

SUPREME COURT OF NIGERIA
9TH DECEMBER, 1994. SC./174/1993
CORAM:- S. M. A. BELGORE, A. B. WALL,
I. L. KUTIGI, M. E. OGUNDARE, U. MOHAMMED,
S. U. ONU, Y. O. ADIO, JJSC.

THE STATE APPELLANT
V.
ETIM BASSEY & TWO OTHERS RESPONDENTS

APPEALS - *Extention of time to appeal - Right of prosecutor to apply for extention of time.*

APPEALS - *Grounds of appeal - Where of mixed law and facts - And leave was not secured pursuant to s. 213(3) of the Constitution - Whether the appeal is competent.*

FACTS

The respondents were tried and convicted to death for murder by the defunct Cross River State high court, Uyo judicial division. Their appeal to the Court of Appeal was allowed. The conviction of each of them was set aside and the death sentence quashed. Being dissatisfied with the Court of Appeal's decision, the prosecution appealed to the Supreme Court on two grounds of appeal.

After exchange of briefs, counsel for the respondents filed along with his brief a Notice of Preliminary Objection urging the court to strike out the appeal for not being competent. Counsel contended that the appellant's grounds of appeal were not on questions of law alone. As such, leave of Court of Appeal or the Supreme Court ought to have been obtained by the appellant.

HELD (Unanimously striking out the appeal per lead judgment of **WALI JSC**)
Whether the appeal is competent

1. I have myself carefully considered the two grounds of appeal filed by the appellant and am fully satisfied, having regard to the particulars in support of each one of them, that they are grounds of mixed law and facts. They are caught by Section 213(3) of the 1979 Constitution and the appellant therefore requires leave to file them. And having filed them without first obtaining leave, they, both the Notice of Appeal and the appeal, are incompetent and are accordingly struck out. (P.270 L.23)

Extention of time to appeal

2. Section 27(4) of the Supreme Court Act 1960 confers on the Supreme Court power to extend, on application, periods prescribed for appealing in Section 27(2) of the Act. The prosecutor can apply for extension of time to appeal at any time and it would be within the court's discretion to either grant or refuse it, depending on its merit. (P.270 L.36)

NOTABLE POINTS OF INTEREST

KUTIGLJSC

1. Appellant cannot appeal as of right

The two grounds of appeal filed by the appellant herein are not covered by any of the provisions of section 213(2) including the right to appeal on ground of law alone, and the appeal therefore did not lie as of right. The correct statement therefore in my view would have been that "*the appellant cannot appeal as of right save on question of law alone*" as provided for under section 213(2) of the Constitution. The appellant clearly has a right of appeal under section 213(3) provided leave of either the Court of Appeal or of the Supreme Court is obtained before hand (P.272 L.33)

ONUJSC

2. Counsel's Christening of a ground of appeal - Effects

A careful look at the two grounds of appeal I had herein set out which allege error in law and misdirection, coupled with the concession of the Appellant in her brief to which I will advert shortly, although on the outward portray grounds of law, they disclose at best, ground of mixed law and facts. They do not, in my respectful view, therefore disclose questions of law alone. As had been held by this Court on numerous occasions in numerous cases, christening a ground of fact or of mixed law and fact as a ground of law does not ipso facto convert such a ground into a ground of law. (P.276 L.29)

REPRESENTATION

No appearance by the Appellant.
Ladi Williams with G.M.O. Oguntade, A.I. Iguh,
and Miss O.K. Johnson for the Respondents.

CASES REFERRED TO

Nafiu Rabiu v. The State (1980) 8 - 11 SC 130

Ogbechie v. Onochie (1986) 2 NWLR (Pt.23) 484
 Nwadike v. Ibekwe (1987) 4 NWLR (Pt.67) 718
 Ojemen v. Momodu (1983) 3 SC 173
 N.N.S.C. Ltd v. Establishment Sima of Vaduz (1990) 7 NWLR (Pt.164) 526
 Oteki v. A-G Bendel State (1986) NSCC 538
 Adili v. The State (1989) 2 NLWR (Pt.103) 305
 Ezeugo v. Ohamjere (1978) 6 - 7 SC 171

STATUTES & RULES REFERRED TO

Supreme Court Rules 1985 0.6 r.5 (b) & (d), 0.6 r. 8(7)
 Constitution of the Federal Republic of Nigeria 1979 s. 213, 220, 221
 Judicial Officers and Appeals by Prosecutors Act No. 10 of 1963 s.4(3)(4)
 Supreme Court Act s.27

LEAD JUDGMENT BY WALLIJC

On the 29th of September, 1994, after hearing learned counsel for the respondents on the issue of preliminary objection he filed on 9th May 1994 on the competence of the appeal before us, I ruled in his favour by upholding it and struck out the appeal for incompetence. I reserve my reasons for doing so to today which I now give.

