

SUPREME COURT OF NIGERIA

15TH JANUARY, 1993. SC. 73/1991

CORAM:- M. L. UWAI, S. KAWU, O. OLATAWURA, I. L. KUTIGI, S. U. MOHAMMED, JJSC

FOLUSO OLADELE APPELLANT
AND
THE STATE RESPONDENT

CRIMINAL LAW - presumption of sanity - Defence of insanity - when it avails an accused.

EVIDENCE - proof of insanity - rests on the defence - discharged on a balance of probabilities.

EVIDENCE - heresay - when evidence of a psychiatric doctor is not heresay.

INTERPRETATION - act capable of two interpretations - one most favourable to accused preferred.

FACTS

The Appellant was charged with murder of her daughter before the Ondo State High Court. At the trial the defence of insanity was raised and evidence adduced in support. The trial Judge dismissed the defence as “feebly raised” and convicted the appellant on her confessional statement. The appellant had previously been treated for moodiness, fright and excitement prior to her conviction.

On appeal against conviction and sentence, the counsel for the appellant applied for further evidence to be called. The court of Appeal (Benin Division) granted the application and ordered that a senior consultant psychiatrist at Aro hospital who attended to and treated the appellant while in prison custody be called as an expert witness. The psychiatrist testified that the appellant was suffering from schizophrenia psychosis. The Court of Appeal rejected his evidence as inadmissible hearsay evidence and further dismissed the appeal, affirming the decision of the trial court. The Appellant appealed to the Supreme Court against the decision of the two lower courts.

HELD (unanimously allowing the appeal)

1. In appropriate cases an accused person can be found guilty and convicted on his confessional statement; but where the defence of insanity is raised, it is better to first of all, deal with the issue of insanity before considering the confessional statements made by an accused person whose defence is based mainly on insanity, lest a person be found guilty before the consideration of the issue of insanity.

(p. 103 L. 14)

2. Every person is presumed to be of sound mind and to have been of sound mind at the time in question until the contrary is proved.

(p. 103 L. 7)

3. The onus is on the defence on a balance of probabilities to establish insanity. And an accused must prove that at the time of commission of the offence, he was actually insane within the conditions stipulated under the law. (p.105 L.1)

4. Where a person is taken to a mental hospital for treatment and the Doctor in charge of the mental hospital gives evidence of insanity based on his observation, the presumption of sanity is rebutted as in this case. (p.106 L. 2)

5. Where an act is capable of two or more interpretations, the interpretation most favourable to the accused person should be preferred. Therefore, that part of evidence of the Doctor that created doubt about the appellant's sanity should be resolved in her favour.

(p. 105 L. 22)

PER OLATAWURA JSC *"If evidence of ancestors or blood relations is admissible, it appears to me the observation of a Psychiatric nurse to a psychiatrist is admissible."* (p. 104 L. 9)

PER MOHAMMED JSC *"At any rate evidence of relations about the mental condition of an accused is admissible as it may assist the court in making a finding on the mental condition of the accused."* (p. 112 L. 20)

REPRESENTATION

Chief Duro Ajayi, L.A. Oyinloye, L.K. Ogundana
For the Appellant

S.G. Glowo, Director of Public Prosecutions, Ministry of Justice, Ondo State, O. Omoleye (Mrs.), Deputy Director of Public Prosecutions, Ministry of Justice, Ondo State For the Respondent

CASES REFERRED TO:

1. R. V. Harding (1936) 25 C. A.R. 190
2. Ijeoma v. The State. (1990) 6 NWLR (Pt 158) 567
3. Loke v. The State. (1985) 1 SC 1
4. Salako v. A.G. (1965) NMLR 107
5. Onokpoya v. Queen (1959) NSCC 130
6. R. v. Tuchet (1844) 4 LT 50
7. R. v. Vyse 176 ER 111
8. Asanya v. The State (1991) 4 SCNJ 1
9. Adegbesan v. The State (1986) 1 NSCC 457
10. Nkanu v. The State (1980) 3 - 4 SC 1
11. Udofia v. The State (1981) 11 - 12 SC 49
12. Kure v. The State (1988) 1 NSCC 269
13. Kabul v. The State (1972) NSCC 456
14. Aiworo v. The State (1987) 2 NWLR 526

STATUTES REFERRED TO

Criminal Code Law Cap. 30 Laws of Ondo State 1978, ss. 27, 28, 316(1)

