more of the group.

In reaching the verdict of guilt of the 2nd appellant the learned trial Judge had this to say:

"2nd accused denied firing. He maintained that the two boys had died at the one shot given them by 1 st accused so he did not shoot. That he expended his ammunition at Adorns Club to scare away people that were there. It is not indicated how many bullets were expended at Adorns Club by 2nd accused. PW4 however confirmed under cross-examination that the 2nd accused fired in the air at Adorns Club to scare away people. PW4 w'as present at the scene of crime. He testified positively that 2nd accused also shot the deceased persons. So did PW5 also testify. It does appear to my mind that 2nd accused was working in harmony with the 1st accused who was his boss and was willing to obey his orders even if such orders were illegal ones.

In accounting for his ammunition 2nd accused returned 16 rounds instead of the twenty he had collected for the operation . I am convinced that some of his bullets went in the body of the deceased persons on the orders of 1st accused. Even though 2nd accused claimed it was the shot of 1st accused that killed the two young men, there was no report that they had died before he fired at their morbid bodies. It will therefore be of no consequence to assume that the boys died after 1st accused fired on them. It is my view based on the evidence coming mainly from PW4 and PW5 that 2nd accused also shot the deceased persons and that he did so when there was still life in them." (see page 144, lines 13 – line 8 of page 145 of the record)

Two issues deserve some careful examination in the above quoted statement of the learned trial Judge. The first is the claim by the 2nd appellant that he expended some ammunitions at the Adorns Club. This evidence was corroborated by the PW4 under cross-examination. But it appears that this evidence was not believed because the 2nd appellant did not state exactly how many bullets he expended at Adorns Club. That in my view was a misplacement of the burden of proof. In criminal cases the burden of proof remains always with the prosecution and never shifts except in certain exceptional cases like insanity. See The State v. Idapu Emine & 2 Ors. (1992) 7 NWLR (Pt. 256) 658 at 674 and Onubogu v. The State (supra). The 2nd appellant having adduced evidence corroborated by the prosecution witness PW4 that he expended ammunitions at Adorns Club, he had no further burden of proving that he expended four bullets there.

The more crucial issue from the statement of the learned trial Judge is that he relied wholly on the evidence of the PW4 and PW5. It is on record that apart from the 2nd appellant himself, there were three eye witnesses of the killings. These are the 3rd accused, the PW4 and PW5. The learned trial Judge relied only on the evidence of the PW4 and PW5 to convict the 2nd appellant. There is nothing to show that he also considered the evidence of the 3rd accused on the role played by the 2nd appellant. In his statement to the police on the 31/12/2001 copied at pages 33 – 35 of the record, the 3rd accused said categorically that 2nd accused Sgt. Gideon Atime did not fire the deceased persons. He repeated the same in his testimony in court. (See page 106 line 26 of the record). This evidence cannot be wished away. Yet, the learned trial Judge ignored this all crucial evidence in favour of the 2nd appellant.

In a criminal trial the court is bound to consider not only those defences specifically raised by the accused but also all such evidence and defences which favourably avail him. See Aclebayo v. The Republic (1967) NMLR 39\\Akpabio v. The State (1994) 7 NWLR (Pt. 359) 635; Oguntohi v. The State (1996) 2 NWLR (Pt. 432) 503; Mcilam Zakari Ahmed v. The State (1999) 7 NWLR (Pt. 612) 641 at 679 and 681.

In this case, two of the three eye witnesses said the 2nd appellant also shot the deceased. While one said he did not. There are thus two competing versions on the question of whether or not the 2nd appellant also shot the two deceased young men. May be he did as alleged by the PW4 and PW5. May be he did not as alleged by the 3rd accused and the 2nd appellant himself. Each version remains a possibility. The prosecution can only be held to have proved the charges against the 2nd appellant beyond reasonable doubt if they successfully eliminated the possibility of the version put forth by the 2nd appellant and 3rd accused person. In my view the prosecution failed to eliminate that possibility.

The consequence is that there is a doubt on the guilt of the 2nd appellant which must be resolved in his favour. The totality of the evidence before the court has not established the charges against the 2nd appellant beyond reasonable doubt.

On the whole and having regard to all I have discussed above, I hold that there is no merit in the appeal of the 1st appellant, DSP GODSPOWER NWANKWOALA. In the result, his conviction and sentence for culpable homicide under section 221 of the Penal Code at the trial court and affirmed by the court below is further affirmed by me. His appeal is accordingly dismissed.

The appeal of the 2nd appellant SGT. GIDEON ATIME succeeds and is accordingly allowed. His conviction and sentence for culpable homicide under section 221 of the Penal Code at the trial High Court and affirmed by the court below are set aside. In substitution therewith I enter judgment for his acquittal and discharge.

ONU, J.S.C.:

Having had the opportunity to read before now the judgment just read by my learned brother, Tabai, JSC, I am in agreement that 1st appellant's appeal fails and it is accordingly dismissed.

In respect of the 2nd appellant, his appeal being meritorious, I accordingly allow it and quash his conviction and sentence.

KALGO, J.S.C.:

I have, before now, read the judgment just delivered by my learned brother, Tabai JSC. I agree entirely with his reasoning and conclusions reached in the said judgment and have nothing useful to add thereto. I therefore also dismiss the appeal of the 1st appellant and allow the appeal of the 2nd appellant. The 2nd appellant is accordingly discharged and acquitted.

