

SUPREME COURT OF NIGERIA
16TH DECEMBER 1994. SC. 156/ 1993
CORAM:- M. L. UWAIS, A. B. WALI, M. E. OGUNDARE,
U. MOHAMMED, Y. O. ADIO, JJSC

EDET OFFIONG EKPE APPELLANT

V.

THE STATE RESPONDENT

CRIMINAL LAW - *Defences of provocation and self defence - Whether available to the appellant - In a charge of murder.*

CRIMINAL PROCEDURE - *Extra judicial statement - Retraction therefrom - Whether it has any effect on appellant's conviction.*

CRIMINAL PROCEDURE - *Murder - No denial of incident resulting in death by appellant - Appellant's version of the evidence - Whether rightly rejected by the trial court.*

EVIDENCE - *Retraction from extra judicial statement - Whether it has any effect on the overwhelming evidence against appellant.*

FACTS

The deceased, sent his daughter to a nearby store at night, to buy some foodstuffs. On her way back, she met the Appellant who used her lantern in lightening his own, and invited the girl to come into his room to collect her lantern. On doing so, Appellant held her and said he would have sexual intercourse with her. The girl raised an alarm which led to the eventual arrival of her father (deceased) and brother to the scene. They had the girl shouting in the Appellant's room. The deceased knocked on the door. Appellant opened the door, hit the deceased with a broken bottle on the head, and also used a piece of scantling in hitting him several times on the

head. The deceased died before he was taken to the hospital.

The Appellant was charged with murder before the Cross River State High Court. The Appellant denied the charge and presented a different story about the incident. Appellant retracted from his extra-judicial statement to the Police. The defences of provocation and self-defence were raised for the Appellant. The trial court disbelieved Appellant's version of the incident, convicted and sentenced him to death. Appellant's appeal to the Court of Appeal was dismissed. Being dissatisfied, Appellant has further appealed to the Supreme Court to determine whether the prosecution has proved its case beyond reasonable doubt. And as a corollary whether the Appellant's version of the events can be dismissed without proper investigation.

HELD (Unanimously dismissing the appeal per lead judgment of **MOHAMMED JSC**)

Murder - Rejection of appellant's evidence

1. The evidence adduced by the prosecution, in this case, is without any clouds. The appellant did not deny the incident which resulted in the death of the deceased. His version was that when he was being attacked he defended himself and hit someone with an empty bottle. He told the trial court that those who attacked him went out and later came back and began to attack the person they saw on the ground who, unknown to them, was the deceased. The learned trial judge, rightly, rejected that defence. In fact it was a useless defence because in the same evidence he said that when Nkoyo Dickson Udoh, Udo Udo Jonah and Asuquo Dickson Udo returned and began to beat the person on the ground, he was not there. He said, "they then began to wonder how I got out and walked up to the store." (P. 170 L 21)

Retraction from extra judicial statement

2. In his evidence before the court the appellant fell short of repeating the confession he made to the Police wherein he said that he hit one of those who attacked him with an empty bottle. His retraction from the extra-judicial Statement which he made earlier did not have any effect on the overwhelming evidence against him that he hit Dickson Udoh with a bottle on the head which resulted to his death. (P. 171 L 27)

Defences of provocation and self defence

3. The learned trial judge painstakingly considered all the defence viz, provocation and self-defence, put up by the appellant in trying to find an excuse for his fatal attack on the deceased and, quite rightly, rejected them. The Court of Appeal also referred to those defences and agreed that the trial court was right in rejecting them. The appellant's infliction of fatal violence with an empty bottle on the head of the deceased leaves no one in doubt that both defences of provocation and self-defence cannot bail him out of the offences charged. (P. 171 L 27)

NOTABLE POINTS OF INTEREST**MOHAMMED JSC*****1. Duty of proving prosecution's failure to establish its case***