⁵ Criminal Procedure Law of Ondo State, s. 230 (2)

Evidence Act Cap 112 Laws of the Federation 1990, ss. 57 (1) & (2), 60, 227, 141 (3) (c)

¹⁰

LEAD JUDGMENT BY OLATAWURA JSC

The appellant was charged with the murder of her daughter one Tomike Oladele contrary to S.316 (1) of the Criminal Code Law
¹⁵ of Ondo State. This appeal raises once again the legal criteria for insanity. These are provided under section 28 of the Criminal Code Law of Ondo State to which I will refer later. Before considering these criteria, it will be appropriate to set down the facts on which the prosecution relied and also the events that led to this unfortunate case.
²⁰ The appellant got married to one Michael Oladele (P.W.3) in 1977 when she was about 20 years old. There were three children of the marriage: OLUWASEUN; CHRISTIANA and TOMIKE. It would appear that the marriage was not a happy one. It was not disclosed in
²⁵ evidence the cause of the breakdown of the marriage.

The appellant and her husband lived in Ondo town until she was sent packing by her husband in 1985. Before that time and according to the husband, the appellant, after the birth of Christiana,
³⁰ had a swollen breast and she was always weeping. The appellant was taken to her father (P.W.1) in Ise-Ekiti. She was treated and she later joined her husband in Ondo town. She and the children lived with her husband. She later left and came back after one year to collect the children. In June 1985 the appellant returned to her husband
³⁵ with Tomike because Tomike was sick. The husband looked after Tomike and after she recovered he asked the appellant to return to her parents in Ise-Ekiti. The appellant said she would not go back to Ise-Ekiti until the other two children were on holidays in July of that year because she wanted to take them to Ise-Ekiti. He refused. A

complaint was made to the Welfare Office in Ondo. The Welfare Office advised that she should be allowed to take the children with her to Ise-Ekiti but that she should return them to their father after their holidays. It was eight days after she left that she came back with the children and told her husband that she had come to stay for good. Her husband asked her to leave the children with him and that she should return to her parents in Ise-Ekiti. It is better to quote him:

"I asked her to leave the children with me, whilst she should return to Ise-Ekiti and discuss with her father concerning her own arrangements whether to settle in Ise or some where else. She went back with the children."

She actually went to her parents in Ise-Ekiti with the children. On 31st July 1985 her father, one Rufus Bejide (P.W.1) saw the appellant and the three children at Ajebamidele Camp. On enquiry by the father why she left her husband the appellant told her father that her husband (P.W.3) had ordered her and the children out of their matrimonial home. He advised her to return to her husband and on 1st August 1985 she went to the farm with her father. On 1st August after she had washed the children she and the children later went to bed. At 6a.m. on 2nd August, 1985 when her father woke up and could not find her in her room, he hailed on her. She answered across the road. He saw her and Seun, the first child. Apparently she had taken all of them with her. He asked for the other two children. 1st P. W. (the appellant's father) continued his evidence as follows:

"She told me they were somewhere very far away. She then took to her heels and I called people to assist me in getting her arrested. She was running towards a school building in the camp. I asked Seun to remain and he did".

The appellant was pursued and caught near a school building. The cry and agony of Christiana led to her own discovery in a nearby bush. She had matchet cuts on the right temple, on the leg and head. Christiana was rushed to the hospital and the search for Tomike continued. Tomike's corpse was eventually found. She also had matchet cuts all over her body. It is better to restate again that P.W.1 is the father of the appellant. He gave the history of her life thus:

"The accused is given to being moody most of the time. In her early life at school it was the same condition of moodiness for her I used to treat her on native medicine. Whenever she fell in that sort of spell, she would look emaciated."

Under cross-examination the father said:

5 *"I was regularly applying native medicine on her before her marriage. I was also doing the same even after she was married. I believe she has the love for her children at heart because she washed them twice daily, in the morning and in the evening before going to bed."*
10

The prosecution called 3 policemen who investigated the case and closed the case for the prosecution. After the close of the case for the prosecution there in this record of one Mustapha Faserimi who
15 was invited by the court:

*"Court: At this stage Mr. Mustapha Faserimi, who admits putting the accused in a state of pregnancy, appears in court upon the court's invitation. Says he is a native of Ilogbo. Says he started having intercourse with the accused from the beginning of November last
20 year after her release on bail. Says the accused told him that her husband had sent her away from his matrimonial home and the case she had in court had been disposed of. Says the accused did not disclose to him the nature of the case she was having in court. Says the accused is about 4 months pregnant."*
25

