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FALLACY OF THE CRIMINAL LAW DOCTRINE OF "LAST SEEN": A LOOK AT LEGAL CAUSATION IN HOMICIDE CASES IN NIGERIA

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ABSTRACT

Causation as a criminal law concept is the link or bridge between forbidden conducts and the resultant effect of bringing them about by human agents called accused persons. Two types of causation govern the criminal law. These are factual and legal causation. This paper took a deep look at legal causation which finds expression in interferences, presumptions and circumstantial evidence all of which merge into the "last seen" doctrine mainly applicable in culpable homicide cases with particular reference to Nigeria, where the appellate courts seem to have elevated the doctrine to substantive law though without enabling legislation and without recourse to the negative effect of its rigid application on the fundamental rights of accused persons and on our adversary system of criminal justice adjudication. The doctrine calls on the person last seen with the deceased in homicide cases to explain how the deceased met his or her death in the absence of which explanation, such a person is said to be the murderer. It was observed that a rigid application of the doctrine imposes on the accused a "reverse burden" of proof by calling upon him to prove his innocence. The doctrine violates our adversary criminal justice system as practised in all common law jurisdictions and the accused's constitutional right to silence in the face of criminal allegations as well as his presumption of innocence until proven guilty by a court of competent jurisdiction. It was concluded that much as presumptions, inferences and circumstantial evidence aid judicial proceedings in most common law jurisdictions the last seen doctrine which is an integral part of circumstantial evidence should be sparingly applied with much caution in homicide cases given the consequences of possible convictions for such cases so as to guard against a miscarriage of justice. A legislative intervention to curtail judicial excesses of the Nigerian appellate courts in this area of the law was called for.

Keywords: Causation, evidence, Homicide, Constitution, Justice, Reverse burden.

1. INTRODUCTION

In Criminal Law, *causation* is a bridge between the conduct of an accused person and the prohibited result. If the bridge collapses soon after the conduct of the accused before the results, the chain of causation is said to have broken. The courts, in ascertaining causation in *result offences (murder and manslaughter)*, seem to unconsciously apply some tests which place the

burden of proving his innocence on the accused person. This practice, imports the concept of "*reverse burden"* which constitutes a breach of our constitutional provisions relating to *fair hearing* generally and the accused's right to silence in the face of criminal allegations, in particular. What is called for, is strict proof and not presumptions of any kind. Current law, (particularly, case-law) is sometimes criticized for not being a straight forward application of scientific principles, but it is double talk whether one could reach the stage where science alone solves *causation* problems. *Causation-in-fact*, is not sufficient by itself. This is so because, to say that the accused caused or brought about the occurrence of a forbidden result, is not necessarily a statement of fact, but sometimes, more of a scientific statement.[1]

2. MATERIALS AND METHOD

The discourse adopted the conceptual and doctrinal approach. It gathered, examined and analyzed such primary and secondary source materials as legislation, learned journal articles, precedents, textbooks and scholarly opinions with the aim of an indepth and extensive study of the topic. It highlighted problem areas, made observations, conclusions and recommendations for possible reforms.

3. CATEGORIZATION OF OFFENCES

It is becoming the practice to divide offences into *conduct* and *result* offences. *Conduct crimes* are those where only the forbidden conduct needs to be proved to ground conviction. An example is dangerous driving contrary to Road Traffic Laws[2]. Under such laws, one does not need to show that anything occurred. The accused is guilty if he drove a motor vehicle dangerously on the road. There need not be harmful consequences, such as the accused driving a car on a public road so dangerously that someone was knocked down. Also, in "*perjury*" cases[3], the accused is guilty if he makes a statement on Oath, knowing or believing it to be false. The outcome of the case need not be affected. "Perjury", like dangerous driving, is therefore a "conduct" crime. In result crimes, the act and the forbidden consequences are part of the definition of the *actus reus*. The prosecution shall prove that the forbidden consequences resulted and/or occurred due to the conduct of the accused. It then follows that, in result offences, what is forbidden is the result and not the conduct of the accused which led to the result. The reverse may apply in respect of conduct crimes. In the offences of murder and manslaughter, someone must be killed. The forbidden results must be caused by the accused. Murder and manslaughter are therefore good examples of "*results crimes*". With regard to "conduct" crimes, there is no problem normally with 'causation', since no results need be proved. But in result crimes, the accused must be proved to have caused the prohibited consequence. The various tests applied by the courts in determining the causal link between the conduct of the accused and the forbidden result remain problematic and inconsistent. They are not the focus of this paper[4]

