PROOF BEYOND REASONABLE DOUBT AND THE PRACTICE OF CUSTOMARY CRIMINAL LAW IN NIGERIA: A LEGAL APPRAISAL

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ABSTRACT

In Criminal trials, the principle of proof of crime or offence is very essential and necessary for the apportionment of blame, fault or criminal responsibility which may ultimately lead to punishment or sanctions as the case may be. The onus of proof is placed on the accuser and he loses if he is unable to discharge same. It is immaterial if the accused is known to have actually committed the offence. This paper will consider the principle of proof beyond reasonable doubt and determine whether it applies to proofs in Nigeria Customary Criminal Adjudication. In the end, it will be shown that this notable principle of proof beyond reasonable doubt is prevalent in both the English Common Law Criminal Procedure and in Nigeria Customary Criminal Procedure, though with a great and remarkable difference in the approach of and result from both systems.

Keywords: Criminal Trials, Evidence, Criminal Law, Burden of Proof.

1. INTRODUCTION

This paper shall evaluate two systems of law: the English common law system and the Nigerian Customary System. However, it is not intended to consider every facet of the systems, but the focal point shall be the application of the principle of ‘proof beyond reasonable doubt’ in both jurisdictions. In criminal trials, the principle of proof of crime or offence is very essential and necessary for the apportionment of blame, fault or criminal responsibility which may ultimately lead to punishment or sanctions as the case may be. Therefore, in criminal trials, proof of the offence is required to ground liability or criminal responsibility.¹

It is important that for an offender or an accused person to be criminally responsible for his acts or omission, there must be proof beyond reasonable doubt. It means that evidence will be led by the prosecution to show that first, the accused had the intention to commit the crime (mens rea) and secondly, that the ingredients of the particular crime are complete (actus reus). The onus of proof is placed on the accuser and he loses if he is unable to discharge same. It is immaterial if the accused is known to have actually committed the offence. According to Glanville Williams:

There is no agreed mathematical translation of probable and all we can say about it, likely is that it may cover a lower degree of probability.

than probable, in statistics, Probability means the whole range of possibility between impossibility and certainty, the degree of probability is expressed either as a vulgar fraction or as a decimal fraction... that it is a chance of 1 in a hundred or that the odds are 99 to 1 against.²

The aforesaid expression represents and captures the English Standard of Proof in Criminal Law, which is the position of English Law in Nigeria as a result of the received English Common Law which has become a part of the Nigerian Criminal Jurisprudence. Therefore, this paper will consider the principle of proof beyond reasonable doubt and determine whether it applies to proofs in Customary Criminal Adjudication. In the end, it will be shown that this notable principle of proof beyond reasonable doubt is prevalent in both the English Common Law Criminal Procedure and the Customary Criminal Procedure, though with a great and remarkable difference in the approach of and result from both systems.

2. THE BURDEN OF PROOF OR LEGAL BURDEN OF PROOF

When a case is brought to the Court, whether civil or criminal, it is the duty of the person who claims that he has been wronged to prove that the defendant or the accused has done or committed the said wrong. In law, it is the duty of the person who claims to prove his claim. It is that the onus to prove what you claim that is known as the burden of proof. The burden of proof which is necessary for a plaintiff to win a civil matter or for the prosecution to get a conviction never shifts. This burden of proof is known as the legal burden of proof. Sections 131 and 132 of the Evidence Act³ provide as follows:

• “Whoever desires any court to give judgment as to any legal right or liability depend[s] on the existence of facts which he asserts must prove that those facts exist (131 (1));
• When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person 131 (2).
• The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side (s.132)”.

From the foregoing, it is clear that the general rule of law or rule of evidence is that a person who claims is to prove or establish what he claims, thus the common saying “He who asserts or alleges must prove”. This is further buttressed by the Latin maxim “affirmanti non neganti incumbit probatio” which means that the burden of proof is on the person who claims and not on he who denies.

There are two types of burden of proof, namely: (1) Legal burden of proof; and (2) Evidential burden which is the duty or obligation to give evidence. Fidelis Nwadialo, SAN, in his book⁴ had this to say:

The term ‘Burden of proof’ is used in two different senses. In the first sense, it means the burden or obligation to establish a case. This is the obligation which lies on a party to persuade the court either by preponderance of evidence, or beyond reasonable doubt that the material facts which constitute his whole case are true, and consequently to have the case established and judgment given in his

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³ 2011.
The other meaning of the expression ‘burden of proof’ is the obligation to adduce evidence on a particular fact or issue. This evidence in some cases, must be sufficient to prove the fact or issue, while in others, all that is required is for it to be enough to justify a finding on that fact or issue, in favour of the party on whom the burden lies. It is called ‘the evidential burden’. This is the sense in which the expression is more generally used.\(^5\)

3. THE STANDARD OF PROOF REQUIRED IN A CIVIL LITIGATION

For a Plaintiff to get a judgment in his favour, the standard, quantum or weight of evidence required of him is proof on the balance of probabilities, or proof by a preponderance of evidence. This simply means:

- That the evidence of the Plaintiff or Claimant must be more probable than that of his opponent, or
- That the evidence of the plaintiff must have more quality, weight, or be more believable than that of his opponent.