The three respondents were charged before the High Court of Cross River State sitting in Uyo, with the offence of murdering Effanga Asuquo on 4th January 1985 in a swamp at Esuk within the Uyo Judicial Division.

At the end of the trial, the learned judge Nkop, J found all the three guilty as charged, convicted and sentenced them to death. They all appealed to the Court of Appeal Enugu Division. In a unanimous judgment of that court delivered by Uwaifo JCA, their appeal was allowed. The conviction of each of them was set aside and the sentence quashed.

The prosecution being not satisfied with the Court of Appeal decision, appealed to this Court against it on the following two grounds:-

1. *"The Court of Appeal erred in law and thereby misdirected itself by holding that the accused persons' Confessional Statements Exhibits G, H, H, H1, Land J1 which were retracted were not proved in accordance- with the principle in R. V Sykes.*

PARTICULARS OF MISDIRECTION

(i) The Appeal Court having been satisfied with the fact that the

Accused persons' confessional statements corroborated the prosecution's evidence as to the scene of crime, nature of injury as well as the nature of instruments used, turned round to hold that 'the Information appearing in the alleged Confessional Statements made after the police had visited the scene is of no import.

(ii) Exhibit G being the 1st Accused person's statement having been recorded in English and was therefore rightly admitted in the language in which the statement was received, the Court misdirected itself when it held that the said statement of 1st Accused is hearsay.

(iii) Although there was no evidence during trial in the Court below as to the reasons the 1st Accused should have gone to the scene with a snuff box, the Court went to town to proffer reasons why the 1st Accused could not have been at the scene with his snuff box - Exhibit A.

2. The Court of Appeal erred in law and thereby misdirected itself when it failed to find the abundant evidence of corroboration of the Confessional Statements of the accused persons.

PARTICULARS OF MISDIRECTION

"Even when the Court of Appeal accepted the fact that the confessions were possible, it erroneously found that 'they were not therefore confessions of something that did not or could never have happened."

Learned counsel involved in the appeal filed and exchanged briefs.

Mr. Ladi Williams of learned counsel for the respondents tiled along with his brief, a Notice of Preliminary Objection that _

"The Appellant has no right of appeal save on question of law alone. The appeal herein is not on questions of law alone."

In support of the preliminary objection, learned counsel tiled a separate brief of argument to which learned counsel for the appellant responded by tiling also a brief.

On the day the appeal came up for hearing, appellant did not put in appearance despite the fact that he was served with hearing notice. By virtue of the provision of Order 6 rule 5(b) (d) of the Supreme Court Rules, 1985 the appellant's brief filed in reply to the respondents' brief to the preliminary objection is deemed to have been read.

Moving his preliminary objection, learned counsel for the respondents adopted the brief he filed in support thereof and urged the court to declare the appeal incompetent and to accordingly strike out the same.

The appellant's brief filed in reply is deemed to have been argued by virtue of

the provision of Order 6 rule 8(7) of the Supreme Court Rules, 1985.

In the respondents' brief filed in support of the preliminary objection, the following two issues were raised for determination:

“(a) *Whether the grounds of Appeal are on questions of law alone;*
5 *in which case the Appellant requires no leave and can come to this court as of right.*

(b) *Jurisdiction*

The second question to be determined is whether the Supreme Court has jurisdiction to entertain the Appeal lodged by the Appellant having
10 *regards to the ground of Appeal and S.213 of the 1979 Constitution.”*

In the appellant's corresponding brief, the following three issues were formulated:-

(i) *Whether the Supreme Court has jurisdiction to entertain the Appeal lodged by the Appellant considering the GROUNDS OF APPEAL AND*
15 *SECTION 213(2) (a) of the 1979 CONSTITUTION without seeking leave of Court.*

(ii) *Whether the Appellant's Brief is on Grounds of Law alone.*

(iii) *Whether the Supreme Court can validly entertain an Appeal by the Prosecutor from the Court of Appeal in a MURDER case in which the*
20 *later entered a verdict of acquittal, when the Notice of Appeal was filed on a date well outside 7 (seven) days statutory period.*

As the three issues formulated in the appellant's brief are covered by the two issues in the respondents' brief, I shall adopt the latter for determining the preliminary objection.