The accused/appellant gave evidence. She gave the names and age of her children as Seun, Christiana and Tomike who were 10, 8 and 5 years respectively. She knew that Tomike had died but that "they alleged that I had killed Tomike." She still acknowledges
30 P.W.3 as her husband. She related how in 1984 she suddenly became frightened and that she did not know the cause. She told her husband, P.W.3, her problems. He took her to one Celestial Church at Omolore for spiritual healing, later to a herbalist. When there was no improvement in her condition the husband took her to another
35 Celestial Church in Oka Ondo. Despite the treatment there was no improvement and in 1984, the husband came with a motor vehicle and parked her belongings into the vehicle and took her to her Parents. She resented her being sent to her parents without her children. According to her there was no quarrel between the two of

them. Her parents took her to Ilogbo, their hometown where she could not stay with her parents. She was taken to another herbalist at Ilogbo and still her health did not improve, She went to her husband in Ondo in 1985 since she did not wish to part with her children, Her mother-in-Law who is a native of Usi-Ekiti came to Ondo and asked her to go back to Usi-Ekiti to allow her husband work in order to repay the outstanding loan on his motor vehicle. They both left with the children with the hope they were going to Usi-Ekiti but her mother-in-law abandoned her and the children at a junction to Ise-Ekiti - the way to where her parents lived. Narrating the episode the night before she killed her child Tomike she said:

"At that night I washed my said three children. We then went together in my mother's room. In the morning my father asked of my children and I told him that I had sent them away and on being questioned I told them where I took the children to. Christiana walked down to my father's house from the school, On seeing Christiana and the wound on her body. I was held and arrested. I was tied up. Later Police came and took me away. Later I was taken to prison at Ado-Ekiti. At the prison a doctor attended to me on several occasions when complained on (sic) constant headache, lightness and a feeling of dizziness, I can read and write. This card shown to me was the card issued at the prison (put in as X). I loved my children very dearly. She was cross-examined by the State Counsel. She said: "They said Tomike had died. I did not know how that came about."

That was all she was asked in the cross-examination. Both counsel admitted that the only defence raised was that of insanity. After a thorough and meticulous review of the evidence before the court and a consideration of the defence of insanity, the learned trial Judge, Fawehinmi J. found the appellant guilty of murder and sentenced her to death on 15th April 1988. She filed Notice and one ground of appeal - the omnibus ground to the Court of Appeal on 11th May 1988.

On 28th day of November, 1989, the appellant's learned counsel in the Court of Appeal and this Court, Chief Duro Ajayi filed an application in the lower court praying the court to call additional evidence. On 8th January 1990, the Court of Appeal, Benin Division, granted the application and ordered "that Dr. Ogunlesi be called to testify at the hearing of the appeal.

It was on 5th April 1990 that one Dr. Adegboyega Ogunlesi, a Senior Consultant Psychiatrist at Aro Hospital, Abeokuta gave evidence before the Court of Appeal, Benin Division. According to Dr. Ogunlesi he started seeing the appellant in April 1988 when the Psychiatrist nurse of Abeokuta prison brought her to him. He diagnosed her
5 ailment and started to treat her. She responded to the treatment, because there was a relapse when the stock of drug recommended was exhausted, he invited her relatives in order to have a background history and also to see whether they could supply the drugs which
10 were not available in the prison yard. Dr. Ogunlesi's findings are as follows:

*"I find that the appellant was mentally ill schizophrenia psychosis. It is a major mental disorder which can be characterised by disturbances of multiple psychological functions e.g. perfections (sic)
15 through the eyes, or the ears, disturbances for emotions of thinking, behaviour etc. When he (sic) examined her she was insane. I also called once perused (sic) the records of proceedings and convicting the patient for the offence and drew same inferences from the records; I cannot with any degree of, (sic) certainty bond for the length the
20 patient had been suffering from the ailment but probably from the inferences I made from the record of proceedings it might have antedated the offence with which she was charged"* (Underlining is mine).