It is always simple in arguing a criminal appeal to assert that the prosecution had failed to prove the case beyond reasonable doubt. If an appellant asserts that the prosecution has failed to prove the prisoner's guilt beyond all reasonable doubt before conviction, it is for him to establish that it is so and it is the duty of an appeal court to examine the assertion against the whole background of the case, and in particular against the evidence leading to the guilt of the appellant (P. 169 L 10)

2. Standard of proof required in criminal prosecution

In considering the standard of proof required in criminal prosecution the golden rule enunciated by the House of Lords in *Woolmington v. The Director of Public Prosecution*. (1935) 25 Criminal Appeal Reports 72, should always be the guide. If at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether the offence was committed by him, the prosecution has not made out the case and the prisoner is entitled to an acquittal. (P. 169 L 35)

WALI JSC***3. Whether appellant was rightly convicted for murder***

The evidence adduced by the prosecution, including the retracted

confessional statement of the appellant - "Exhibits 4 - 4A" leaves no room for doubt that it was the premeditated acts of the appellant that caused the instantaneous death of the deceased. Both the issues of provocation, self-defence and accident were considered and rightly rejected by the learned trial judge. The Court of Appeal was equally
 5 right in dismissing the appeal. The evidence against the appellant is cogent and overwhelming. The concurrent findings of the two lower courts are unimpeachable and give no room for interference (P. 172 L 18)

10 **REPRESENTATION**

Seyi Sowemimo for the Appellant
 Respondent not represented.

15 **CASES REFERRED TO**

- Oteki v. State (1986) All N.L.R. Part 371 Page 37
 State v. Akpabio (1993) 4 N.W.L.R. Part 286 page 204 at 224 v.
 Woolmington v. The Director of Public Prosecutions (1935) 25 CAR
 72
 20 Oladejo v. The State (1987) 3 N.W.L.R. (Pt. 6) 419
 Egboghonome v. The State (1993) 7 N.W.L.R. (pt. 306) 388.
 Nwangbomu v. The State (1994) 2 N.W.L.R. (pt. 327) 380
 Adio v. The State (1986) 2 N.W.L.R. (pt. 24) 581 at 589
 25 Onyejekwe v. The State (1992) 4 S.C.R. (pt. 1)19

RULES REFERRED TO

Supreme Court Rules 0.6 r 8 (5), (7) & (8)

30 **LEAD JUDGMENT BY MOHAMMED JSC**

This appeal is from the decision of the Court of Appeal, Enugu Division, affirming the conviction of the appellant for the offence of murder, contrary to section 319(1) of the Criminal Code. The appellant was sentenced to death by Ecoma, J. (as he then was) of Cross
 35 River State High Court.

The incident leading to the conviction of the appellant happened on 15th April 1983. at Ikot Asuquo Affiong Aye village, in

Akpabuyo, within the Calabar Judicial Division. The deceased, Dickson Udo, sent his daughter, Nkoyo Dickson Udo, to a nearby store to buy some foodstuffs. As it was already dark the girl went with a lantern to the store. On her way back she met the appellant who asked her to allow him light his lantern with her own.

The girl gave him the lantern and after he had lit his own he 5 invited the girl to come into his room to collect her lantern. On coming into the room the appellant held her and told her that he would have sexual intercourse with her. She raised an alarm and one Udo Udo Jonah, who earlier saw the girl outside the house of the appellant, came to her rescue. He knocked at the door of the appellant's 10 room but it was locked. He then ran and reported to one Edet Bassey. A small boy Nnana, who heard the girl shouting went and reported the matter to her father, Dickson Udoh.

Dickson Udoh and his son, Asuquo Okon Dickson, ran to 15 the scene. On arrival they heard the girl shouting in the room of the appellant. Dickson Udoh knocked at the door and, when appellant opened, he hit him (Dickson Udoh) with a broken bottle on the head. The father of the girl fell down. The appellant picked a piece of scantling and hit him several times on the head. Dickson Udoh died 20 before he was taken to hospital.

The appellant gave a different story of the incident. He said that Nkoyo Dickson was his girl friend and that he had given her N10.00 earlier on that day.