25 It was the submission of learned counsel for the respondents that the two grounds of appeal filed by the appellant are, having regard to their particulars, of mixed law and fact. He contended that since the respondents were discharged and acquitted by the Court of Appeal on the conviction and sentence of death, the appellant cannot appeal as of right under Section
30 213(2)(d) of the 1979 Constitution having regard to the two grounds of appeal he filed, but under S.213(3) of the said Constitution with the leave of either Court of Appeal or the Supreme Court (as the, case may be). L e a r n e d
counsel referred to some decisions of this court, particularly on the competence of the Notice of Appeal filed and urged us to strike it out on ground that
35 it is incompetent.

Learned counsel for the appellant has conceded in the brief he filed, that the two grounds of appeal filed by him involve issues of law and fact that since they are of mixed law and fact, an appeal cannot lie as of right. Learned counsel also conceded that the prosecution is precluded from appealing as of

right in view of section 4(3)4 of the Judicial Officers and Appeals by Prosecutors Act No. 10 of 1963.

He further agreed that since the cast is one of acquittal against death sentence and the Court of Appeal judgment was delivered on 30th June 1993, the prosecution's time within which to appeal has since been exhausted and he referred to Section 4(3) of the Judicial Officers and Appeals by the Prosecutors Act, No. 10 of 1963 in support.

Learned counsel however appealed to this court to have a dispassionate consideration of the fact involved in this case *"and determine that the appellant can safely seek leave to appeal against the judgment of the Court of Appeal."*

As stated by learned counsel for the respondents in his brief in support of the preliminary objection and conceded to by learned counsel for the appellant, Section 213(2)(a) of the 1979 Constitution states cases in which an appeal lies as of right from the Court of Appeal decisions to the Supreme Court. See *NAFIU RABIU v. THE STATE* (1980) 8 - 11 SC 130. In all cases other than those enumerated in S. 213(a) supra, leave of either the Court of Appeal or the Supreme Court (as the case may be) must first be sought for and obtained before lodging an appeal, See Section 213(3) of the 1979 Constitution which provides as follows:-

"3. Subject to the provisions of subsection (2) of this section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with leave of the Court of Appeal or the Supreme Court."

Section 213(6) of the Constitution further provides as follows:-

"Any right of appeal to the Supreme Court from the decisions of the Court of Appeal conferred by this section shall subject to section 216 of this Constitution, be exercised in accordance with any Act of National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Supreme Court."

Both the practice and procedure for an appeal to this court are now provided for in the Supreme Court Act (Cap. 424) Laws of the Federation of Nigeria 1990 Vol.22 and Supreme Court Rules, (Caps 62) Laws of the Federation of Nigeria, 1990, respectively.

Section 27 of the Supreme Court Act provides that -

"27 (1) where a person desires to appeal to the Supreme Court he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by Rules of Court within the period prescribed by subsection (2) of this section that is applicable to the case."

(2) The periods prescribed for the giving of notice of appeal or

notice of application for leave to appeal are -

(a) in an appeal in a civil case, fourteen days in an appeal against an interlocutory decision and three months in an appeal against a final decision.

5 *(b) in an appeal in a criminal case, thirty days from the date of the decision appealed against.*

(3) Where an application for leave to appeal is made in the first instance to the court below, a person making such application shall, in addition to the period prescribed by subsection (2) of this section, be allowed a further
10 *period of fifteen days, from the date of the hearing of the application by the court below, to make an application to the Supreme Court.*

(4) The Supreme Court may extend the periods prescribed in subsection (2) of this section. “

This court has settled the question of the prosecutor’s right of appeal against
15 an order of acquittal for a conviction of murder where a death sentence is imposed in *NAFIU RABIU v. THE STATE* (1980) 8 - 11 SC. 130. In that case this court considered and interpreted provisions of Sections 220 and 221 (1) of the 1979 Constitution as to when a person can appeal as of right or with leave to the Court of Appeal. Section 213 (2) and (3) contain in certain respect
20 provisions similar to those in sections 220 and 211 of the 1979 Constitution as to when a person can appeal as of right or with leave from decisions of the Court of Appeal to the Supreme Court.