In *Mogaji v. Odofin*,\(^6\) Fatai Williams JSC explained how a court should determine whether a party has proved his case by a preponderance of evidence or balance of probabilities thus:

The judge should first of all put the totality of the testimony adduced by both parties on an imaginary scale. He will put the evidence adduced by the plaintiff on one side of the scale, and that of the defendant on the other side, and weigh them together. He will then see which is heavier, not by the number of witnesses called by each party, but the quality or the probative value of the testimony of those witnesses.

In determining which of the evidence is heavier or more believable, the judge usually considers whether the evidence is admissible, relevant, credible, conclusive and more probable than that given by the other party. Furthermore, the preponderance of evidence required to get a judgment may be less where a civil case is uncontested or undefended by the defendant. Thus, in *fashion v. Pharco Nig. Ltd.*\(^7\) Taylor CJ, citing Halbury’s Laws of England\(^8\) with approval held that: In civil actions, other than matrimonial causes, the general rule is that an uncontested case may be established with a minimum of proof and a contested issue may be established by a balance of probabilities.

From the foregoing, therefore, in the standard of proof required in civil cases, there are degrees of probabilities. For instance, where an allegation is very serious, a very serious degree of proof is also required to prove it. However, this is not the same degree of proof beyond reasonable doubt, which is required in criminal matters or proceedings.\(^9\)

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5. See also the case of *Elemo v. Omolade* (1968) NMLR 359.
7. (1965) NMLR 444.
4. BURDEN OF PROOF IN ENGLISH COMMON LAW CRIMINAL PROCEDURE

By virtue of Sections 131 and 132 of the Evidence Act as reproduced above and Section 135 of the same Act, the burden of proof in Criminal proceedings is always on the prosecution, throughout the trial or proceedings, to show that the accused committed the offence charged. Section 135 provides thus:

- If the commission of a crime by a party to any proceedings is directly in issue in any proceedings, civil or criminal, it must be proved beyond reasonable doubt.
- The burden of proving that any person has been guilty of a crime or wrongful act is, subject to the provisions of Section 139 of this Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.
- If the prosecution proves the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted onto the defendant.

Therefore, the standard of proof, weight or quality of evidence required of the prosecution to prove his case and secure conviction of the accused is proof beyond reasonable doubt. The requirement that the prosecution should have the immovable burden to prove the guilt of the accused is based on Section 36 (5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). This Section stipulates that:

Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts in a civil or criminal proceedings.

Therefore, from the beginning of the trial, the offender or accused is presumed to be innocent and the burden of proof is on the prosecution to prove its case. That is, to prove the essential elements of the offence. It is not enough, if it merely proves that the accused probably committed the offence, it must prove beyond reasonable doubt that the accused committed it. The burden of proof which rests on the prosecution to prove the guilt of the accused and the presumption that an accused person is innocent until he is proved guilty beyond reasonable doubt has its origin in the Common Law Rule which originated from the Criminal Law of England and Wales. This standard of proof has been affirmed severally by the House of Lords in several cases including Woolmington v. DPP and Mancini v. DPP, and by the Nigerian case of R. v. Lawrence. This has also been affirmed by the Supreme Court in a plethora of cases. By legislation, this principle is entrenched in the Nigerian Evidence Act, 2011.