He was cross-examined by the learned Deputy Director of Public Prosecution. The doctor did not shift ground. He concluded
25 his evidence by saying:

*"I formed my opinion based on the information given to me by my nurse, relation of the patient as well as my observation and
also by my interpretation for (Sic) the record of proceedings"*

30 The appeal was thereafter argued and the Court of Appeal dismissed the appeal. It is against that decision the appellant has now appealed to this Court. Leave of this Court was sought and obtained to amend ground five of the grounds of appeal stated in the Schedule to the application. Although 6 grounds of appeal were filed, since
35 this appeal turns merely on the issue of insanity I do not consider it necessary to set down the grounds of appeal. The issues canvassed cover these grounds. Briefs were filed by the parties. The appellant raises four issues for determination. They are:

1. Was the appellant criminally responsible for the murder of her daughter Tomike on 2/8/85 or was she in such a state of mental disease or natural mental infirmity as to deprive her of capacity to understand what she was doing, or capacity to control her actions, or capacity to know that she ought not to do the act or make the omission?

2. Has the appellant satisfied the test under the Provisions of Section 141(3) (c) of the Evidence Act Cap.112 Laws of the Federation 1990 to the effect that she has established the defence of insanity under Section 28 of the Criminal Code Law, Cap.30, Laws of Ondo State, 1978 and thereby entitle her to a discharge and acquittal of the charge of murder?

3. Was the oral testimony of D.W.1 Dr. Adegboyega Ogunlesi a Senior Consultant Psychiatrist given at the Court of Appeal on 5/4/90 amounted in totality to hearsay evidence and inadmissible in Law? and

4. Was the case put forward by the appellant at the Court of Appeal fully considered by that Court before dismissing her appeal?" The respondent's brief has also set down three issues for determination. They are as follows:

"1. Whether the defence of insanity avails the appellant?"

2. What is the effect of the medical evidence of insanity produced by the appellant at the Court of Appeal?"

3. Was the Court of Appeal right in upholding the judgment of the trial court after a proper appraisal and evaluation of the said judgment?"

These issues as formulated by both parties are in essence on one issue i.e. whether the appellant can succeed on the issue of insanity.

In his oral submission in amplification of his brief, Chief Duro Ajayi submitted that the appellant was suffering from a mental disease and that she has satisfied section 28 of the Criminal Code Law of Ondo State. Learned counsel referred to the evidence of Dr. Ogunlesi (D.W.1) on pages 107-109 of the printed record and that the evidence of the Doctor was not controverted. The observation of the doctor was made 6 days after the conviction of the appellant on 21st April 1988. The appellant had previously been treated for moodiness, fright and excitement prior to her

conviction. Learned counsel cited *R. v. HARDING* (1936) 25 C.A.R. 190. He pointed out that the whole of the evidence of Dr. Ogunlesi was excluded by the lower court on the ground that it was hearsay and therefore inadmissible and that this led to a miscarriage of justice. *IJEOMA v. THE STATE* (1990) 6 NWLR (Pt.158) 567/586-7.

5 Learned counsel described Dr. Ogunlesi's evidence as primary evidence and referred to s.227 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria 1990. He concluded that the exclusion of that evidence has affected the conclusion reached by the lower court: *LOKE v. THE STATE* (1985) 1 S.C. 1/29-36(1985)1
10 NWLR (Pt.1) 1. He finally urged that the appeal be allowed.

In his own reply Mr. Olowo, the Director of Public Prosecu-
15 tions submitted on issues 1 and 3 of the respondent's brief that having regard to the evidence of P.W.1 (the appellant's father), D.W.1 (Dr. Ogunlesi) and the appellant. The respondent does not deny that the appellant's behaviour was unusual; but that her behaviour before, during and after the act was not such that could have deprived
20 her of the conditions laid down under section 28 of the Criminal Code. Learned Director of Public Prosecutions referred to the evidence of the appellant's father on p.22 lines 7-9 of the record. On the medical report, he also referred to the medical report and pointed out that time is of the essence when insanity is raised as a defence:
25 *SALAKO v. ATTORNEY GENERAL* (1965) NMLR 107/108.

Learned counsel submitted that the evidence of Dr. Ogunlesi was hearsay and therefore inadmissible. He finally urged that the appeal be dismissed.

30 It is now necessary to examine section 28 of the Criminal Code Law. It states:

"28. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.

35

A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusion to believe to exist",

I will quickly point out that every person is presumed to be of sound mind and to have been of sound mind at the time in question until the contrary is proved: See section 27 of the Criminal Code Law; ONAKPOYA v. THE QUEEN (1959) NSCC.130 (1959) SCNLR 384.

