

SUPREME COURT OF NIGERIA
MARCH 5TH, 1993. SC. 316/1991

**CORAM:- S.M.A. BELGORE, A.B. WALI, I.L. KUTIGI,
E.O. OGWUEGBU, S.U. MOHAMMED, JJSC.**

NSE UDO NTITA APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL LAW - Insanity - Burden of proof - rests on the accused - discharged on a balance of probabilities - evidence of prosecution as to abnormality - relied upon.

CRIMINAL PROCEDURE - Defence - should be considered how ever stupid or unreasonable.

CRIMINAL JUSTICE - Where there is benefit of doubt - always resolved in favour of accused.

LEGAL PRACTITIONERS - Duty of - in capital offences - to save life - not to accelerate death by negative advocacy.

FACTS

The Appellant was charged in the High Court of Cross - River State for murder contrary to s. 319 (1) of the Criminal Code. He pleaded not guilty to the charge. The Prosecution called five witnesses to prove its case. The Appellant testified in his own defence and called no witnesses. He raised the defences of insanity, provocation, self-defence, mistake and intoxication.

The witnesses for the Prosecution testified that the Appellant behaved abnormally before and after the commission of the offence.

The trial court rejected the Defences raised and found the

12 NTITA V. THE STATE (1993) 3 KLR 11; (1993) 3 NWLR

Appellant guilty as charged and sentenced him to death.

On appeal to the court of Appeal, the Appellant challenged the decision of the trial court on four grounds. The Learned Counsel who represented the Appellant at the court of Appeal however submitted in the brief that no issue for determination arose in the appeal because the conclusion of the trial Judge can not be faulted both in law and in fact.

The Court of Appeal after considering the defences raised by the Appellant dismissed the appeal and concluded that the defences were not established. The Appellant appealed to the Supreme Court.

HELD (unanimously allowing the appeal)

1. Even if the trial court had considered the defence of insanity and had rejected it as in this case, that did not entitle the Counsel to say that he was not going to pursue it again. The offence under consideration being a capital offence, it ought to have dawned on Counsel that his duty was not a light one. Counsel's duty was to save the life of the Appellant, and not to accelerate his death. (P. 17 L. 5)

2. The mere fact that a defence was rejected or upheld in a lower court did not mean that it would not succeed or fail in a higher Court. (P. 17 L. 19)

3. The Burden of establishing the defence of insanity rests squarely on the accused. And it will be satisfied if the facts proved by the defence are such as to make it "most probable" that the accused was at the relevant time, insane, within the meaning of s. 28 of the Criminal Code. This burden is not higher than that which rests on a Plaintiff or a Defendant in Civil Proceedings. (P. 20 L. 8)

4. It was an error on the part of the learned trial Judge to have proceeded on a voyage of discovery in coming to the conclusion that

the insanity pleaded by the Appellant was "self-induced" merely be-

cause Indian hemp smoking was prohibited by law, when there was clearly no evidence on record that the Appellant was insane because he smoked a wrap of Indian hemp on the relevant day.

(P. 21 L. 1)

5. It is settled law that any defence to which an accused person is on the evidence entitled to should be considered however stupid or unreasonable for whatever it is worth. (P. 21 L. 13)

6. The defence of insanity was properly raised notwithstanding the fact that it was not mentioned in the Appellant's statement to the police. The defence was clear every where even from the evidence of the prosecution witnesses. (P. 22 L. 6)

7. The burden of proof of insanity on the Appellant is discharged on the unanimous verdict of the prosecution witnesses that the Appellant had behaved abnormally which was not typical of him.

(P. 23 L. 1)

8. The unanimous testimony of prosecution witnesses as to the abnormality in behaviour of the Appellant before and after the alleged incident, ought to raise a doubt in the mind of any reasonable tribunal that the Appellant was insane. And in keeping with a cardinal principle of criminal justice such benefit of doubt is always given to an accused person. (P. 23 L. 13)

PER KUTIGI JSC "It is a cardinal principle of criminal justice that the benefit of a doubt is always given to an accused person. So that even if the Appellant in this case had failed to establish insanity as contended by the Respondent's Counsel, the evidence on record have certainly to my mind raised some doubt as to his sanity at the time the alleged offence was committed. I will therefore give to the Appellant the benefit of that doubt. I prefer to err on the side of acquittal rather than of conviction". (P. 23 L. 17)