4. MURDER AND MANSLAUGHTER CASES

[1] Alili N., "A Critical Analysis of Factual Causation in Result Offences", Kogi State University Bi-Annual Journal of Public Law (KSU-BJPL), vol. 3, No. 1, 2010, p. 89.

[2] Section 2 of the English Road Traffic Act, 1988 (as amended) provides in relation to the "*actus reus*", that a person is guilty when he is driving a mechanically propelled vehicle on the road if dangerously done. See also, sections 28 and 29, Road Traffic Act (Cap. 548) LFN (Abuja) 1990 which used the expression "recklessly or negligently" and "without due care and attention" or "without reasonable consideration for other road users" et cetera.

[3] See Section 117, Criminal Code Act (Cap. C38) LFN, 2004, Sections 156-165, Penal Code Act (Cap. 532) LFN (Abuja) 1990, dealing with "False Evidence".

[4] For the tests, see Alili N., *op. cit* at pages 91-94.

In a charge of murder or manslaughter, as the case may be, the burden is on the prosecution to prove the following ingredients; (a) that the deceased, a human being had died, (b) that the death of the deceased was caused by the act of the accused, and (c) that the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence.[5] The burden of proof placed on the prosecution in a charge of murder is not discharged unless the prosecution establishes not only the cause of death but also that the act or event which caused the death of the deceased, emanated from the accused.[6] Our main focus here, is ingredient (b) which demands that he prosecution must prove that the death of the deceased was caused by the act of the accused and which puts on the front burner, the legal concept of causation in result offences.

5. TYPES OF CAUSATION

Causation as a legal concept, may be broken into two (2) for the purposes of clarity and convenience. These are; *factual causation* and *legal causation*, the latter being the focus of this discourse. *Cause* is an ordinary English word which needs no further explanation and/or construction. Accordingly, to cause is to bring about a certain result, occurrence or event which may be either desired, permissible or prohibited. What or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory. Nonetheless there are principles of law involved, too, and some may be complicated.[7] We are much guided by the Supreme Court of Nigeria, when it held that:

In every case where it is alleged that death has resulted from the act of a person, a causal link between that death and the act must be established and proved, in a criminal proceedings, beyond reasonable doubt. The first and logical step in the process of such proof is to prove the cause of death. Where there is no certainty as to the cause of death, the enquiry should proceed no further. Where the cause of death is ascertained, the next step in the enquiry is to link that cause of death with the act (or omission) of the person alleged to have caused it. These are factual questions to be answered by a consideration of the evidence.[8]

But sometimes, direct and positive factual pieces of evidence may not present themselves in answer to questions and issues relating to causation and such a situation may create a vacuum capable of breaking the chain of causation. In such a situation, the law comes in to bridge the lacuna by invoking the doctrine of "circumstantial evidence" which finds expression in the "last seen" doctrine in culpable homicide cases. In *Moses Jua v. The State*[9], Niki Tobi JSC, pointed out that:

It is not every case of murder, or every case of culpable homicide punishable with death that is proved by eye witnesses. And that, in my humble view, is the only essence of the jurisprudence of circumstantial evidence. In R. v. Sala[10], there was no direct evidence of anybody who saw the dead body of the person alleged to have been murdered. The West African Court of

[5] *Adekunle v. the State* (2006)14 NWLR (pt. 1000)717 at 736, 737. See also, *Ogba v. The State* (1992)2 NWLR (pt. 222)164, *Nwaeze v. the State* (1996)2 NWLR (pt. 428)1, *Gira v. The State* (1996)4NWLR (pt. 443) 375, et cetera.