The case of Woolmington v. DPP (Supra) has the underlying philosophy of the rule which places a stringent onus on the prosecution and holds that, “it is better that ten guilty men should escape than that one innocent man should suffer”. Glanville Williams opines that the presumption of the accused’s innocence is not to be prejudiced by any presumption of other people’s innocence."
In the case of *R v. Adamu*, the deceased had gone out armed to hunt the accused whom he suspected of theft. There was no doubt that the accused, who was a thief, had killed the deceased. It was also not clear from the evidence how the clash between them had occurred. The killing might well have been in self-defence, Therefore, the accused’s conviction was quashed by the Court of Appeal. There is not yet a precise definition of the phrase “proof beyond reasonable doubt”. However, the judges, over time, have offered a useful guide on what it means. Lord Denning, J. (as he then was), explaining the phrase in the case of *Miller v Minister of Pensions*, had this to say:

> It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt. But nothing short of that will suffice.\(^{19}\)

Similarly, in *Bakare v State*, Oputa JSC explained the requirement of proof beyond reasonable doubt thus:

> Proof beyond reasonable doubt stems out of the competing presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt, not beyond the shadow of a doubt, that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says. It does not admit of plausible and fanciful possibilities, but does admit … high degree of cogency consistent with an equally high degree of probability.\(^{21}\)

The above obiter clearly shows that absolute certainty is impossible in the English common law procedure. Unfortunately, this position of the received English Common Law has been adopted not only in the various courts in Nigeria, but also in our Customary Courts with regards to criminal proceedings. Technical requirement and strict proof of elements of offences also apply in Customary Courts. Where a charge is laid under the Criminal Code or any other law, the elements in the case must be strictly proved. The requirements for plea and proof beyond reasonable doubt cannot be dispensed with merely because the proceedings are before a Customary Court. This was the position in *Alice Odewara v. the State*.

Adultery, which is one of the issues frequently decided in Customary Courts, is an allegation that requires proof beyond reasonable doubt. There are no presumptions on adultery. The Plaintiff must establish his case. A Customary Court is bound to ensure that the evidence adduced in support of a claim of adultery irresistibly points to the guilt of the alleged adulterer.

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\(^{17}\) *Ibid.*

\(^{18}\) *Ibid* at 373.

\(^{19}\) (1987) 1 NWLR pt. 52, p. 579 Sc; *Bozin v. State* (Supra).

\(^{20}\) *Ibid* at 587.

\(^{21}\) (1985) 2 NWLR pt 8 p. 465 SC.

\(^{22}\) (1969) All NLR 484.
This principle was clearly established in the case of *Yakubu Gbadamosi v. Isaac Atansuyi*\(^{23}\) in that case the court held, *inter alia*, that:

- The standard of proof in a case of adultery is as high as that required in a criminal case. It allows, therefore, that before a presumption of adultery can be drawn from circumstantial evidence such a presumption must flow irresistibly from the circumstances proved. In other words, such circumstances should allow for no other explanation than that of adultery.

- In the present case, all that the evidence showed was that the plaintiff’s wife was found on several occasions in the house in which the Defendant lived. There was evidence that the Plaintiff’s wife had made up her mind to divorce the Plaintiff and that for the purpose, she had left the matrimonial home. There was further evidence that the Defendant was the man she intended to marry if her petition for divorce was granted, and that the Defendant was financing the divorce action. It is the accepted practice in our Customary Courts for the intending husband to finance the divorce action and this had never been held or interpreted to mean evidence of adultery. Under the circumstances, it could not be said that the presence of the Plaintiff’s wife in the Defendant’s house had no other objective than that of illicit sexual intercourse.

Consequently, the adultery alleged, was not proved beyond reasonable doubt and the President was wrong to have found that it was proved.

5. PROOF BEYOND REASONABLE DOUBT UNDER CUSTOMARY CRIMINAL PROCEDURE

Essentially, one has to admit that the act of proof is very important in our Customary Criminal Procedure. It is also true that the proof has been used by and has remained in our Customary Criminal Procedure in the adjudication of cases. It is interesting to note that different traditional communities adopt different methods of proof in the settlement of disputes for the ascertainment of offences and the offenders involved. One remarkable feature of our customary criminal procedure is that it is dynamic, flexible and adaptable to changes in the society.\(^{24}\) The methods of proof adopted by a community may vary from place to place and also changes from time to time as the case may be.

Under Customary Criminal Procedure in the communities in Ikwerre, Kalabari, Oyigbo, Ogba, Etche, Ekpeye, Engenne, Egbema, Ogoni, to mention a few, once an allegation is made by one party against another, the accused is under customary obligation to prove his innocence. He must clear his name and that of his family or community as the case may be. For instance, if a complainant (Mr. A) brings a complaint to the Paramount Ruler of his community or the head of his family alleging that (Mr. B) had been sneaking into his yam barn or cassava farm to steal his yams or cassava and that on this particular occasion he saw (Mr. B), but as he made to catch him he outran him, a *prima facie* case has been made out.