REPRESENTATIONS

A. Ekong Bassey for the Appellant

S. B. Akpan (D.P.P.) (Akwa Ibom State) for the Respondent.

CASES REFERRED TO

- 5 1. Okpere v. The State (1971) 1 ALL NLR 1
2. Nwosu v. The State (1986) 4 NWLR (pt. 35) 349
3. Nadar v. B.O.C.E. (1965) 4 NSCC 24
4. Onyekwe v. B.O.C.E. (1988) 1 NWLR (pt. 72) 564
5. R. v. Inyang. 12. WACA 5
- 10 6. R. v. Ashigifumo 12 WACA 389
7. Nkanu v. The State (1980) 3-4 SC 1
8. Dim v. The Queen 14 WACA 154
9. Onyekwe v. The State (1988) 1 NWLR (pt. 72) 565
- 15 10. R. v. Echem 14 WACA 158
11. R. v. Onakoya (1959) 4 FSC 150
12. R. v. Fadina 3 FSC 11
13. Ojo v. The State (1972) 12 SC 147
14. Olade v. The State (1993) 1 NWLR (pt. 269) 294
- 20 15. R. v. Nasamu 6 WACA 14.

STATUTES REFERRED TO

- 25 1. Criminal Code. s. 319 (1), 28
2. Criminal Procedure Act s. 230 (2)

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LEAD JUDGMENT BY KUTIGI JSC

In the High Court of Cross-River State holden at Ikot Abasi, the appellant was charged as follows -

“Statement of Offence

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Murder contrary to Section 319(1) of the Criminal Code.

Statement of Offence

Nse Udo Ntita (alias) Nse Akpan Ekpo on the 12th day of May, 1979 at Ikot Aba in the Ikot Abasi Judicial Division murdered Okon John Okpoho.”

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He pleaded not guilty to the charge. The prosecution called a total of five witnesses to prove its case while the appellant testified in his own defence but called no witnesses. The facts on which the prosecution relied and the events which led to them may be summarised as follows -

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In the night of 12th day of May, 1979, neighbours of the appellant including his father (P.W.1) were awakened from sleep by unusual shouts by the appellant calling on “God of Sabbath; Power of Sabbath” uncountable times. When the appellant saw his father, the appellant asked him for forgiveness. The appellant also asked his father to give him palm oil to drink which his father was persuaded to do. Shortly after, the appellant gripped his father until the latter was rescued by his (father’s) brother. The appellant ran into his father’s house and forced the door of his room open. Next, the appellant was seen running all over the place with only his underpant on. He knocked down one of the neighbours and held him for about 30 minutes until the neighbour freed himself from the appellant’s grip. The appellant finally ran to the Sabbath Church, rattled and knocked down the door of the church. When one Mfon John (P.W.5) and Okon John Okpoho (deceased) tried to challenge the appellant, the appellant suddenly gave P.W.5 a blow and flung something at the deceased. Both P.W.5 and the deceased took to their heels. The appellant chased them. He was able to catch up with the deceased. He gave him a blow with an iron rod in consequence of which the deceased fell and died on the spot. In the post mortem examination

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report (Exhibit A), the cause of death was certified thus -

“severe brain Laceration or damage and hemorrhage as a result of direct external violence or blow by some blunt instrument.”

5 The appellant in his statement to the police (Exhibit C) denied attacking the deceased with an iron rod. He said it was P.W.5 who did. However, in his evidence before the Court the appellant raised the defences of self-defence, provocation and insanity.

10 After a review of the evidence before the court and a consideration of the defences raised by the appellant, the learned trial Judge. Akpabio J., (as he then was) found the appellant guilty as charged and sentenced him to death.

15 Dissatisfied with the decision of the trial court, the appellant appealed to the Court of Appeal, Enugu Division on four (4) grounds of appeal. They read as follows -

20 *“1. That I was not myself when I committed the offence of murder. I had no quarrel with my uncle whatsoever that can warrant such havoc.*

2. That it was at the native Doctor’s place where I was receiving treatment that I learnt of my uncle’s death killed by me.

25 *3. In this case I could not have in my correct senses wanted to harm my uncle or talk of seeking for his dear life while he was even looking after me when receiving treatment.*

30 *4. That the trial Judge erred in law by failing to give me even an iota of the benefit of doubt in an incident that I still maintain, took place when I was not with my correct senses.”*

35 It is to be observed that learned counsel Johnny C. Okonkwo Esq. Who represented the appellant in the Court of Appeal had this to say in the appellant’s Brief on page 64 of the record:

Issues for Determination

“It is my humble opinion that no issues for determination arise in this appeal as the findings and conclusions of the learned trial

Judge cannot be faulted both in law and fact.”