[6] *Edobo v. The State* (2004)5NWLR (pt. 865)17 at 43, *Uguru v. The State* (2002)9 NWLR (pt. 771)90 at 106, *Omini v. The State* (1999)9-10 SCNJ 1 at 15, *Gira v. The State* (1996)4SCNJ 95 at 101, *Abogede v. The State* (1996)4 SCNJ 223 at 228, *Idowu v. The State* (2000)7SCNJ 245 at 262, *Nwaeze v. The State* (1994)12 SCNJ 140 at 149. See also, sections 316 and 317, Criminal Code Act, Sections 220 and 221, Penal Code Act.

[7] See *Alphacell Ltd. v. Woodnard* (1972) AC. 824 *Environmental Agency v. Empress Carco Ltd*. (1999)2 AC. 22 etc.

[8] Per Ayoola JSC in *Oforlete v. The State* (1994)10 SCNJ 46 at 55. See also, *Babuga v. The State* (1996)7 SCNJ9 at 14, *Akpan v. The State* (Supra).

[9] (2010)1 NACLR 1 at pp. 19-20.

[10] (1938)4 WACA 10.

Appeal, held that (i) in such cases, the circumstantial evidence leading to the conclusion that the deceased died must be examined with great caution (ii) in this case,[11] the trial court was satisfied that circumstantial evidence that the deceased died was so strong as to justify the findings, even though no witness testified to actually seeing the body. Much as it may be easier to use circumstantial evidence to prove that a person alleged to be dead is actually dead, it may not also be that easy to prove the cause of death and to link such cause to a particular person. Causation, in Criminal Law, is not meant to prove that death has taken place. Its province is to prove the cause of death and to link such cause to the accused.

6. THE LAST SEEN DOCTRINE

Though of common law origin and creation through precedent, the common law courts never held the doctrine with such rigidity and sacrosantity as is the case with the Nigerian courts, particularly, the appellate courts. The doctrine was stated with much clarity, weight and legal force in the *Moses Jua case*[12] thus:

> The position as firmly settled, is that if Mr. A was last seen alive with or in company of Mr. B and the next thing that happened, was the disappearance of Mr. A, the irresistible inference is that Mr. A was or had been killed by Mr. B. The onus is on Mr. B. to offer an explanation for the purposes of showing that he was not the one who killed Mr. A.

It would seem that the doctrine thrives in hasty conclusions in the sense that once someone disappears, no effort may be made to prove that he is dead before concluding that someone else had killed him. Nonetheless, the "*last seen*" doctrine is a mere presumption which, like all presumptions, is rebuttable. It means in effect however, that the law presumes that the person "*last seen*" with the deceased bears the full responsibility for his death if it turns out that the person last seen with him is dead.[13]

In Nigeria, the doctrine is firmly settled, established and/or entrenched, but in other common law jurisdictions, it is applied with caution and flexibility so as to guard against a miscarriage of justice. Applying the doctrine to the law of evidence, the Indian Legal writers[14], maintained that:

> The mere fact that the accused and the deceased were together in the field prior to the occurrence does not by itself lead to irresistible inference that the accused must have murdered the deceased…it could not be deemed to be conclusive unless it is further established that during the interval between the time when they were last seen together and the time at which the victim died, every circumstance was inconsistent with the innocence of the accused. The theory of last seen together is extremely a weak piece of evidence.

This seems to be a better view of the doctrine and its application in deserving circumstances. This is so because, presumptions are created to permit orderly civil and criminal

[11] *R v. Sala (Supra)*
[12] Supra at pp. 35, 36 & 44.
[13] The State v. Ogere Uke & ors (1981)1 MSLR 107.
[14] Sarkar M.C & Sarkar S.C, *The Law of Evidence in India, Pakistan, Bangladesh, Burma & Ceylon* 16th Edn, (New Delhi-India, Wadhwa & Co. Nagpur, Law Publisher, 2007) Vol. I p. 90.

trials. The Supreme Court of Pennsylvania[15] and the *Supreme Court of Indiana*[16] defined the function and legal significance of presumptions as follows:

> …a presumption of law is not evidence nor should it be weighed by the fact finder as though it had evidentiary value. Rather, a presumption is a rule of law enabling the party in whose favour it operates to take his case to the jury without presenting evidence of the fact presumed. It serves as a challenge for proof and indicates the party from whom such proof must be forthcoming. When the opponent of the presumption has met the burden of production thus imposed, however, the office of the presumption has been performed, the presumption is of no further effect and drops from the case.[17]