He testified in court and said that the girl came on her own 25 to visit him and told him that she was going to a store. He later followed her and they came back to his house together. He then had sexual intercourse with her in his room. It was after they had finished that he heard a knock on his door. He did not open because the person knocking did not speak. 30

After a while he saw rays of light in his compound and when he opened the door he saw Udo Udo Jonah, Asuquo Dickson Udoh and the deceased standing by his door. The deceased attacked him and hit him with a lantern. He went into the room and the three 35 people followed in and began to beat him. It was in the process that he picked a bottle and hit one of them. They went out and later came back again. They saw one person on the ground and began to beat him, not knowing that the person was the deceased.

The learned trial Judge evaluated the evidence adduced and disbe-

lieved the version of the incident put up by the appellant. He convicted the appellant of murder and sentenced him to death. Dissatisfied with the said decision, the appellant appealed to the Court of Appeal, which, in dismissing the appeal, affirmed the conviction and sentence passed on him by the trial court. He has now come to this Court.

On 22nd September, 1994, when this appeal was called for hearing it became clear that only the appellant had filed his brief. The respondent did not, in spite of proof of service of appellant's brief on the Cross River State Ministry of Justice. The provision of Order 6, Rule 8 (5), (7) and (8) of the Supreme Court Rules makes it abundantly clear that, save with the leave of the court, a party who fails to file his brief will not be permitted to present his oral argument in support of his appeal. Consequently, when an appeal is called and it is discovered that a brief has been filed for only one of the parties, the appeal shall be argued on that brief.

In the case in hand, Mr. Seyi Sowemimo, learned Counsel for the appellant, filed appellant's brief on 23rd December, 1993, and had it served on the respondent. Up to 22nd September, 1994, the date fixed for hearing of this appeal, the respondent did not file brief on behalf of the State. We therefore permitted Mr. Sowemimo to make his oral submission in support of the appeal. The question raised for the determination of this appeal is whether the prosecution had proved their case beyond reasonable doubt, and as a corollary to this issue is the question whether the appellant's version of the events can be dismissed without proper investigation.

It is clear from the issue raised for the determination of this appeal that the core of the appellant's argument centred on standard of proof required in criminal cases. Counsel argued that if at the close of a criminal trial, the evidence put before the court is such, that the mind of the court is thrown into a state of uncertainty as to the true circumstances in which the crime imputed to the prisoner occurred and in particular whether the accused committed the crime, then it can be said that a reasonable doubt exists and the required standard had not been met. He referred to *State v. Akpabio* (1993) 4 NWLR (Pt.286) 204 at 224.

Mr. Sowemimo thereafter argued that both at the trial court and the Court of Appeal, the conviction of the appellant rested essentially on the preference for the evidence of PW.1, PW.4 and PW.5

against that of the accused. In accepting the testimony of these prosecution witnesses, due consideration was not given to the evidence of the appellant. Counsel then attacked the finding of the learned trial Judge where he said:-

"Although, he hit someone and not necessarily the deceased. I think the criminal responsibility would be the same. Thus, it seems to me that whichever way one looks at it, one would find that it was the act of the accused that killed the deceased."

It is always simple in arguing a criminal appeal to assert that the prosecution had failed to prove the case beyond reasonable doubt. If an appellant asserts that the prosecution has failed to prove the prisoner's guilt beyond all reasonable doubt before conviction. It is for him to establish that it is so and it is the duty of an appeal court to examine the assertion against the whole background of the case, and in particular against the evidence leading to the guilt of the appellant. In the case of *Oteki v. A-G., Bendel* (1986) 2 NWLR (Pt.24) 648 at 657, paras. C-D: (1986) All NLR 378, Uwais J.S.C. had the following to say on the issue of Burden of Proof:-

"It can be seen from the forgoing that the issues raised in the appeal concern mainly the evaluation of the totality of the evidence before the learned trial Judge. It is indeed within the trial Judge's province to do so. In a criminal case the prosecution has a duty to prove its case beyond reasonable doubt. This duty has, first of all to be discharged by the prosecution by making at least a prima facie case against the accused at the close of its case. If it failed to establish such a case the accused is entitled to be discharged without being called upon to enter his defence. There is no corresponding duty on the accused to prove his innocence unless the prosecution has made such a case against him. In my opinion, there is, therefore, nothing wrong with the trial Judge assessing the prosecution's case first and making findings of fact before considering and evaluating the appellant's defence. What the trial court was concerned with was the proof of the prosecution's case beyond reasonable doubt and not the lesser standard of proof in civil cases which is based on the weight of evidence or the balance of probabilities."