I venture to ask immediately - was that what learned counsel was paid to do? I believe counsel was employed to defend the appellant to the best of his ability according to the available facts and the applicable law. It is incontestable that the appellant's grounds of appeal set out above show that the appellant talks of – 5

“I was not myself” (ground 1)

“I could not have in my correct senses wanted “
(ground 3)” 10

I was not in my correct senses” (ground 4)

which to say the least all go to show that the appellant was pleading insanity. I am of the view that even if the trial court had considered that defence and had rejected it as in this case, that did not entitle counsel to say that because it (defence) had been considered before he was not going to pursue it again being the only defence open to the appellant. Moreover, the offence being a capital offence, it ought to have dawned on counsel that his duty was not a light one. His duty was to save the life of the appellant, and not to accelerate his death by negative or nil advocacy. The mere fact that a defence was rejected or upheld in a lower court did not mean that it would not succeed or fail in a higher court. In the instant case I feel counsel had failed in his duty both to the appellant and to the court. 15 20 25

The Court of Appeal, however, in its lead judgment delivered by Oguntade JCA and concurred by Katsina - Alu and Chigbue JJCA, despite the attitude of appellant's counsel as described above, rightly in my view proceeded to consider the defence of insanity which was open to the appellant, and came to the conclusion that it was not established. The appeal was therefore dismissed. It is against that decision that the appellant has now appealed to this Court. 30 35

Counsel on both sides filed and exchanged briefs of argument. They were adopted at the hearing. Oral submissions were also made. Mr. Ekong Bassey learned counsel for the appellant formu

lated only one issue for determination as follows -

“Whether from all the circumstances of this case, the defence of insanity was not available to the accused/appellant under section 28 of the Criminal Code.”

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It was submitted that the record of proceedings in the High Court show that on the day in question and at the relevant time the appellant was behaving abnormally. That the appellant spoke of seeing visions which he said was like a dream. That all the prosecution witnesses also spoke of the abnormal behaviour of the appellant on the day in question. He referred to the evidence of PW.5 on pages 28 - 29, and evidence of PWs 1 & 2 on pages 15 & 17 respectively. We were also referred to the judgment of the Court of Appeal on 15 pages 92 - 93 of the record. It was submitted that the Court of Appeal having found on page 93 of the record that -

“It looks like his was a case of fleeting or transitory attack of some mental sickness.”

20 ought to have come to the conclusion that the appellant was not in control of his actions at the time of the alleged killing of the deceased. He said the mere fact that the appellant’s statement to the police (Exhibit C) differed from his testimony in court was not sufficient to rob him or the defence of insanity. We were referred to the following 25 cases -

Okpere v. The State (1971) 1 All NLR 1,
Nwosu v. The State (1986) 4 NWLR (Pt.35) 348,
Nader v. B. O. C. E. (1965) 4 NSCC 24,
30 Onyekwe v. The State (1988) 1 NWLR (Pt.72) 565.

Learned counsel then referred to section 28 of the Criminal Code and submitted that the appellant was not responsible for an act or omission if at the time of doing the act or omission he was in such 35 a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he was 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. The appellant herein was insane he stressed.

It was also submitted that whether or not the appellant smoked Indian hemp was irrelevant to his defence of insanity because there was no evidence that it caused him insanity. It was further submitted that although mere absence of any evidence of motive for a crime is not a sufficient ground on which to infer mania, it is the law that where there is sufficient evidence indicative of insanity as in this case, the absence of any evidence of motive becomes relevant to the point in issue and material to it. He referred us to

R. v. Inyang 12 W.A.C.A. 5,

R. v. Ashigifuwo 12 W.A.C.A 389,

Okpere v. The State (supra)

The Court was urged to allow the appeal.

In his own reply Mr. Akpan learned Director of Public Prosecutions conceded on page 6 of his brief that -

Clearly from the evidence of prosecution witnesses who saw the appellant shortly before and after he had attacked and killed the deceased, there was unanimity of opinions that he had behaved abnormally.”