I have myself carefully considered the two grounds of appeal filed by the appellant and am fully satisfied, having regard to the particulars in
25 support of each one of them, that they are grounds of mixed law and facts. See *OGBECHIE v. ONOCHIE* (1986) 2 NWLR (PT. 23) 484. They are caught by Section 213(3) of the 1979 Constitution and the appellant therefore requires leave to file them. And having filed them without first obtaining leave, they, both the Notice of Appeal and the appeal, are incompetent and are accord-
30 ingly struck out.

I wish however to draw the attention of learned counsel for the appellant that the provision of Section 31 of the Supreme Court Act, 1960 as amended has now become Section 27 of the Supreme Court Act, 1960 (Cap. 424) of the revised Laws of the Federation of Nigeria 1990, Vol. 22. The limita-
35 tion of 7 days by Section 3 of the Judicial Officers and Appeals by the Prosecutors Act, No.10 of 1960 has ceased to be the applicable Law. Section 27(4) of the Supreme Court Act 1960 confers on the Supreme Court power to extend, on application, periods prescribed for appealing in Section 27(2) of the Act. The prosecutor can apply for extension of time to appeal at any time and it

would be within the court's discretion to either grant or refuse it, depending on its merit.

BELGORE JSC

This appeal, based on the verdict of discharge and acquittal as distinct from that of sentence of death based on conviction for murder is not as of right if based on mixed law and facts unless leave is obtained to file such appeal. In this case the appellant admits the verdict appealed against is that of acquittal and thus is not as of right and that the grounds are of mixed law and fact. No leave having been obtained the appeal offends Section 213(3) of the Constitution of 1979 and it is therefore incompetent. 5 10

It is for the foregoing reasons and fuller reason given by Wali, J.S.C. that on 29th September, 1994 upheld the preliminary objection and struck out the appeal.

KUTIGI JSC

The respondents were charged and convicted of murder in Uyo High Court. They were accordingly sentenced to death. On appeal to the Court of Appeal, their appeals were allowed. The convictions and sentences were set aside. The state was dissatisfied with the decision of the Court of Appeal and has appealed to this court. Only two grounds of appeal were filed. They were clearly filed within thirty days from the date of the decision as prescribed under section 27(2)(b) of the Supreme Court Act Cap. 424 Laws of the Federation of Nigeria, 1990. 15 20

Meanwhile Mr. Ladi Williams learned counsel for the respondents filed a Notice of Preliminary Objection that - 25
"The appellant has no right of appeal save on question of law alone. The appeal herein is not on questions of law alone."

The wording of the Notice of Preliminary Objection is such that ex facie one would be tempted to have thought that a constitutional issue was involved to warrant constituting a Court of seven justices (instead of five) as was done in this case. But as it turned out, no such issue was involved. The issue was simply that of failure on the part of the appellant to have obtained leave before filing Grounds and Notice of Appeal which read thus - 30

"1. The Court of Appeal erred in law and thereby misdirected itself by hold-

ing that the accused person's Confessional Statements Exhibit G, H1, J, L and J1 which were retracted were not proved in accordance with the principle in *R. V. Sykes*.

PARTICULARS OF MISDIRECTION

5 (I) The Appeal Court having been satisfied with the fact that the Accused persons' confessional statements corroborated the prosecution's evidence as to the scene of crime, nature of injury as well as the nature of instruments used, turned round to hold that "the Information appearing in the alleged Confessional Statements made after the police had visited the
10 scene is of no import."

(ii) Exhibit G being the 1st Accused person's statement having been recorded in English and was therefore rightly admitted in the language in which statement was received, the Court misdirected itself when it held that the said statement of 1st Accused is hearsay.

15 (iii) Although there was no evidence during trial in the Court below as to the reasons the 1st Accused should have gone to the scene with a snuff box, the Court went to town to proffer reasons why the 1st Accused could not have been at the scene with his snuff box - Exhibit A.