The problem here is that presumption is too vague a concept upon which to hang the fate of an accused person in capital offences such as murder. Again, it imposes on the accused person, a "reverse burden" of proof by calling on him to prove his innocence and this is inconsistent with our adversary system of criminal justice which imposes a legal burden on the prosecution to prove its case against the accused beyond reasonable doubt. The adversary system preserves the presumption of innocence embedded in our criminal jurisprudence and this is inconsistent with the presumption associated with the "last seen" doctrine which is an offshoot of circumstantial evidence.

There is also the "time-lag" principle which is deeply associated with the "last seen" doctrine though consistently glossed-over by the Nigerian courts in their application of the "last seen" doctrine. The principle runs thus:

> The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and where the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases"[18].

It then follows that the time-gap between the time accused person was seen in the company of the deceased and the detection of the crime would be a material consideration for the evaluation of the evidence and placing of reliance on it as a circumstance against the accused.

7. A LOOK AT OTHER SUPREME COURT DECISIONS IN THIS AREA OF THE LAW

[15] Common wealth v. Vogel, 440 pa. 1, 17, 268 A 2d 89, 102 (1970).
[16] *Sumpter v. State*, 261 Ind. 471, 306 N.E. 2d 95 (1970).
[17] Gardner T.J. & Manian V., *Criminal Law: Principles Cases and Readings* 2nd Edn, (St. Paul, New York, West Publishing Co. 1981) p. 58.
[18] *Mbang v. The State* (2005) 2 SCNJ3, (2005) 3 SCC 114.

In *Archibong v. The State*,[19] the appellant was charged and accordingly convicted for the murder of one Bernadette Edem Essien. The incident allegedly took place on the 5th day of July, 1988, at Babara Inn of No. 22 Uko Eshiat Street, Uyo in Cross-River State, Nigeria. The case of the prosecution was that the appellant and the deceased went to the Inn at about 3.00pm on the fateful day. After ordering and taking some drinks, the appellant booked for a room at the Inn at the rate of N2.00 per hour. The appellant and the deceased were checked into the room by one of the attendants called Peter Paulinus (PW3) and they locked themselves inside by about 6.00pm. At about 7.00pm, PW3 knocked at the door of the room to ask for the money due for the hiring of the chalet and the drinks taken by the appellant and the deceased. The appellant responded by saying that he would pay when he came out and demanded for a little extra-time. At about 8.00pm, PW3 knocked at the door of the chalet again, and there being no response, opened the door, switched on the lights and noticed that the appellant was no longer in the room, having somehow mysteriously disappeared. He observed that the woman (the deceased) was lying naked, motionless and dead on the floor with foams from her mouth and nose and the clothes she wore were thrown on a table in the room. PW3 then drew the attention of PW2 (Margaret Otu Udo) a co-attendant at the Inn to the incident. Early on the next day (6th July, 1988) the proprietor of the Inn (PW1) was alerted about what happened in his Inn. He promptly went into the room and found the deceased lying naked on the floor with her clothes on the table and then asked PW2 and PW3 to lodge a complaint with the police. PW2 and PW3 were detained by the police until the appellant was arrested. Both PW2 and PW3 had known the appellant and deceased as regular customers at the Inn before the incident of 5th July 1988, in fact, PW3 thought that the deceased was the wife of the appellant. It was the description of the appellant made by PW2 and PW3 that enabled the police to arrest the appellant and during the identification parade, it were PW2 and PW3 that picked out the appellant from the midst of other persons lined up for the exercise. PW4, Dr. Udeme medically examined the deceased and the result revealed that the deceased died due to suffocation either by strangulation or by some other means and that the bruises on her body and the act of strangulation could not be self-inflicted.