The learned trial Judge based the conviction of the appellant on her confessional statements (Exhibits B & C). Exhibit B was made on 2nd August 1985, the day of the alleged offence. Exhibit C was made on 12/8/85. Since these statements were not made an issue. I will say nothing more about them: but suffice it to say that the learned trial Judge had found her guilty before considering the issue of insanity. There is no doubt that in appropriate cases an accused person can be found guilty and convicted on his confessional statement; but where as in this case, the defence of insanity is raised, it is better to deal with the issue of insanity first before considering the confessional statements made by an accused person whose defence is based mainly on insanity. If the defence of insanity succeeds, it will definitely affect the confessional statement made by a person who is insane. No weight should be attached to such a statement. The learned trial Judge said:

"So, on the accused's own confessional statements, she is guilty of the offence charged that is one the premeditated murder of Tomike. Insanity was feebly raised by the defence counsel. Mr. Ojoko. All that the accused said in her evidence was that she suffered from fright, restlessness and emotional storms at Ondo between 1984 and 1985. Restlessness, fright, excitement or moodiness are traces of mental abnormality. So is insanity..." (Italics mine).

The learned trial Judge then analysed the requirements of section 28 of the Criminal Code Law of Ondo State.

However, the additional evidence of Dr. Ogunlesi in the Court

of Appeal was rejected on the ground that it was hearsay and therefore inadmissible. With respect to the learned Justices of the Court of Appeal, this is a serious misdirection on their part. In the first place a patient taken to the hospital is sometimes unable to talk either due to the nature of the illness or his inability to explain why he is in the hospital. Relatives or friends who took him to the hospital will explain to the doctor who by the nature of his training will know the type of illness and what to prescribe. If evidence of insanity of ancestors or blood relations is admissible (*R. v. TUCHET* (1844) 4 L.T. 50 and *R. v. VYSE* 176 E.R.111). It appears to me the observation of a psychiatrist nurse to a psychiatrist is admissible. It appears to me that the alleged discrepancy in the evidence of the P.W.1 (the appellant's father) and P.W.3 (the appellant's husband) about the appellant's nature of illness affected their Lordships minds to the extent of losing sight of the pith of Dr. Ogunlesi's evidence. I will repeat, if only to emphasize that the doctor's summary of evidence was not based mainly on what he was told. The doctor said:

"I formed my opinion based on the information given to me by my nurse, relations of the patient as well as my observations and also by my interpretation for the record of proceedings."

The information required from relatives appears to me relevant in view of the fact that insanity is not an outbreak of an epidemic. The antecedent of the accused, such as the family history, the evidence of previous acts which show traits of insanity are material if section 28 of the Criminal Code Law is to be satisfied: *ASANYA v. THE STATE* (1991) 4 SCNJ. 1/40(1991) 3 NWLR (Pt. 180) 422.

The requirements of the first limb of S.28 of the Criminal Code Law or Ondo State are: The accused person lacks:

- (a) the capacity to understand what he is doing
- (b) capacity to control his action
- (c) capacity to know that he should not do the act or make the omissions.

See *ADEGBESAN v. THE STATE* (1986) 1 NSCC. 457:

The clear statement of the law is that the onus is on the defence on a

balance of probabilities to establish insanity. The accused must prove that at the time the offence was committed he was actually insane within the conditions stipulated under section 28 of the Criminal Code:

1. LOKE v. THE STATE (1985) 1 S.C. 1 (1985) 1 NWLR (Pt. 1) S.C.

2. EGBE NKANU v. THE STATE (1980) 3/4 S.C. 1

3. UDOFIA v. THE STATE (1981) 11-12 S.C. 49. 5

The authorities on insanity are many. It is the application of the law that presents difficulty. This seeming difficulty can be overcome if the totality of the evidence of both the prosecution and the defence is considered. It is in this area now that I find it difficult to know the conclusion the lower court would have reached if Dr. Ogunlesi's evidence has not been rejected. The vital part of the evidence in my view is: 10

"I cannot with any degree of (sic) certainty bond for the length the patient had been suffering from the ailment but probably from the inferences I made from the record of proceedings it might have antedated the offence with which she was charged." 15