The procedure is that the accused will be summoned before the chiefs-in-council where he will be required to defend himself and prove his innocence. Assuming he denies committing the crime, the onus will then be on him to prove his innocence. The Paramount Ruler or the head of the family together with the elders of the family will sit over the matter, hear and take statements from both the complainant and the accused, and a judicial panel may be set up to further look into the matter. It may be the head of the family and other principal members of the family or the Nne-nwe-eli-in-council or the Eze-in-council, etc, depending on the place and how the judicial body is addressed.

\(^{23}\) (1969) All NLR 665.

After hearing from both parties and their witnesses, the Panel, based on the evidence before it, may give their verdict on the matter and decide on what punishment to be meted out to the accused if he is found guilty. This procedure is usually adopted where there is an accusation against somebody that he has committed a wrong likely to impact negatively on the community, for example, theft, adultery, rape or child defilement, witchcraft, murder, etc. If the accused denies the allegation strongly such that the judicial body is thrown into a difficult situation and there is no clue as to the true position of things, the panel will then proceed on a ‘fact-finding mission’ to ascertain the truth of the matter, and every member of the community is subject to whatever means or medium the community adopts.

The Africans, especially Nigerians, are inclined to religion and this makes them believe that the supernatural knows the truth in every case. The referral method (referring a whole or part of a matter to the supernatural) is efficacious because the intents to ensure that a person who has committed crime against another person or the community does not go scot-free. The African traditional religion is so strong that the gods on their own, even when not consulted directly, vindicate an innocent person or expose an evil doer through some visible signs.

6. METHODS OF CUSTOMARY PROOF BEYOND REASONABLE DOUBT

When an offence, for example, theft, rope or child defilement, murder, etc, is committed and the offender is unknown, it is usually quite difficult to unearth the offender. In the pre-colonial times (and even now) in the various communities in Nigeria, various supernatural means exist to identify the culprit and bring him to justice. The most common means of doing this are by divination, trial by ordeal and oath-taking.

6.1 DIVINATION

This is the first step taken to trace an unknown criminal, and as Emiola\(^25\) puts it: “Divination is the first logical step to take in tracing an unknown criminal. It is the victim or his relation who calls in aid the mystical wisdom of the diviner who is still found in many African societies. Mediums or diviners are a special class of medicine men who speak to and relay messages from the spirits in the other world”. Mbiti\(^26\) describes it thus: “Through a medium who gets in touch with the spirit world, a person may be directed to find a lost article or know who stole his goods.” Hence, diviners are employed to help fish out the culprits in traditional African societies, especially in Nigeria. To achieve this, the diviners, while making some incantations, call the names of their gods to assist them, using items like cowries shells, local gin (referred to as ‘manya beke’ by the Ikwerres, ‘Ofiri iru’ by the Kalabaris, ‘gini’ by the Ogonis and ‘akpeteshi’ by the Deltans to mention a few), bowls of water, feathers, tooth of some dead animals, tortoise or snail shell, local chalk, etc. Thereafter, by careful examination, they are able to draw logical inferences and indicate a circle or line of suspects from among whom the real culprit is found.

Sometimes, before the diviner begins to perform his divination or while the exercise is still on, the culprit, out of fear, would step out to confess to the crime, rather than wait for what might befall him afterwards from the gods. In the words of Emiola\(^27\), “out of sheer fright some guilty persons would confess to someone before the consultation with the diviner or at the venue, thus giving the impression that the Oracle had exposed the wrongdoer.”

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It must be noted here that the oracle will expose the wrong-doer whether he confesses or not. It is the fear of knowing, from precedent (that is, from the experience of some other members of the community), what the oracle will do that makes the wrong-doer to confess. No impression that is not true can be created by the gods in very serious matters like this one. Furthermore, if the culprit is hardened at heart he might wait until the diviner concludes the exercise and he may still deny having committed the crime even when he has been fished out. At this point, the community will be left with no choice but to take the further steps of either trial by ordeal or oath-taking to further prove his guilt.

6.2 TRIAL BY ORDEAL

This method of detecting very serious crimes like murder has been practiced by virtually all human societies at one point in time in history or the other. Emiola\textsuperscript{28} observes that trial by ordeal is neither peculiar to Africans nor confined to the black race. Black’s Law Dictionary,\textsuperscript{29} describes ordeal as “the most ancient specie of trial in Saxon and old English Law, being peculiarly distinguished by the application of judicium De “judgment of God”. In the words of Roberts,\textsuperscript{30} “even among primitive tribes where trial by ordeal is practiced, the decisions arrived at are not necessarily unfair.”