In his statement to the police (Exh. A) and his oral testimony before the trial court, the appellant admitted knowing the deceased to be the wife of his cousin and therefore well known to him. He however, denied having anything to do with her death. He admitted having seen the deceased in the vicinity of the Inn at one time. He sought to put up a defence of *alibi* but that only explained his whereabout from morning up to about 3.00pm on that fateful day. He maintained that his son was ill on that day and he had taken him to a native doctor and had only returned home with the son at about 3.00pm and had not gone out to anywhere from that time till the next day. The court rejected his defence of *alibi* in the course of evaluating the evidence on both sides and convicted the appellant for the murder of the deceased and sentenced him to death.

Being dissatisfied with the decree of the High Court, the appellant appealed to the Court of Appeal on grounds, which gave rise to two (2) issues for determination, namely;

- Whether the identity of the appellant as the perpetrator of the crime charged was proved beyond reasonable doubt and
- Whether the circumstantial evidence was direct, positive, cogent and compelling to warrant the conviction of the appellant.[20]

The Court of Appeal, after a thorough consideration of submissions of counsel on both sides, resolved the issues against the appellant and confirmed both conviction and the sentence of death imposed. The appellant further appealed to the Supreme Court. Though the appellant slightly modified the two (2) issues earlier relied on before the Court of Appeal, we would, for convenience and preference retain them for the purposes of this discourse.

[19] (2006)14 NWLR (Pt. 1000) 349.
[20] Page 369 of the Report.

8. LEAD JUDGMENT (MUSDAPHER, JSC)

On issue one, His Lordship agreed that it is trite law that where the identity of a suspect is already known to the witness before the incident where his identity is called into question, identification parade becomes unnecessary[21] and yet allowed the identification parade and its result to stand in this case on grounds that it was a concurrent finding of both the trial court and the Court of Appeal. According to His Lordship:

In the instant case therefore, it is plainly illogical to attack the credibility of PW2 and PW3 on the identification of the appellant, when the appellant himself concedes that both PW2 and PW3 were known to him before the date of the incident in question. In my view, considering the whole circumstances of this case, it was otiose to hold an identification parade. It is not in every case that an identification parade becomes necessary. In the present case, rather than be a case of mistaken identity, it was one of recognition and knowledge of the appellant who was already known to the witnesses prior to the date of the incident in question. The appellant who by his statement to the police and his evidence admitted the knowledge of him by both PW2 and PW3 can hardly complain of any mistaken identity. In my view, the identification of the appellant as the person who went into that room with the deceased on that fateful day by PW2 and PW3 was a concurrent and consistent finding of fact by both the trial court and the Court of Appeal.[22]

Our humble but quick reaction to His Lordship's position is that the apex court should overrule a concurrent finding of the lower courts which though factually right, is legally wrong. This should constitute an exception to the general rule that the Supreme Court should not overturn a concurrent finding of the Lower Courts.[23] On the second issue, His Lordship affirmed the conviction of the appellant based on *circumstantial evidence* and the *last seen doctrine*. According to his Lordship:

> Now, under our criminal jurisprudence, where doubt exists in the mind of the court on the guilt of an accused, the court should acquit and discharge him. Insufficiency of evidence or lacking in credibility of evidence cannot ground a conviction of a criminal offence. But a conviction of murder may be based upon circumstantial evidence. That is the evidence which unequivocally points to one direction only, that the accused was the one who killed the deceased. It must be evidence that is cogent, complete, unequivocal, compelling and must lead to the irresistible conclusion that the accused and no one else is the murderer…now, there is no dispute whatever, that the appellant was seen sitting down drinking and talking with a woman, they were seen and indeed directed to a room hired by the appellant by PW3 on that fateful day…there was evidence, accepted by the trial judge that no one else had access to the room after the appellant and the deceased woman entered and locked themselves in. It was evident that the woman died of strangulation which could not be self-inflicted. The inference that the appellant killed the woman is cogent, compelling and irresistible[24]

It must be pointed out that His Lordship added some extraneous facts to embellish the evidence upon which he relied in convicting the accused. There was no evidence to the effect that