This in my view is capable of two interpretations: that the mental illness started before the commission of the offence or after the offence. The position in law is that where an act is capable of two or more interpretations the interpretation most favourable to the accused should be preferred. Again this piece of evidence by Dr. Ogunlesi created a doubt about the appellant's sanity and should be resolved in her favour. KURE v. THE STATE (1972) N.S.C.C. 269: (1988) 1 NWLR (Pt. 71) 404; KABUL v. THE STATE (1972) N.S.C.C. 456/7. Consequently the evidence of her previous illness which was loosely called moodiness but in strict medical term is covered by what Dr. Ogunlesi described as schizophrenia psychosis. 25

There is no doubt that section 28 of the Criminal Code Law of Ondo State takes no cognizance of the harmless madmen roaming about streets. Neither does it countenance the presence of the madmen whose actions evoke sympathy. They only come within that section when a crime is committed by them. It is for this reason we are concerned with legal insanity the three requisites under S.28 of the Criminal Code earlier mentioned above. They are legal requirements. 30 35

Even if the action is bizarre it may not necessarily amount to

insanity. But where a person is taken to a mental hospital for treatment and the Doctor in charge of the mental hospital gave evidence of insanity based on his observation, in my view the presumption of sanity is rebutted. Dr. Ogunlesi was not invited specially to see the appellant, but it was during one of his routine visits to Abeokuta prison
5 that his attention was drawn to the condition of the appellant by "my prison psychiatrist nurse". He diagnosed her ailment, invited her relatives so as to have a background knowledge of her past. It was the sum total of his treatment of the appellant that led him to the conclusion that the appellant had a major mental disorder and that she was
10 therefore "mentally ill schizophrenia psychosis". The doctor though called by the appellant cannot be said to be biased. The respondent in his brief submitted as follows:

*"Finally, it is submitted that even if this evidence were available
15 at the trial court it would not have influenced the mind and consequently affect the judgment of the learned trial Judge because it would not have amounted to an evidence on which the court of trial could rely".*

It appears to me that this submission is a mere conjecture. It
20 is difficult for me to read the mind of the Judge so as to know the impression this evidence would have had on him. This Court will therefore not speculate on this issue.

I will make some observations about the investigation and
25 the trial of this case. Unless the prosecution, in a case of this nature, does not develop a passive attitude to the defences an accused may put up there is likely to be a miscarriage of justice. I know that it is not the duty of the prosecution to call evidence of insanity, but the nature of this case is such that it should have been anticipated. Consequently, the evidence of Dr. Ogunlesi and the evidence of the doctor
30 who saw and treated the appellant when she was remanded in prison so soon after her arrest would have been of assistance to the court. Definitely as at the time the appellant was remanded in prison yard before her trial, it was the doctor in charge of the prison that saw and
35 treated her. Why did the prosecution fail to call the doctor in charge of the prison? The proof of evidence supplied by the Director of Public Prosecutions gives enough indication of the defence raised even though described as a feeble defence.

I now come to the question of bail. It is very unusual for a

person accused of murder to be on bail pending the trial. Murder is a very serious offence. From account given by the prosecution, one would have thought that it was not in the interest of the public to release her on bail. The reason for granting bail to the appellant was not disclosed. Although the evidence called by the Judge about how the appellant got pregnant when she was on bail is immaterial to the charge and the determination of this appeal, the mere fact that the man gave evidence of non-disclosure of the offence by the appellant and the unfortunate and savage attack on her children confirmed all was not well with her.

On the whole I will allow the appeal against conviction and sentence. I therefore enter a verdict of NOT GUILTY by reason of her insanity under section 28 of the Criminal Code Law of Ondo State. I now direct that the said FOLUSO OLADELE be kept in PRISON CUSTODY under section 230(2) of the Criminal Procedure Law of Ondo State pending the order of His Excellency the Governor of Ondo State.

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Olatawura. J.S.C. I agree that the appeal has merit and that it should be allowed. The additional evidence given in the Court of Appeal by Dr. A. Ogunlesi at the instance of the accused threw new light on the defence of insanity which was raised by the accused at the trial before the High Court. In the evidence, Dr. B Ogunlesi said that he saw the accused in Abeokuta Prison in April, 1988 and interviewed her. He also interviewed the accused on 7th July, 1988. It was after the interviews that he wrote his report on 3rd August, 1988. The report was based on various sources. They include the observation he carried out on the accused while in prison, the report from the Prison Psychiatrist nurse, who in the first place drew his attention to the medical condition of the accused and the interviews he held with the accused and her relations. Part of his testimony reads thus -