Trial by ordeal is an old and ancient process of detecting a wrong-doer by appealing to a god or a spirit, or relying on a procedure to reveal the innocence or guilt of an accused person. According to Elias,\textsuperscript{31} among the English people, trials by ordeal were employed through handling of hot iron, boiling water or subjecting both the accuser and the accused to physical combat. They believed that supernatural intervention would rescue an innocent person from the danger of physical harm to which he was exposed in the trial by ordeal. It must be noted, however, that the same people who enjoyed such supernatural guidance and protection now refer to the same practice as inhuman, barbaric and callous. The practice was, therefore, abolished in England in 1215. In following hook, line and sinker, the same practice has been so described and abolished by the Constitution of the Federal Republic of Nigeria\textsuperscript{32} 1999. Unfortunately, as an erroneous replacement, a suspect or an accused is physically tortured into confessing his crime. Elias\textsuperscript{33} notes that “truth scrums’ were used by law enforcement agents in the United States to exert confessions from persons suspected of having committed a crime”.

Where the torture gets too much and the accused has been physically battered, bruised and gravely wounded, he might decide to confess if he is guilty. At other times, he will rather die than confess to his guilt. On the other hand, if he does not confess (perhaps because he is not guilty) he is released from the torture and still charged to court (during which time he has been tortured). Sometimes the torture continues with the belief that he is hardened or proving difficult, and this may lead to his death. Again an innocent man may just have been killed for nothing.

In our Customary Criminal Procedure, trial by ordeal is usually a mixture of oath-taking and endurance test. When an accused is put through a trial by ordeal, in whatever form, for example, by putting his hand inside fire, banishing him into the evil forest, throwing him into crocodile infested river or a deep hole with deadly creatures inside, etc, after an appeal to the gods or spirits, it is believed that the gods will intervene to rescue him if he is innocent of the allegation. To this end, before the accused embarks on such ordeal, incantations are made, libations are poured, sometimes charms are prepared and tied around him and the gods are summoned to guide the process. He then swears to an oath declaring that he should not return

\begin{footnotes}
\item[28] Ibid, p. 87.
\item[30] Roberts C.C., Tangled Justice (Macmillan 1937) p. 79.
\item[32] Section 34(a).
\item[33] Elias T.O. Ibid, p. 238.
\end{footnotes}
from the journey or survive the task if he is guilty. If he is innocent, he will definitely return unhurt. However, if he is not, he will meet his death the same way he had caused the death of another.

6.3 OATH TAKING

This is one of the most common methods of resolving disputes in our traditional communities and it is very frequently used in detecting crime and criminals with a view to proving same beyond reasonable doubt. It is usually employed in respect of very serious crimes and as a last resort.

In civil proceedings, both parties willingly accept to take oath to ascertain the true position of their claims. Thus, in the case of *Ume v. Okoronkwo*, Ogundare JSC held that “oath-taking was one of the methods of establishing the truth of a matter and was known to customary law and accepted by both parties...” However, where one party refuses to take the oath, it is believed that he has no claim, and judgment is entered against him in favour of the one who swore on the oath, because it is believed that he has proved his claim. Among the Yoruba clans, when a crime is committed and no one would confess to having committed it, a special form of oath-taking known as *Aje* is administered. In a situation like this, all the suspects are assembled before a medicine-man who will then give them a portion of some medicine to drink in turns. It is believed that whoever succumbs to the effect of the portion is the offender.

From the foregoing, it means that even when there is no direct accusation of one person against another, in the Customary Criminal Procedure there are still means by which accused members of a community are made to prove their innocence beyond reasonable doubt and crimes are detected so that no one who commits a crime goes scot-free. In customary criminal proceedings, once there is an allegation, even if a person was accused and his accuser took no further steps to substantiate his allegation, and the accused did nothing about the accusation, the whole community will view him with great suspicion. Therefore, he must clear himself and prove his innocence without any iota of doubt (that is, beyond reasonable doubt). One of the ways by which he will do this is by submitting himself to oath-taking. This process entails going to a juju shrine where the priest, after some incantations, administers an oath to the accused. It is also a process whereby the juju priest actually brings the prescribed juju to the house of the accused or to a town square or any other agreed location for the oath-taking, in the presence of the chiefs, elders and family members of both the complainant and the accused.

However, during the process of preparing for the oath-taking, the accused may decide to confess to his crime rather than face the greater wrath of the gods, should the oath be administered and he is found guilty. If the accused swore falsely he will be visited by the gods. It must be noted at this point that the signs that may follow the oath-taking, as an indication that the accused is guilty, include strange physical ailments or diseases like boils, sores, blindness, paralysis, etc, and even death. These ailments defy medical and even native treatments until the accused confesses to his crime, including those he may have committed previously without anyone’s knowledge. Sometimes the diseases or ailments or even death may visit, not just the accused (if he is guilty) but his family members also. But if he is not guilty of the offence for which he is accused, even if he was already sick of a terminal disease before he took the oath, the gods will even cure him mysteriously so that he does not die during the period of the oath-taking.