2. The Court of Appeal erred in law and thereby misdirected itself
20 when it failed to find the abundant evidence of corroboration of the Confessional Statements of the accused persons.

PARTICULARS OF MISDIRECTION

Even when the Court of Appeal accepted the fact that the confessions were possible, it erroneously found that "they were not therefore
25 fessions to something that did not or could never have happened."

Mr. Williams was certainly not correct when he said -

"The appellant has no right of appeal save on question of law alone."

The relevant Constitutional provisions regarding appellate jurisdiction of the supreme Court are to be found under section 213(2) of the 1979
30 Constitution where an appeal lies from the decision of the Court of Appeal to the Supreme Court as of right, and section 213(3) of the same Constitution where an appeal lies from the decision of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or of the Supreme Court. The two grounds of appeal filed by the appellant herein are not covered by any of the
35 provisions of section 213(2) including the right to appeal on ground of law alone, and the appeal therefore did not lie as of right. The correct statement therefore in my view would have been that "the appellant cannot appeal as of right save on question of law alone" as provided for under section 213(2)

of the Constitution. The appellant clearly has a right of appeal under section 213(3) provided leave of either the Court of Appeal or of the Supreme Court is obtained before hand (see OGBECHIE v. ONOCHIE (1986) 2 NWLR (PT. 23) 484). The right to appeal did not cease to exist merely because leave was required before that right could have been exercised. The right is always there. 5 I may add that even in cases where an appeal lies as of right! -unless and until the right is exercised by an appellant filling a proper Notice and Grounds of Appeal, no appeal can be assumed or imagined. Learned Counsel was therefore obviously right when he said in the Notice that-

"The appeal herein is not on questions of law alone." 10

I have myself read over the two grounds of appeal filed by the appellant in this case and have come to the conclusion that they are clearly of mixed law and facts. Leave of this Court or of the Court of Appeal was therefore necessary because they are caught by the provisions of section 213(3) of the Constitution. That much was conceded in the brief filed on behalf of the 15 appellant in a reaction to the preliminary objection. Consequently having conceded filing the appeal without-leave, the appeal was incompetent and ought to have been struck-out.

It was for the above reasons and others contained in the Reasons for Judgment of my learned brother Wali J.S.C. that I struck out this appeal as 20 incompetent on the 29th day of September, 1994.

OGUNDARE JSC

On the 29th September, 1994, after hearing counsel for the respondents on his preliminary objection to the competence of the appeal before us and 25 learned counsel for the appellant being absent but after considering also his brief on the preliminary objection, I upheld the objection and struck out the appeal as being incompetent. I indicated then that I would give my reasons for my decision today. I now proceed to give my reasons.

I have had the advantage of reading in draft Reasons for judgment 30 just read by my Lord, Wali, JSC. I agree entirely with the reasons given by him for upholding the preliminary objection and striking out the appeal. I adopt these reasons as mine and have nothing more to add.

MOHAMMED JSC

On 29th of September, 1994, when this appeal was about to be considered Mr. Ladi Williams, learned counsel for the respondents, was permitted to argue a preliminary objection, which he earlier filed, against the hearing of this appeal.

5 The respondents were tried and convicted of murder under section 319(1) of the Criminal Code by the High Court of Justice of Akwa Ibom State holden at Uyo. On appeal to the Court of Appeal, Enugu Division, the learned justices unanimously allowed the appeal, set aside both the conviction and sentence, discharged and acquitted the respondents.

10 On appeal to this Court, the State filed only grounds of mixed law and fact. It is against those grounds that the learned counsel for the respondents raised a preliminary objection and argued that the appellant had no right of appeal save on question of law alone. Mr. Ladi Williams is quite right and after hearing him we struck out the appeal being incompetent and reserved reason for
15 judgment later.

I have had the privilege of reading the reasons given by my learned brother, Wali, JSC., for striking out the appeal. I agree with those reasons and adopt them as mine. The appeal is incompetent and I hereby strike it out.

20

ONU JSC

On the 29th day of September, 1994 when we heard this appeal, I summarily upheld the Preliminary Objection filed on 9th May, 1994 at the instance of the three respondents to the effect that the Appellant (the State)
25 has no right of appeal save on question of law alone and that the appeal herein, premised on two grounds, not being on questions of law, ought to be accordingly struck out as being incompetent. I on that occasion indicated that I would give my reasons in full for so doing today. I will now proceed to do so.