[21] *Adeyemi v. The State* (1991)1 NWLR (pt. 170)679*, Igbi v. The State* (2000)3 NWLR (pt. 648)169, *Ibrahim v. The State* (1991)4 NWLR (pt. 186)399 etc.
[22] Pages 371-372 of the Report.
[23] *Olokotintin v. Sarumi* (2002)13 NWLR (pt. 784)307, *Jonason Triangles Ltd v.N&P Ltd* (2002)15 NWLR (pt. 789)194, *Akulaku v. Yohgo* (2002)5 NWLR (pt. 759)135, *Wankey v. The State* (1993)5 NWLR (pt. 295)542.
[24] Pages 374-376

the appellant and the deceased were seen together taking some drinks. The evidence was to the effect that "after ordering and taking some drinks, the appellant booked for a room at the Inn"[25]. Again, there was no evidence that the deceased died as a result of strangulation. PW4's evidence was to the effect that "the deceased died due to suffocation either by strangulation or by some other means"[26] Medical evidence did not determine the cause of death with certainty.

Thirdly, there was evidence to the effect that only the appellant and the deceased were checked into the room, there was no evidence that no other person(s) entered the room within the period of two hours that marked the beginning and occurrence of the incident and the one hour intervals is long enough to accommodate intrusion or trespass into the room by persons other than the appellant. In *Reddy v. the state of Andhra Pradesh II*[27] the court opined that even in cases where time-gap between the point of time when the accused and the deceased were last seen alive and the deceased was found dead is too small that the possibility of any person other than the accused being the author of the crime becomes impossible, the court should look for some corroboration.

Rather than look for such corroboration, His Lordship based his judgment on mere presumption and inference without considering the nature of the alleged offence and the legal consequences of conviction for it. We would nonetheless, humbly appreciate His Lordship for exercising caution and warning when he observed that:

> …it is also the law that circumstantial evidence should be used and applied sparingly because of the possibility of fabrications which may cause suspicion on innocent persons. In using circumstantial evidence to determine the guilt of an accused, it must be shown by credible evidence that there are a number of circumstances co-existing and which are accepted by credible evidence so as to make a complete and unbroken chain of evidence and sufficient and cogent proof that the accused committed the offence. The standard of proof required is very high, the evidence must be reliable and must be consistent with no other hypothesis except the guilt of the accused, it must be clear that no other co-existing circumstances arise which would weaken the inference. Even though circumstantial evidence is often described as the best evidence the prosecution must still prove its case beyond reasonable doubt[28]

Whether, the facts of this case satisfy all the conditions herein laid down by His Lordship, may constitute the substance of the readers' reactions and comments. Our humble view is that the inferences, presumptions and circumstantial evidence applied and relied upon by the apex court in this case are too hasty and overwhelming for comfort.

9. THE CONCURRING VOICES

Most judges do not like to dissent[29]. Judges also do not like dissents from their decisions, which is why dissents fray collegiality. Judges do not like to be criticized, to bother having to

[25] Pages 352 and 367 of the Report
[26] Pages 353 and 367 of the Report.
[27] (2006)4 SC 16.
[28] Page 376 of the Report. See also, *Udedibia v. The State* (1976)11 SC133, *Fatoyinbo v. The Attorney-General WR* (1966)WRNLR. 4, *Ukorah v. The State* (1977)4 SC. 167, *Omogodo v. The State* (1981)5 SC 5, *Nasamu v. The State* (1979)6-9 SC 153 etc.
[29] Appellate Court Judges are an exception-See Posner, R.V, *How Judges Think* (New Delhi—India, Universal Law Publishing Co. 2010) p. 32.

revise a draft opinion in order to parry any solid punches thrown by dissent, or worst of all, to lose the third judge to the dissenter. Appellate judging is a cooperative enterprise. It does not work well when the judges' relationship with one another become tinged with animosity. That is always a danger because of the way in which the numbers of the cooperative enterprise are selected.[30] Though none of the justices of the apex court that participated in this case dissented, the concurring judgment of His Lordship, Ogbuagu JSC, calls for a brief comment because of its unbridled and inflammatory posture. According to His Lordship:

> As regards issue 3-02 of the appellant and issue 2.1 of the respondent, from the evidence of the PW2 and PW3 and in all the circumstances of the case, the doctrine of "last seen", comes into play and becomes very relevant to the determination of this case. The deceased was last seen with the appellant who after the dastardly act of strangulating and/or brutalizing the deceased, took advantage that night had set in, and sneaked out of the chalet and the hotel or Inn.[31]