MUSDAPHER, J.S.C.:

I have read before now the judgment of my Lord, Tabai, JSC, just delivered and with which I entirely agree. For the same reasons canvassed in the aforesaid judgment, I also affirm the conviction and sentence of the 1st appellant by the courts below and I allow the appeal of the 2nd appellant, the conviction and sentence of the 2nd appellant is set aside by me, in their place, I enter a verdict of discharge and acquittal of the 2nd appellant on the two counts contained in the charge against him.

MOHAMMED, J.S.C.:

My learned brother, Tabai, JSC, had permitted me before today to read in draft his judgment which he has just delivered and I completely agree with him. I however wish to add my own views on some of the issues presented for determination.

The appellants were tried and convicted by the Benue State High Court of Justice at Makurdi on a charge of causing the death of Echono Itolo and Robert Inalegwu Ale, contrary to section 221 and read along with section 79 of the Penal Code and sentenced to death by hanging. Aggrieved by this judgment of the court of trial, the appellants appealed to the Court of Appeal which after hearing the appeal, dismissed it and confirmed their conviction and sentence. Dissatisfied with the judgment, the appellants have further appeal to this court. In separate briefs of arguments filed by the appellants, the following four issues were raised in the 1st appellant's brief:

"1. Whether in view of the circumstances of this case, the Court of Appeal is right in affirming the conviction of the 1st appellant.

2.Whether in view of the two count charge framed against the 1st appellant, the Court of Appeal was right to hold/ affirm that the prosecution had proved its case when there is no evidence of common intention to commit murder as required by the law.

3.Whether the court below is justified when it held that there was no material contradiction in the evidence of the prosecution witnesses.

4.Whether the findings of fact by the court are perverse and as such liable to be set aside by this court."

In the 2nd appellant's brief of argument however, only two issues were identified from the grounds of appeal filed by him. The issues are:

"1. Whether from the surrounding circumstances of this case, the 2nd appellant was rightly convicted under section 221 of the Penal Code based on the doctrine of joint act or common intention as held by the Court of Appeal.

2. Whether the prosecution satisfied the evidential burden of proof beyond reasonable doubt when the Court of Appeal confirmed the conviction and sentence of the 2nd appellant by the trial court for culpable homicide punishable with death under section 221 of the Penal Code read together with section 79 of the Penal Code."

As far as the learned counsel for the state respondent is concerned, only one issue arise for determination from the grounds of appeal filed by the two appellants in their separate respective notices of appeal. The issue is:

"Whether in view of the overwhelming evidence available both at the trial and at the Court of Appeal (herein after referred to as the 'court below') the court below was right in affirming the conviction of the appellants."

The evidence led by the prosecution in this case is that the appellants were members of a five man police patrol team led by the 1st appellant that was on duty in Makurdi in the night on 23-12-2000. In the course of its duty, the patrol team came across the deceased along Inikpi Street and arrested them on allegation of armed robbery. The deceased who turned out to be students of Benue State University, Makurdi, were detained at 'B' Division Police Station, Makurdi. The 1st appellant and his team later that night removed the deceased to a spot along Ishaya Bakut Road, Makurdi and shot them dead. The 1st appellant shot the deceased first before asking the 2nd appellant and 3rd accused, now deceased, who were subordinate officers to the 1st appellant also to shoot the deceased and they obeyed.

The story put up by the 1st appellant in his defence was that the deceased students were killed in a gun battle between the members of his patrol team and a gang of the deceased armed robbers. He denied participating in the shooting because he was the one driving the patrol vehicle at the time of the incident. The trial court which saw and heard the witnesses both for the prosecution and the defence, was satisfied with the case of the prosecution and therefore convicted and sentenced the appellants to death for the offence of culpable homicide under

section 221 and 79 of the Penal Code. The court below on appeal by the appellants, saw no reason at all to disturb the judgment of trial High Court and dismissed their appeal.

On further appeal to this court, having regard to the evidence on record, I agree with my learned brother, Tabai, JSC, in his judgment that the 1st appellant's appeal has no merit and ought to be dismissed. On the face of the evidence of PW1, PW2 and PW3 who were present at Inikpi Street where the deceased were arrested without firing a single gun shot and taken away by the 1st appellant and his patrol team, the story put up by him of a gun battle with armed robbers certainly did not take place in the course of arresting the deceased. As the 1st appellant has no defence whatsoever for his action is causing the death of the deceased, his appeal must fail and the same in hereby dismissed by me.

However, with regard to the 2nd appellant, the evidence against him regarding the manner he carried out the orders of the 1 st appellant in shooting the deceased, raised a lot of doubt the benefit of which ought to be given to the 2nd appellant. I therefore entirely agree with my learned brother, Tabai, JSC. that the conviction and sentence of the 2nd appellant must be set aside.

In the final result, the appeal of the 1st appellant is dismissed and his conviction and sentence for Culpable Homicide under section 221 of the Penal Code as affirmed by the court below is further affirmed. The appeal of the 2nd appellant is however allowed and his conviction and sentence under section 221 of the Penal Code are set aside. He is acquitted and discharged.

Appeal allowed in part