In the High Court of Uyo Judicial Division holden at Uyo (then in the
30 Cross River State). Nkop, J., tried and convicted the three respondents in 1989 of the offence of murder punishable under section 319 of the Criminal Code. Being dissatisfied with the conviction and sentence, all three respondents appealed against the judgment to the Court of Appeal of the Enugu Judicial Division sitting at Enugu. The Court of Appeal (per Uwaifo, JCA delivering
35 the leading judgment and concurred in by Oguntade and Akintan, JJCA) in a considered Judgment discharged' and acquitted the Respondents on 30th June, 1993, set aside the Judgment of the Uyo High Court and accordingly

quashed their conviction.

Aggrieved by this decision, the Appellant appealed to this Court against the discharge and acquittal premised on a Notice of Appeal containing two grounds. On grounds of relevance, it is well to set out the two grounds from the outset thus: 5

1. The Court of Appeal erred in law and thereby misdirected itself by holding that the accused persons' confessional statements Exhibit G, H, H1, J, Land J1 which were retracted were not proved in accordance with the principle in *R. v. Sykes*.

PARTICULARS OF MISDIRECTION 10

(i) The Appeal Court having been satisfied with the fact that the Accused persons' confessional statements corroborated the prosecution's evidence as to the scene of crime, nature of injury as well as the nature of instruments used, turned round to hold that "*the information appearing in the alleged confessional statements made after the police had visited the scene is of no imports.*" 15

(ii) Exhibit G being 1st Accused person's statement having been recorded in English and was therefore rightly admitted in the language in which the statement was received, the court misdirected itself when it held that the said statement of 1st Accused is hearsay. 20

(iii) Although there was no evidence during trial in the court below as to the reasons the 1st Accused should have gone to the scene with a snuff box, the Court went to town to proffer reasons why the 1st Accused could not have been at the scene with his snuff-box Exhibit A.

2. The Court of Appeal erred in law and hereby misdirected itself 25 when it failed to find the abundant evidence of corroboration of the confessional statement of the accused persons.

PARTICULARS OF MISDIRECTION 30

Even when the Court of Appeal accepted the fact that the confessions were possible, it erroneously found that "*they were not therefore confessions to something that did not or could never have happened.*"

The parties exchanged briefs of arguments pursuant to the rules of Court. The Appellant in her brief submitted the following three issues as arising for determination, viz: 35

1. Whether the confessions of the 1st, 2nd and 3rd Respondents did not pass the test in *R. v. Sykes*.

2. Whether the learned trial Justice (sic) of the Court of Appeal was right to hold that Exhibit ‘G’ is hearsay and thus constitute no evidence.

3. Whether the failure by PW4 to record the statement of 1st Respondent in the language he made it occasioned any miscarriage of justice in this
5 case.

On behalf of the Respondents, the following two issues were submitted as arising for determination:

(a) Whether the grounds of Appeal are on questions of law alone, in which case the Appellant requires no leave and can come to this Court as of
10 right.

(b) Jurisdiction:

Whether the Supreme Court has jurisdiction to entertain the Appeal lodged by the Appellant having regards to the grounds of Appeal and section 231 (sic) of the 1979 Constitution.

15 When this appeal came up for hearing on 29th September, 1994, however, Ladi Williams, Esq. on behalf of the Respondents, moved his application of Preliminary Objection to strike out the appeal filed by the State against the acquittal of the Respondents.

In the absence of representation on Appellant’s behalf to present an
20 oral argument, if any at the hearing, we invoked the provisions of Order 6 Rule 8(7) of the Supreme Court Rules, 1985, to regard her argument as having been duly made. See *Ogbu v. Urum* (1981) 4 S.C 1 at page 8.

As both issues submitted at the instance of the Respondents and moved by their counsel, Ladi Williams, Esq. strike at the very root of the
25 appeal, to wit, that my ruling on them will be decisive of the matter one way or the other, I humbly adopt them in my consideration of the arguments proffered in dealing with the Preliminary Objection raised and herein upheld.