But it was submitted that the Court of Appeal was right when it found that the evidence of abnormal behaviour of the appellant on the night in question fell short of positively establishing that the appellant was insane. It was contended that the defence of insanity was not even properly raised nor was any effort made to lead evidence to that effect. He cited Nkanu v. The State (1980) 3-4 S.C. 1 and Dim v. The Queen (1952) 14 W.A.C.A. 154. It was also submitted that the shift from outright denial in appellant's statement (Exh.C), to partial admission of the offence in his testimony before the court did not point towards any insanity on the part of the appellant. That the absence of motive was not necessarily an indication of insanity and a person must be taken to have intended the natural and probable consequences of his acts. He said taking all the circumstances of the case into consideration the appellant did not suffer from insanity as defined by Section 28 of the Criminal Code. He cited Onyekwe v. The State (1988) 1 NWLR (Pt.72) 565 at 579. We were urged to dismiss the appeal.

Now Section 28 of the Criminal Code states as follows -

“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.”

I must quickly say that the burden of establishing a defence on the ground of insanity rests squarely on the accused. And it will be satisfied if the facts proved by the defence are such as to make it “most probable” that the accused was at the relevant time, insane within the meaning of Section 28 above (see R v. Nasamu (1940) 6 W.A.C.A 74; R v. Ashigifuwo (1984) 12 W.A.C.A 389). The burden on the accused is not higher than that which rests on a plaintiff or a defendant in civil proceedings (see R. v. Echem 14 W.A.C.A 158, R. v. Onakoya (1959) SCNLR 384 (1959) 4 FSC 150)

The learned trial Judge rejected the defence of insanity amongst others when he stated in his judgment on page 47 thus -

“It appears therefore that all the defences raised for accused in this court by his learned defence counsel, namely insanity, intoxication, self-defence and mistake, were afterthought and must be rejected. Regarding the defence of insanity or in intoxication which appeared to be the principal defence can vassed for accused, I must add that even if this defence had been raised by accused in his statement Exhibit ‘C’ it would still not have availed the accused for reasons which have already been well argued by the learned state counsel in his submission. In this connection I should like to emphasize the fact that the so-called intoxication or insanity in his case was clearly self induced by accused when he knowingly smoked a wrap of Indian hemp which is prohibited by our law.”

My short reaction to the above passage of the learned trial Judge is that he had failed to consider adequately the defence of insanity raised by the appellant. It was not sufficient merely to have said that it was an “after thought” simply because it was not men

tioned in his statement to the Police (Exhibit C). It was equally an error on the part of the learned trial Judge to have proceeded to conclude that the insanity or intoxication pleaded by the appellant was “*self induced*” merely because Indian hemp smoking was prohibited by law. The learned trial Judge must have embarked on a voyage of discovery. Who told him that it was the Indian hemp smoked by the appellant on the day in question that caused him to become insane? Or was the trial Judge saying that he found the appellant to be insane because he allegedly smoked Indian hemp? There was clearly no evidence on record that the appellant was insane because he smoked a wrap of Indian hemp on the relevant day. Enough of that!

It is settled law that any defence to which an accused person is on the evidence entitled to should be considered however stupid or unreasonable for whatever it is worth (see *R v. Fadina* (1958) SCNLR 250; 3 FSC 11; *Ojo v. The State* (1972) 12 SC 147. The evidence necessarily includes the evidence on the record for both the prosecution and the accused or defence.

Evidence of insanity of the appellant was given by the prosecution witnesses themselves.

PW.1 (appellant’s father) said in his examination-in-chief on page 16 thus

“When I woke up to see the accused on that night I heard accused shouting about the Power of Sabbath and the God of Sabbath like a mad man.”

Under cross-examination on page 17 he said -

“When I saw accused that night I regarded him as abnormal.”

P. W.2 also testifying under cross-examination on page 18 said-

“I cannot tell why accused behaved the way he did on the night in question. Accused’s action towards us was not normal.”

PW.3 the Investigating Police Officer also had this to say on pages 20 - 21 of the record -

“From, the statement of witnesses that accused was running about and shouting ‘help me Sabbath, help me Sabbath,’ I concluded that the accused ran amock.”

PW.5 who was an eye witness said in cross-examination on page 28

that

“I have never known the accused to be suffering from mental imbalance. He had not been acting like that before. His actions that night were abnormal. I was surprised to see him behave like that.”

5 It was therefore not true as contended by Mr. Akpan for the respondent, that the defence of insanity was not properly raised. The defence was clearly everywhere and from the evidence of the prosecution witnesses themselves. The Court was therefore bound to have considered it on the merit.