Where, on the other hand, the allegation is found to be false, either because the complainant confessed to its falsehood, or the accused successfully proved his innocence after

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35 Emiola Akintunde *Ibid* at p. 42.
coming out of the oath-taking unscathed, the false accuser is in turn punished by the community.

A survivor of an oath-taking is believed to have been vindicated by the gods and proved his innocence beyond reasonable doubt. He is also entitled to ‘cleansing’ which his accuser will undertake to perform. This includes going round the village with a town-crier to declare that he had lied against the accused. This kind of cleansing in Kalabari Kingdom is referred to as ‘Iro Kpokpo’. He will also be compelled to pay compensation to the accused. In some Ikwerre communities, he will be expected to pacify the gods with goats, yams and jars of palm wine as well as the community by killing goats and cooking for the chiefs and elders accordingly.

As has been mentioned earlier, even where there was no initial direct accusation, the gods have their own way of fishing out culprits or perpetrators of evil in a community. Sometime in 1999, in Idama-Ekulama Community, a Kalabari town in Akuku-Toru Local Government Area of Rivers State, an enterprising young Legal Practitioner died in a ghastly motor accident in Lagos where he resided and carried out his legal practice before his death.

On the day of his burial, the corpse refused to be taken to the burial ground. Those bearing the coffin could hardly move. The family members were informed about the development and one of the deceased brothers got to the scene and asked him if he was trying to ‘say something’ and whether his death was not natural. At this question, the coffin shook. Then one of his Sisters said ‘if someone killed you, go and show us the person’. Immediately, the coffin turned back in the direction of their compound and stopped. Then when it refused to continue, his father was alerted and the old man came out to meet his deceased son, and began to address him. While this was going on, some persons ran to inform the ‘Polo Dabo’ (that is, compound chief/head) who incidentally was the deceased father’s direct elder brother. The chief came down from his upstairs building in the company of another chief. Immediately, the coffin turned in the direction of the chief of the compound, and made to hit him, but he dodged. The other man who had arrived with the chief shouted “animiye ofori o!” ibara fifia wureri o!! (which, literally interpreted, is “I know nothing o!” “my hands are clean !!”), which means “I am innocent !!!”. The coffin went back and headed again for the chief, this time, knocking him down. At this point, those around began to shout and accuse the chief of having a hand in the young man’s death. He denied out rightly while still lying on the ground. The father of the deceased and elders present began to plead with the deceased to take his leave. He turned and immediately ran to the cemetery to be buried.

Having been accused by the community of killing an innocent young man who happened to be his nephew and son, and having denied same, he was asked to prove his innocence traditionally. Twice the medium pointed to his guilt and he was banished from the community. While in Port Harcourt, he engaged the services of a lawyer to take the matter to court. While the matter was in court, he was afflicted with a very strange illness. His body began to decay and drip water while he was still alive. Finally, he died.

Sometimes, the juju priest is bribed and manipulated by the accused, especially when he is guilty of the crime. Sometime in Odegu, one of the Ikwerre communities in Emohua Local Government Area of Rivers State, a man accused his closest friend of committing adultery with his wife. His friend and his wife denied the allegation. The accused was made to swear to an oath. He did, but went behind to bribe the juju priest who neutralized the oath. At the expiration of the time within which he was to have been visited by the gods, he was declared innocent and his accuser friend was made to pay compensation and perform some cleansing rites in his favour. The juju priest later became blind and very sick, but no one imagined that it could be connected with the incident. However, the wife of the accuser-friend who was pregnant went into labour and could not have her baby for days. She was asked if she knew of any reason why she could not bring forth her baby. Afraid that she would lose her life in the process, she confessed to committing the adultery with the husband’s friend who was earlier accused of same. She also confessed that years ago she had committed incest with her brother, and that
sometime in her marriage, she had lured her husband’s younger brother into her bed. Finally, she confessed that the baby she was about to have was her husband’s friend’s baby. Immediately she concluded with her confessions, she delivered her baby. The accused-friend was made to refund all that his friend had paid to him earlier as compensation and then undergo the process of payment of damages. The woman was not left out in her share of the humiliation by the women and the community. Other women, men and girls did not need to be advised thereafter.

It could be stated at this point that, in the majority of cases, the three approaches to crime detection, as enumerated above, have worked effectively with the primary result of averting communal instability and insecurity which would have arisen from the inability to identify a criminal or prove the guilt of an accused person beyond reasonable doubt, as well as setting an innocent person free.