Issue 1

A careful look at the two grounds of appeal I had herein set out which
30 allege error in law and misdirection, coupled with the concession off the Appellant in her brief to which I will advert shortly, although on the outward portray grounds of law, they disclose at best, ground of mixed law and facts. They do not, in my respectful view, therefore disclose questions of law alone. As had been held by this Court on numerous occasions in numerous cases,
35 christening a ground of fact or of mixed law and fact as a ground of law does not ipso facto convert such a ground into a ground of law. See *Ogbechie v. Onochie* (1986) 2 NWLR (Part 23) 484; *Nwadike v. Ibekwe* (1987) 4 NWLR (Part 67) 718 and *S.U. Ojemen & ors. v. His Highness Williams O. Momodu & ors.* (1983) 3 S.C. 173 at 211. Thus, in *Ogbechie v. Onochie* (supra) this

Court (per Eso, J.S.C.) stated at page 491:

“There is no doubt that it is always difficult to distinguish a ground of law from a ground of fact but what is required is to examine thoroughly the grounds of Appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law to the facts already proved or admitted, in which case it would be a question of law, or one that would require questioning the evaluation of facts by the lower tribunal before the application of the law in which case it would amount to a question of mixed law and fact. The issue of pure fact is easier to determine”

and in the latest case of Nigeria National Supply Co. Ltd. v. Establishment Sima of Vaduz (1990) 7 NWLR (Part 164) 526, Nnaemeka-Agu, J.S.C. observed at page 548 thus:

“It is recognised that the line of division between a ground of law simpliciter and one of mixed law and facts is very thin. But it is equally accepted that in the decision whether a ground of appeal is one of law alone or mixed law and fact, the court ought to be guarded by a number of considerations, including:

(i) that it does not matter whether the appellant called his grounds of appeal that of law, fact, or mixed law, and fact; what the Court ought to do is read the particular ground together with its particulars if any, as a whole: See Ogbechie v. Onochie (1986) 2 NWLR (PART 23) 484; (1986) 2 SC 54; also Nwadike v. Ibekwe (1987) 2 N.S.C.C. 1219 at 1232 and 1238; (1987) 4 NWLR (PART 67) 718.

(ii) Where it raises an issue of law based on accepted undisputed or admitted facts or on facts as found by the court below it is a ground of law; but where it is based on facts in dispute, or unascertained, it is one of mixed law and facts.”

It is my firm view that as the two grounds of appeal are mixed law and facts and as the Appellant obtained no leave before appealing, the Appeal lacks constitutional validity and it is accordingly declared incompetent.

Issue 2

On Issue 2 relating to the jurisdiction of this Court to entertain the Appeal lodged by the Appellant, it is pertinent to set out the relevant section of the Constitution of the Federal Republic of Nigeria, 1979 (hereinafter referred to shortly as the Constitution). Section 213 (ibid) (not section 231 as set out in the brief of the Respondents) relevantly provides as follows:-

213 (1) The Supreme Court shall have jurisdiction to the exclusion of any other court of law in Nigeria to hear and determine appeals from the

Court of Appeal.

(2) *An appeal shall lie from decision of the Court of Appeal to the Supreme Court as of right in the following cases:*

(a) *Where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceedings before the Court of Appeal,*

- 5 (a).....
- (b).....

 (d) *decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of*
10 *Appeal has affirmed a sentence of death imposed by any other court;*

 (3) *Subject to the provisions of sub-section(2) of this section an appeal shall lie from the decision of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court.*

[Underlining is mine for emphasis]

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From sub-section 2 of Section 213 of the 1979 Constitution set out above, it is patently clear that an appeal operates only where any person has been sentenced to death by the Court of Appeal or in which the Court of
20 Appeal affirmed a sentence of death imposed by any other court. That situation with the case in hand contrasts with sub-section 3 of section 213 (ibid) where an appeal shall lie from the decision of the Court of Appeal to the Supreme Court with the leave of either the Court of Appeal or that of this Court. See Nafiu Rabi v. The State (1980)11 S.C. 130 where this Court consid-
25 ered the 25 provisions of sections 220 and 221 of the Constitution. Prior leave of the Court of Appeal or that of this Court not having first been sought and obtained, there is a clear breach of the mandatory provisions of the Constitution which thereby renders the appeal incompetent. Had the respondents been sentenced to death by the Court of Appeal (e.g. one involving the rever-
30 sal of the decision of the High Court which earlier acquitted and discharged them) or had the Court of Appeal affirmed the death sentence passed by the High Court on the Respondent, by the provisions of section 213 (2)(a) to (d) of the Constitution, the Appellant would not require leave to appeal, provided the appeal was lodged within 30 days of the delivery of the judgment or time
35 is extended within which to appeal. See Hakido Kpema v. State (1986) 1 NWLR (Part 17) 396 and Oteki v. A-G, Bendel State (1986) NSCC 538. Besides, since the learned D.P.P. for the Appellant in her brief had conceded that the two grounds of appeal filed by her involve issues of law and fact, an appeal cannot lie as of right. She also conceded that since the Case is one of acquittal against