In considering the standard of proof required in criminal prosecution the golden rule enunciated by the House of Lords in *Woolmington v. The Director of Public Prosecutions* (1935) A.C. 462; (1935) 25 Criminal Appeal Reports 72, should always be the guide. If at the end of and on the whole of the case, there is reasonable doubt, created by the evi-

dence given either by the prosecution or the prisoner, as to whether the offence was committed by him, the prosecution has not made out the case and the prisoner is entitled to an acquittal.

I have given the brief facts of this case at the beginning of this judgment. It is relevant therefore to consider whether the court below had considered the argument of the appellant that the case against him had not been proved beyond reasonable doubt. The learned justice of the Court of Appeal, Akintan, J.C.A. who delivered the lead judgment of the court referred to the finding of the learned trial Judge and said that the court was right to reject the conflicting evidence adduced by the accused in his defence Akintan, J.C.A. went further and observed thus:

"The learned trial Judge definitely considered and rejected the defences of self-defence and provocation in the course of his judgment. The facts relied on in the appellant's brief are those given in the accused's evidence at the trial. The Court rejected the defence put across at the trial and accepted the version put forward by the prosecution. As already stated above the evidence given by the appellant at the trial was inconsistent with his statement to the police. The Court was therefore right in rejecting the appellant's version of the incident."

The evidence adduced by the prosecution, in this case, is without any clouds. The appellant did not deny the incident which resulted in the death of the deceased. His version was that when he was being attacked he defended and hit someone with an empty bottle. He told the trial court that those who attacked him went out and later came back and began to attack the person they saw on the ground who, unknown to them, was the deceased. The learned trial Judge, rightly, rejected that defence. In fact it was a useless defence because in the same evidence he said that when Nkoyo Dickson Udoh, Udo Udo Jonah and Asuquo Dickson Udo returned and began to beat the person on the ground, he was not there. He said:-

"they then began to wonder how I got out and walked up to the store."

Learned counsel for the appellant made spirited effort to show that the appellant had retracted from the confession he made to the police wherein he stated after his arrest that he beat the deceased with a bottle on his head and that the deceased fell down on the ground in his house. A number of cases have been decided in this court on the issue of extra-judicial statement which a witness has made and which is inconsistent with his testimony at the trial. In *Oladejo v. The State*

(1987) 3 NWLR (Pt.61) 419, Nnamani, J.S.C. stated as follows:

"Where a witness (here an accused person) makes a statement which is inconsistent with his testimony, such testimony is to be treated as unreliable while the statement is not regarded as evidence upon which the court can act."

This Court considered other decisions which were apparently inconsistent in their approach to the issue of confessions voluntarily made but later retracted during the trial. The matter was put to rest in a full court's decision in the case of Stanley Egboghomome v. The State (1993) 7 NWLR (Pt.306) 383. In over-ruling its earlier decision in Oladejo v. The State (supra) this court held that once a confessional statement is admitted in evidence it becomes part of the case for the prosecution. Having formed part of the case for the prosecution, the Judge is bound to consider its probative value when considering the retraction made subsequently.

This decision has been followed in the case of Nwanghomu v. The State (1994) 2 NWLR (Pt. 327) 380, Uwaifo, J.C.A. whose opinion was, coincidentally, accepted by this Court in Eghoghomome v. The State (supra) was expressing that very opinion, in his contribution to the lead judgment in this case, when he stated thus

"It is thus now no more in doubt that the statement to the police by an accused person and his evidence in court even though contradictory to the said statement or in retraction of it must both be considered. That is the only way the defence of an accused can be truly considered, no matter how stupid, contradictory or doubtful."