7. THE DEFECTIVE NATURE OF THE ENGLISH COMMON LAW PROCEDURE AS AGAINST THE ADVANTAGES OF THE CUSTOMARY CRIMINAL PROCEDURE

This principle of “proof beyond reasonable doubt” is one that is open to various grave errors. It is not an error-free standard and formula for detecting crimes and criminals since absolute certainty is impossible in human affairs as enumerated below.

In the English Common Law Procedure, where the prosecution is under pressure to prove its case beyond reasonable doubt, it can employ fraudulent strategies to meet this requirement and secure the conviction of the accused. The prosecution may procure all manner of evidence (oral or documentary). The judge or the court may not be bothered about the authenticity or otherwise of the source of the evidence since it is not relevant how a piece of evidence is procured. The prosecution could go all out to pay and procure a false witness(s) to corroborate their evidence with the aim of getting judgment at all cost. Thus, there may be evidence of proof beyond reasonable doubt, and the evidence may point clearly and convincingly to the guilt of the accused, yet the accused may be innocent. During the Customary Criminal Procedure, however, the process of proof beyond reasonable doubt is nearly always foolproof. When a man procures false witnesses to corroborate his evidence in order to cover up a crime he had committed, he and his cohorts are visited by the wrath of the gods and severely punished.

Where the evidence of the prosecution is equivocal, i.e. not clear and direct, is improbable, and leaves any doubt, the prosecution has not discharged the burden of proof beyond reasonable doubt, and the accused should be acquitted. The implication of this is that even when the accused committed the crime, he could be acquitted simply because the prosecution made technical errors.

Where, from the words used in a judgment, it appears that a trial judge had some doubt about the guilt of the accused, the verdict cannot stand on appeal, as there is no proof beyond reasonable doubt. In Okonji v State, Nnamani, JSC, delivering the judgment of the Supreme Court, held that the findings of a judge on material issues must be unequivocal and positive. The use of the words “I think I shall accept the version of PW3 as what happened” in a judge’s judgment as his finding on a material issue in the trial showed that he had doubts in his mind. The Supreme Court held that the burden of proof beyond reasonable doubt was not discharged by the prosecution and consequently, quashed the verdict and set aside the conviction for the offence charged and substituted it with a conviction for a lesser offence. Similarly, in Bozin v State, Oputa JSC explained the position thus:

36 Ibid at 471.
37 (1987) 1 NWLR pt 52, p. 659 SC; Akinfe v State (188) 3 NWLR pt. 85 p. 729 SC
“There is no magic, or sanctity in the words and expressions, ‘I believe’ or ‘I am satisfied’ and they should not be used as a sanctuary. Believe and satisfaction should represent the court’s reaction towards facts and possibilities and probabilities based on those facts”.

He went further to state that “suspicion, however grave does not amount to proof”. In the customary criminal procedure, and with both situations above, where there is an allegation against an accused and the evidence of the complainant is not clear and there is an iota of doubt in any form whatsoever, the accused will still be expected to prove his innocence beyond reasonable doubt.

The burden of proving that the accused is guilty beyond reasonable doubt rests totally on the prosecution throughout the trial. It is not the duty of the accused to prove his innocence since he is presumed innocent until he is proved guilty.38 This also means that the accused (assuming he actually committed the crime) could be acquitted if this onus is not discharged by the prosecution. Thus, in Anekwe v State39 the Supreme Court held that the prosecution still had the duty to prove that the accused was guilty beyond reasonable doubt. On the other hand, once there is an allegation against an accused in the customary criminal system, he is deemed to be guilty until proven innocent. He is then obliged to take some steps to prove his innocence, either by summoning the accuser before the elders or before juju priests.

Where an accused presents a bad image and demeanor of himself in the dock or witness box, it is still the duty of the prosecution to prove the guilt of the accused beyond reasonable doubt. This was the case in Omogodo v. State.40 In the customary criminal system a man who is known to be a criminal is always the first suspect whenever a crime is committed. Even when he was not directly accused, he will always be among the suspects when the community embarks on a fact-finding mission.