the death sentence and the Judgment of the Court below was delivered on 30th June, 1993, the prosecutor's time within which to appeal has run out. After placing reliance on section 4(3) of the Judicial etc. Officers and Appeals by Prosecutors Act, No. 10 of 1963 the learned D.P.P appealed to this court's sentiment by asking it to have a dispassionate consideration of the facts 5 involved herein, motivated by representations from relations of the deceased. She urged us therefore to afford the prosecution leave to appeal against the judgment of the court below in order to mete out punishment to the Respondents for a despicable offence.

This Court's decision in *Paul Adili v. The State* (1989) 2 NWLR (Part 10 103) 305, a case which is virtually on all fours with the one in hand and cited by the learned D.P.P. to us, is instructive and illuminating. The facts of that case were that an application was made at the instance of the Applicant/accused for an order striking out or dismissing the appeal filed by the State against his acquittal. The Appellant's acquittal for murder by the trial Court was set aside 15 by the Court of Appeal in a decision given on 28th day of April, 1988. The state then filed a Notice of Appeal against the judgment. The Notice of Appeal was filed on 22nd July, 1988, a period of 83 days after the Court of Appeal's decision was delivered. The Applicant/accused then filed a Notice of preliminary objection in the Supreme Court praying it that the appeal be struck out or 20 dismissed on grounds inter-alia - .

(a) that being a purported appeal against an acquittal of the respondent by the Court of Appeal in a murder trial, no leave was obtained by the State to appeal to the Supreme Court pursuant to Section 213(2)(d) and 231(3) 25 of the 1979 Constitution.

(b) that the statutory period of 30 days within which to appeal in a murder case had long expired before the purported Notice of Appeal was filed by the State contrary to section 31(2)(6) and 31(4) of the Supreme Court Act, No.12 of 1960. 30

This Court unanimously upheld the preliminary objection and proceeded to strike out the appeal. I find no reason to deviate this sound decision except to add that the limitation of 7 days imposed by the Judicial etc. Officers and Appeal by Prosecutors Act, No. 10 of 1963 by its sub-section thereof, about which Nnaemeka-Agu, JSC in *Adili* (supra) at pages 329-330 of the 35 Report in relation to the need for extension of time had admonished an amendment, has now ceased to be the applicable law. By virtue of section 27 of the Supreme Court Act, 1960 Cap. 424 (formerly section 31 of the Supreme Court Act 1960) now set out in the Revised Laws of the Federation of Nigeria, 1990

Vol. XXII in sub-section (4), the periods for appealing may now be extended at the instance of the prosecutor by the court at the latter’s discretion.

On the Prosecutor’s appeal to sentiments, it is enough to say here that this Court had since held in Ezeugo v. Ohanyere (1978) 6 & 7 S.C. 171 at page 5 184 that -

“Sentiments command no place in judicial deliberations, for if it did, our task would be infinitely more difficult and less beneficial to the society.”

As the age-old judicial adage goes, it is better that ninety-nine criminals be set free, than to convict one innocent person.

It was for the above reasons and those contained in the Reasons for judgment of my learned brother Wali, J .S.C., that I struck out this appeal as incompetent on the 29th day of September, 1994.

ADIO JSC

When this appeal came up for hearing on the 29th September, 1994, there was a preliminary, objection raised by the learned counsel for the respondent on the competence of the appeal. The issue really was that the appeal was not on ground of law alone and no leave to file the appeal had been obtained. The preliminary objection was upheld by this court. The appeal was struck out and we indicated that we would give our reasons later.

I have had the privilege of reading the reasons given by my learned brother, Wali, J.S.C., for striking out the appeal and I entirely agree with them. I adopt them as mine and I have nothing to add.