In his evidence before the court the appellant fell short of repeating the confession he made to the police wherein he said that he hit one of those who attacked him with an empty bottle. His retraction from the extra-judicial statement which he made earlier did not have any effect on the overwhelming evidence against him that he hit Dickson Udoh with a bottle on the head which resulted in his death. The learned trial Judge painstakingly considered all the defences viz, provocation and self-defence, put up by the appellant in trying to find an excuse for his fatal attack on the deceased and, quite rightly, rejected them. The Court of Appeal also referred to those defences and agreed that the trial court was right in rejecting them. The appellant's infliction of fatal violence with an empty bottle on the head of the deceased leaves no one in doubt that both defences of provocation and self-defence cannot bail him out of the offence

charged.

This appeal is without any merit at all and it is dismissed. The judgment of the Court of Appeal affirming the conviction and sentence passed on the appellant by the trial court is hereby affirmed.

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UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Mohammed, J.S.C. I agree that the appeal has no merit and that it should be dismissed. Accordingly the appeal is hereby dismissed and the decision of the Court of Appeal is affirmed.

WALI JSC

I have been privileged to read in advance, the lead judgment of my learned brother, Uthman Mohammed, J.S.C. and I entirely agree with it.

The evidence adduced by the prosecution, including the retracted confessional statement of the appellant - "Exhibits 4 - 4A leave no room for doubt that it was the premeditated acts of the appellant that caused the instantaneous death of the deceased. The learned trial Judge was right and justified to find on the evidence as follows:-

"In the instant case, there is the evidence of P.W.4 and P.W.5 which I believe that the accused hit the deceased with a bottle twice on the head. Thereafter, he proceeded to hit him with a piece of scantling. The accused said so too in both his statement to the Police - Exhibits 4 - 4A and in his evidence in court The testimony of P.W.3 who performed the post mortem examination on the body of the deceased revealed the nature of the injuries inflicted on the deceased. Such injuries, according to him, were such that could cause death and I had already so found. There can therefore be no doubt that from the facts in the instant case, there was an intent on the part of the accused to kill the deceased, or, at any rate, to cause him grievous bodily harm. As his act resulted in the death of the deceased, one can safely say he intended the former result to kill. Even if he had intended to cause grievous harm and as death has resulted the effect would be the same and he would be guilty of murder."

Both the issues of provocation, self-defence and accident were considered and rightly rejected by the learned trial Judge. The Court

of Appeal was equally right in dismissing the appeal.

The evidence against the appellant is cogent and overwhelming. The concurrent findings of the two lower courts are unimpeachable and give no room for interference. See *Amusa Opoola Adio & Anor. v. The State* (1986) 2 NWLR (Pt.24) 581 at 589 and *Onyejekwe v. The State* (1992) 3 NWLR (Pt.230) 444; (1992)4 SCR (Pt 1) 19. 5

The appeal lacks merit and it is accordingly dismissed. The judgments of the courts below are affirmed.

OGUNDARE JSC

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I have had the advantage of reading the judgment of my learned brother Mohammed J.S.C. I agree with his reasoning and conclusion which I hereby adopt as mine. I have nothing more to add. I too dismiss the appeal and affirm the conviction and sentence passed on the Appellant by the trial High Court. 15

ADIO JSC

I have had the privilege of reading, in draft, the judgment just read by my learned brother, Mohammed, J.S.C., and I agree that the appeal has no merit. 20

The totality of the evidence before the learned trial Judge showed that the prosecution proved the charged preferred against the appellant beyond reasonable doubt. The defence upon which the appellant relied was an after-thought and was not true. The court below was, therefore, justified in dismissing the appellant's appeal. 25

I too dismiss the appellant's appeal. The judgment of the court below affirming the conviction of the appellant and the sentence passed on him is hereby affirmed. 30

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