So onerous is the task of the prosecution that even when there is a defence (e.g. of ‘alibi’) by the accused, the prosecution has to prove that the defence pleaded by the accused does not arise or avail him. This was the case in Queen v. Oshunbiyi41. Where an accused pleads a defense, he does not have to prove it. He only has to give evidence of it, and the standard required of him is the standard of proof required in civil matters which is proof on a balance of probability. In other words, he is only required to give evidence that shows that what he is saying is more true than false. Accordingly, an accused has no burden of proof to prove any defense or answer.42 In R. v. Johnson43 the court clearly explained the position of the law as follow: “If a man puts forward an answer in the shape of an alibi, or self-defense, he does not in law thereby assume any burden of proving that answer.”44

The fact that an accused did not give evidence in his own defense does not relieve the prosecution of the burden to prove his guilt beyond reasonable doubt.45 In discharging the onus of proving the guilt of the accused beyond reasonable doubt, the prosecution must first make a prima facie case against the accused. Where it fails to do this first, the accused is entitled to a discharge without being called upon to make his defense.46

In customary criminal procedure, with regards to the situation above, the accused will lose sleep and have no peace until he has washed himself clean’ beyond reasonable doubt.

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41 (1961) 1 All NLR 453.
43 (1962) 46 CAR 55.
44 Ibid at 57; Laoye v. State (1985) 2 NWLR pt. 10 p. 832 SC.

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Where the evidence of the witnesses for the prosecution are inconsistent, and no explanation is given for the inconsistencies, the court cannot choose which witness to believe and which to disbelieve. The inconsistencies or doubt, if any, has to be resolved in favour of the accused. Throughout the proceedings in the Customary Criminal Procedure, there must be no inconsistencies and doubts in the minds of members of the community as regards his innocence as this will worsen the matter for him.

In the English Common Law System, conviction or acquittal could be based on the subjective or objective view or perception of the judge deciding a case. He could also be manipulated by the prosecution and defense alike. In which case, an accused may be acquitted even though he had the intention of committing the crime in question. In the same vein, an innocent man could be convicted for an offence he did not commit. In the customary criminal procedure, more often than not, the verdicts of the customary processes are always correct, because of the pronouncements of the gods who are often impartial, unlike human judges that can be influenced or manipulated to give false or wrong judgments. In this form of proof beyond reasonable doubt, the parties and their relations are usually very careful because life is involved. Moreover, in the customary criminal procedure, even where the juju priest is manipulated, sooner or later the gods will catch up with him, and he will be exposed and punished accordingly.

8. CONCLUSION

We have examined the principle of ‘proof beyond reasonable doubt’ as it relates to the English Common Law System and found that it undoubtedly applies to our customary criminal procedure. However, there is a remarkable and interesting difference in the approach of both systems and the result therefrom.

In the English Common Law System, where he who asserts or alleges must prove beyond reasonable doubt, crime has continued to grow unabated. Men now know that they could commit a crime, hire the services of a good lawyer, and even bribe the prosecution, manipulate the course of justice and go scot-free, if the prosecution fails to discharge this great burden of proof, knowing that any iota of doubt is resolved in their favour.

The English Criminal Law System hurriedly declares an act as criminal thereby digging holes of crime to ensnare the citizenry. It is irrelevant if one does not know that it is a crime, hence the saying, “ignorance of the law is no excuse”.

Our Customary Criminal Procedure, on the other hand, tends to prevent crime rather than dig a hole of crime for persons to fall into it. It has an inherent mechanism of creating awareness about what crimes are and places the duty of inculcating same into the children upon the parents because of the feature of vicarious criminal liability whenever a crime is committed. To this end, the family is customarily considered as a corporate entity. With this duty, from childhood, children are aware and conscious of what constitutes a crime and the attendant consequences.

A child growing up in a community who sees a thief with the item he stole hung around his neck and paraded round the village will make up his mind whether he will want to steal in the future. In the same vein, he will make up his mind whether he will want the calamities that befell some men and women in the community to befall him. The African Traditional Religion is so strong that the gods can vindicate an innocent person or expose an evildoer through some mysterious visible signs. Therefore, even a ‘hidden’ crime, that was not expressly declared, has no hiding place in the traditional setting.

One remarkable feature about the methods adopted by the customary criminal procedure is that the verdicts are often beyond reasonable doubt. Proof beyond a reasonable doubt under this system is basically satisfactory proof. This implies a proof for which both the

complainant and the accused and indeed the community would in the end be satisfied with to the effect that truth has been established. Also, in this system witnesses are always ready to speak the truth whenever they appear before the judicial panel even before they embark on any fact-finding mission, because they know that it will always end with visits to diviners and juju-shrines. They also know what the consequences, maybe, if the truth of the matter is revealed by the oracle, diviner or the gods.

The foregoing discussion shows that the principle of proof beyond reasonable doubt applies to proofs in customary criminal procedure, albeit in a far richer dimension and with the consciousness of actual justice.