With due respect to His Lordship, evidence of "dastardly act, strangulation and/or brutalizing" can only come from an eye-witness and not a product of mere presumption, inference and circumstantial evidence for these are positive acts partaking of a concrete nature. There is no doubt that His Lordship, being human was carried away by sympathy and emotional outburst in favour of the deceased and this is capable of derailing the judicial task. His Lordship was more or less, sentimental, forgetting that "sentiments command no place in judicial deliberations, for if it did, our task would be infinitely more difficult and less beneficial to the society[32]

10. CONCLUDING REMARKS

A major safeguard in favour of persons accused of having committed crimes in our criminal jurisprudence which is of global recognition and application is the constitutional presumption of innocence.[33] Accordingly, article 6(2) of the European Convention on Human Rights[34] provides that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". This provision is perfectly in line with the *adversary* system of criminal justice which is practiced in most common law jurisdictions (Nigeria inclusive) under which the prosecution is legally mandated or required to prove its case against the accused beyond reasonable doubt. Unfortunately, the "*last seen*" doctrine imposes a "*reverse burden*" on the accused person in homicide cases by calling on him to explain to the court how the deceased met his death. According to Ogbuagu JSC:

In view of the said doctrine[35], it is settled that it is the duty of the accused person to give explanation as to how the deceased met his or her death. In the absence of any explanation by the appellant as to how the deceased met her death, surely and certainly, the trial court, was perfectly justified in drawing the inference, that the appellant killed the deceased.[36] With due respect to His Lordship, there is no certainty or assurance about presumptions, inferences and circumstantial evidence as they come into play, operation or application in the absence of sure, certain, positive

[30] Posner, R.A, *How Judges Think* (New Delhi-India, Universal Law Publishing Co., 2010) pp. 32-33.
[31] Page 395 of the Report.
[32] Per Obaseki JSC (as he then was) in *Ezeugo v. Ohanyere* (1978) 6-7 SC 171 at 184.
[33] Section 36 (5) Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[34] (ECHR).
[35] Last seen doctrine. page 395 of the Report. See also, *Obosi v. The State* (1969) NMLR 119, *Adeniji v. The State* (2001)5 SCNJ 371 at 396, *Emeka v. The State* (2001)14 NWLR (pt. 734) 666 etc.
[36] Page 395 of the Report. See also, *Obosi v. The State* (1969) NMLR 119, *Adeniji v. The State* (2001)5 SCNJ 371 at 396, *Emeka v. The State* (2001)14 NWLR (pt. 734) 666 etc.*Salibiaku v. France* (1988)13 EHRR. 379. See also, Smith & Hogan, Criminal Law: Cases and Materials 10th Edn, (Oxford University Press, New York, 2009) pp. 178-179.

and concrete factual evidence. Thus, in the leading European Court of Human Rights case[37], the court recognized that:

> Presumptions of fact or law operate in every legal system. Clearly, the convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law. Above all, the National Legislature would be free to strip the trial court of any genuine power of assessment that would deprive the presumption of innocence of its substance, if the words "according to law" were construed exclusively with reference to domestic law such a situation could not be reconciled with the object and purpose of Article 6, which by protecting the right to a fair trial and in particular, the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law.

We humbly subscribe to this position. The "last seen" doctrine is not of general application. Much as we may not contend that it should completely be inapplicable to criminal law (which we ought to) the apex court is strongly and humbly urged not to apply the doctrine to homicide cases in Nigeria for reasons (inter alia) ranging from clear violation of our *adversary* system of criminal justice to the breach of the constitutional presumption of innocence and the right to remain silent in the face of criminal allegations. The National Assembly is equally urged by this discourse, to enact a law stripping Nigerian courts of the power (no matter how genuine) to apply the doctrine of the "last seen" in criminal cases, particularly, in culpable homicide cases.

[37] *Salibiaku v. France* (1988)13 EHRR. 379. See also, Smith & Hogan, *Criminal Law: Cases and Materials* 10th Edn, (New York, Oxford University Press, 2009) Pp. 178-179.