"I found that the appellant was mentally ill- schizophrenia psychosis. It is a major mental disorder which can be characterized by disturbances of multiple psychological functions, e.g. perceptions (sic

perceptions) through the eyes or the ears, disturbances for (sic from) emotions of (sic or) thinking, behaviour etc. I also called (for and) once perused the records (sic) of proceedings and convicting the patient for the offence (sic) and drew some inferences from the records." (Parenthesis mine)

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In assessing the testimony of Dr. Ogunlesi, the Court of Appeal (per Salami. J.C.A.) made the following observation -

10 "The D.W.1, Dr. Adegboyega Ogunlesi, a Senior Consultant Psychiatrist at Aro Hospital was invited to testify before us. The relevant portion of his testimony before us was predicated on his interviewing relatives of the appellant's principally to have the background history of her affliction. He consequently interviewed some nurses,
15 the father and brother of the appellant. He also had recourse to the record of proceedings. In spite of the view I have expressed on the probative value of the evidence adduced by the appellant and her father on her sanity or otherwise, the learned D.PP rightly in my view, mounted a virulent attack on the nature of the evidence the
20 first D.W. relied upon to arrive at his conclusion. She submitted, that properly to my mind, that the basis of the first D.W.'s testimony is hearsay and therefore inadmissible. She relied for this submission on the decided authority of Michael Aiworo v. The State part II vol. 18 N.S.C.C. 710 at 711. I cannot lay my hands on this report. But the
25 same is reported in (1987) 2 NWLR (pt.58) 526. The case of Aiworo (supra) is slightly different from this case because the doctor in the instant case apart from interviewing the relatives and the nurses saw the appellant though several months, to wit thirty-three months, after the daughter, I agree with the learned D.PP. that the evidence of
30 D.W.1 is predicated on a shaky foundation.

"I have already opined that the evidence of the length of time the appellant had been suffering from the ailment (if at all) from the printed record is conflicting and therefore unreliable."

35 In determining the question whether an accused person is insane and therefore not responsible for his act or omission: it is his state of mind at the time of the commission of the offence with which he is charged that is material as laid down by section 28 of the Criminal Code Law of Ondo State. To help the trial court arrive at that

*conclusion of the state of the mind of an accused, it is sometimes necessary for either the prosecution or the accused or indeed the trial Judge to call for medical evidence. It is elementary that the evidence of a doctor which is based on his special field of scientific knowledge is expert evidence - see section 57 subsection (2) of the Evidence Act Cap. 112 of the Laws of the Federation of Nigeria 1990. Therefore,*⁵
*when Dr. Ogunlesi expressed his opinion about the mental condition of the accused he did so as an expert. The opinion is admissible even though based on report made to him or things heard by others on grounds of relevancy. Sections 57 subsection (1) and 60 of the Evidence Act provided as follows-*¹⁰

*"57 (1) when the court has to form an opinion upon a point of science, the opinions upon that point of persons specially skilled in such science are relevant facts."*¹⁵

*"60. Facts, not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts when such opinions are of experts, when such opinions are relevant."*²⁰

As part of his opinion Dr. Ogunlesi came to the conclusion that the accused was insane and that her insanity might have preceded her commission of the offence she was charged of.

This is a very important piece of evidence in determination whether the accused was insane at the time of committing the offence charged. It could not rightly be rejected as being hearsay, it being the opinion of an expert. However, the evidence is not free from ambivalence because the exact words stated by the doctor are thus -²⁵
³⁰

"I cannot with any degree of certainty vouch the length (of time) the patient had been suffering: from the ailment (i.e. insanity) but probably from the inference I made from the record of proceeding:- it might have antedated the offence with which she was charged."³⁵
 (parenthesis mine).