10 Oguntade J.C.A. who delivered the lead judgment in the Court of Appeal quite conscious of the testimonies given by the prosecution witnesses above, stated on page 93 that -

“From the evidence of prosecution witnesses who saw the appellant shortly before and after he had attacked and killed the deceased, there was unanimity of opinions that he had behaved abnormally which was not typical of him. It seems to me that the evidence of the abnormal behaviour of the appellant on the night in question fell far short of positively establishing that the appellant was insane. It
15 *looks like his was a case of a fleeting or transitory attack of some mental sickness.”*

The learned Justice of the Court of Appeal thus clearly recognised that -

25 1. There was unanimity of opinion amongst the prosecution witnesses that the appellant behaved abnormally which was not typical of him.

2. The evidence of abnormal behaviour of the appellant was not positively established that the appellant was insane.

30 3. It looks like his was a case of fleeting or transitory attack of some mental sickness.

Here I think the learned Justice of the Court of Appeal was putting the burden rather too high on the appellant. The burden as I have said earlier is like the burden in a civil case - on a balance of probabilities (R v. Onakoya) (supra). I am of the view that the burden is discharged on the unanimous verdict of the prosecution witnesses that the appellant “had behaved abnormally which was not typical of him.” *Also the conclusion by the Court of Appeal that “the appellant’s case looks like that of a fleeting or transitory attack of*

some mental sickness”to me is a tacit recognition of the fact that the appellant was mentally sick. So that even going by the above reasoning of the Court of Appeal one cannot but come to the conclusion that appellant at the time of the alleged murder was suffering from some mental sickness, transitory or otherwise, which entitled him to the benefit of the provision of section 28 of the Criminal Code. 5

I think I only need to add that the fact that all the prosecution witnesses who saw the appellant on that night were unanimous that he (the appellant) behaved abnormally before and after the alleged incident, ought to raise a doubt in the mind of any reasonable tribunal that the appellant was insane. It is a cardinal principle of criminal justice that the benefit of a doubt is always given to an accused person. So that even if the appellant in this case failed to establish insanity as contended by the respondent’s counsel, the evidence on record have certainly to my mind raised some doubt as to his sanity at the time the alleged offence was committed. I will therefore give to the appellant, the benefit of that doubt. I prefer to err on the side of acquittal rather than of conviction. 10 15 20

The appeal therefore succeeds and it is hereby allowed. I enter a verdict of NOT GUILTY by reason of unsoundness of mind under Section 28 of the Criminal Code. The appellant is hereby ordered to be kept under safe prison custody subject to the order of the State Governor (see section 230 (2) of the Criminal Procedure Act). 25

BELGORE JSC

I had the privilege of reading in draft the judgment of my learned brother Kutigi, JSC with which I am in full agreement. For the reasons advanced in the said judgment which I adopt as mine, I also allow this appeal. 30

WALI JSC

I have had the privilege of reading in draft the lead judgment of my learned brother, Kutigi, JSC I am in complete agreement with 35

his reasoning and conclusion.

The law is that the onus lies on him that pleads insanity to prove it. The onus is discharged when it is proved, on the preponderance of probability that the accused was insane at the time he committed the offence and section 28 of the Criminal Code would apply. See *Oladele v. The State* (1993) 1 NWLR (Pt.269) 294.

I am therefore in complete agreement with my learned brother Kutigi, JSC that even the evidence adduced by the prosecution proved that the appellant was insane at the time he committed the murder; and for the reasons which were clearly set out by him in the lead judgment, I too would allow and hereby allow the appeal. I set aside the conviction and sentence of death passed on the appellant by the lower court and the court below. I substitute in place thereof a verdict of not guilty resulting from unsoundness of mind.

I order that the appellant shall continue to be kept in prison custody, pending the order of the Governor of Cross-River State of Nigeria.

OGWUEGBU JSC

I agree that this appeal succeeds and should be allowed for the reasons given by my learned brother Kutigi JSC in the lead judgment, the draft of which I have had the privilege of reading in advance.

The appeal is allowed by me.

Having regard to Section 230 (1) of the Criminal Procedure Act Cap. 77, Vol. V, Laws of the Federation of Nigeria, 1990, the appellant is hereby ordered to be kept in safe custody subject to the order of the Governor.

S.U. MOHAMMED JSC also agreed with the lead judgment.