The testimony is therefore, capable of three meaning. Either that the accused was insane before the commission of the offence, at the time of the commission of the offence or after its commission. It is

difficult to say which of the three possibilities categorically apply. However, it is trite law that in interpreting an ambiguous statement in a criminal case, the trial court ought to adopt the interpretation which is most favourable to the accused person. In the present case, the most favourable interpretation to be given to the doctor's opinion is that the accused was insane at the time of killing her daughter. Had the Court of Appeal not wrongly rejected the testimony of the doctor as inadmissible on grounds of hearsay, I am satisfied that it would have come to the same conclusion as I have. It is to be observed that the opinion of the psychiatrist, who testified in the case of *Aiworo v. The State* (1987) 2 N.S.C.C. 710; (1987) 2 NWLR (Pt.58) 526 that the accused was insane after smoking cannabis prior to committing murder was rejected because, beside the evidence of the accused that he smoked the substance, there was not any other independent evidence, apart from that of the psychiatrist, corroborating the allegation. The opinion of the psychiatrist in the case was given 17 months after the smoking of the Indian hemp. The present case, as granted by the lower court, is distinguishable from *Aiworo's* because the opinion of the psychiatrist was not simply based on the *ipse dixit* of the accused but also on the evidence of the prosecution witnesses, the report by the Prison Psychiatrist nurse as well as the observations of the accused by Dr. Ogunlesi. In addition, the testimony of the doctor being based on his observations of the accused is relevant and admissible as the evidence of an expert.

It is for these and the reasons contained in the judgment of my learned brother Olatawura, J.S.C. that I too will allow the appeal. The decision of the Court of Appeal confirming that of the High Court is hereby set aside. The conviction and sentence of death passed on the appellant are hereby quashed. Instead, I return a verdict of not guilty by reason of unsoundness of mind. I order that the appellant be kept under safe prison custody subject to the order of the Governor of Ondo State in accordance with section 230 subsection (2) of the Criminal Procedure Law of Ondo State.

KAWU JSC

I have had a preview of the lead judgment of my brother, OLATAWURA, J.S.C. which has just been delivered.

I am in complete agreement with him that on the totality of the evidence adduced the appeal of the appellant ought to be allowed. I therefore allow the appeal set aside the appellant's conviction and sentence and enter a verdict of NOT guilty by reason of her insanity under section 28 of the Criminal Code Law of Ondo State. It is directed that the appellant be kept in Prison custody under section 230(2) of the Criminal Procedure Law of Ondo State pending the order of the Governor of the State. 5

KUTIGI JSC

I have had a preview of the judgment of my learned brother Olatawura, J.S.C. just delivered. I agree with the conclusion he has arrived at and the reasons therefore. I will also allow the appeal and set aside the conviction and sentence and abide by the consequential orders made in the lead judgment. 15

MOHAMMED JSC

I have read in draft, the lead judgment of my learned brother, Olatawura, J.S.C. just delivered. I agree that the defence of insanity raised in the Court below and for which fresh evidence was called ought to succeed. 20

The main reason why the Court below rejected the defence of insanity was its finding that the evidence of Dr. Ogunlesi amounted to hearsay. With utmost respect to the Justices of the Court, they were clearly in error to so hold. The witness in his evidence on page 107 of the record said, inter alia: 25 30

"I then interviewed the appellant and I observed that she was suspicious. that her emotional responses were generally diminished, she believed that events happening around her had a personal significance and she admitted hearing voices the contents of which varied with time, for example she heard obscene comments passed about her; she also heard voices commanding her to do certain things 'like harm her baby' I made this observation on 21/4/88 when I interviewed her. 35

I then diagnosed her ailment and commenced her on treatment. She responded to the treatment and she remained well (sic), although when I saw her last week, she was beginning to relapse, because the stock of drug she was using was exhausted."

Then on page 108 from line 4, the witness continued:

5 *"I found that the appellant was mentally ill - schizophrenia psychosis. It is a major mental disorder which can be characterised by disturbances of multiple psychological functions e.g. perceptions (sic) through the eyes or the ears, disturbances for emotions of thinking, behavior, etc. when the (sic) examined her she was insane, I can not*
10 *with any degree for (sic) certainty vouch for the length the patient had been suffering from the ailment but probably from the inferences I made from the record, it might have antedated the offence with which she was charged."*

15 The findings of Dr. Ogunlesi quoted above are not findings based on what someone told him and can not therefore be said to be hearsay. They are findings based on his examination of the appellant.

20 At any rate evidence of relations about the mental condition of an accused is admissible as it may assist the court in making a finding on the mental condition of the accused. If the learned Justices of the Court of Appeal had not dismissed the evidence of Dr. Ogunlesi
25 as hearsay, they would have come to a different conclusion. The least conclusion they would have arrived at was that it was probable that the appellant's mental ailment *"antedated the offence with which she was charged."*

30 For the fuller reasons in the lead judgment of my learned brother Olatawura, J.S.C. I too allow the appeal and abide by all the orders made therein.