

SUPREME COURT OF NIGERIA
20TH JANUARY, 1995. SC. 57/94
CORAM: M.L. UWAI, A.B. WALI, I.L. KUTIGI,
U. MOHAMMED, A.I. IGUH, JJSC.

NSEABASI NSE OKON

..... APPELLANT

V.

THE STATE

..... RESPONDENT

APPEALS - Issue - Where not confined within the grounds of appeal - Whether competent.

CRIMINAL PROCEDURE - Conceding to appellant's guilt - By counsel assigned to him - When found to be based on legal and factual submissions.

CRIMINAL PROCEDURE - Conviction - Murder - Whether appellant was rightly convicted - By the two lower courts.

FACTS

The appellant accompanied the deceased inside the bush. The deceased went to cut fork-sticks which her mother will use in erecting a stall in their local market. Following a minor misunderstanding, appellant seized a matchet which the deceased was holding and used it to hack her to death. Appellant was arraigned before the Akwa-Ibom State High Court for the offence of murder.

The trial court convicted the appellant as charged and sentenced him to death. Appellant's appeal to the Court of Appeal was dismissed. Appellant has further appealed to the Supreme Court to determine whether the court below rightly assigned counsel to prosecute the appeal and whether counsel could concede to appellant's conviction without being so instructed.

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

Issues not confined within grounds of appeal

1. Issues 1 and 3 are incompetent because an issue formulated for the

determination of appeal must fall and be confined within the grounds of appeal. Since grounds 1 and 2 from which issues 1 and 3 had been raised are incompetent the issues too cannot be considered and accordingly they are struck out. (p. 246B)

Counsel conceding to appellant's guilt

2. Dr. Okereke made both legal and factual submissions having regard to the evidence adduced before the learned trial judge and stated that on a critical analysis of the facts and the evidence adduced before the trial court he was in total agreement with the findings of the trial court. The learned counsel considered the confessional statement made by the appellant and the overwhelming circumstantial evidence which pointed to his guilt and concluded that he had nothing to urge in favour of the appellant. (p. 247 H)

Whether appellant was rightly convicted

3. After going through the proceedings before the trial court and the Court of Appeal, I am of firm view that Dr. Okereke is right that the appellant's trial was fair and that he had been rightly convicted.

In the result, the Court of Appeal is right to dismiss the appeal. This appeal therefore fails and it is dismissed. (p. 248 B)

NOTABLE POINTS OF INTEREST

IGUH JSC

1. Assigning Counsel in capital offences

Where, therefore, the offence charge involves capital punishment on conviction and the accused person is not defended by a legal practitioner, the court under section 352 of the Criminal Procedure Act is enjoined and, indeed, bound to assign a legal practitioner for his defence. The assignment of counsel by the court to an accused person in capital offence only arises when such an accused person is unable, or has abandoned his right to brief a legal practitioner or has own choice to conduct his defence. The reason is because it is mandatory that an accused person shall be defended by a legal practitioner throughout his trial for an offence which involves capital punishment. (250 B)

2. Consent of accused before assigning counsel

I think I should add that this duty imposed on the court to assign counsel to defend an accused person who is unable to brief a legal practitioner for his

defence in a capital offence does not, in my view, call for or require the consent of or any consultations with such an accused person before the same may be discharged. (p. 250 C)

3. Assigned counsel is in the best interest of accused

It seems to me plain that both the court of first instance and the Court of Appeal were entitled in the circumstances of this case to assign counsel to defend the appellant, that no consultation with the appellant was necessary for both courts to exercise this duty imposed on them by the law and that the said duty was exercised by the two courts in the best interest of the appellant. (p. 250 G)

REPRESENTATION

Kanu G. Agabi for the appellants

Mrs. A.E. Ekpo DDPP, Ministry of Justice Akwa-Ibom State for the respondents.

CASES REFERRED TO

Adio v. The state (1986) 2 NWLR (Part 24) 581 at 587

Ogunlade v. Adeleye (1992) 8 NWLR (Part 260) 409 at 420

Aja v. Okoro (1991) 7 NWLR (Part 203) 360

R. v. Uzorukwu (1958) 2 F.S.C 14

STATUTES REFERRED TO

Criminal code S. 319 (1)

Constitution of The Fed. Rep. of Nig. 1979 ss 213 (1), 33(6)(c)

Criminal procedure Act. 3. 352

LEAD JUDGEMENT BY MUHAMMED JSC

The Court of Appeal, Enugu Division, dismissed the appellant's appeal and affirmed the conviction and sentence of death passed on him by Nkop. J. of the High Court of Akwa-Ibom State for the offence of murder, contrary to section 19(1) of the Criminal Code.

At the trial the prosecution adduced evidence to show that the appellant used to frequent the house of PW.1. Mr Essien Eyo Akpan; in order to meet his girl friend, Atim. Atim was the daughter of PW .1. Both Mr Akpan and Atim's mother did not approve of the relationship and had warned the appellant not to come to their house for Atim.

On the fateful day, the 28th of July, 1986, the appellant visited

the house of Mr. Akpan when both parents of Atim were away. Atim also followed her mother to the market. The appellant met three children of Mr. Akpan in the house. The children were. Mary Essien Eyo, the deceased. Comfort, a girl aged 12 who testified at the trial as P.W.2 and the girl's brother, Dennis. When Dennis left the house, the appellant moved to the B backyard and met some of the children eating. He saw Mary Essien Eyo going out to the bush to cut fork-sticks which her mother wanted to use for erecting a stall in their local market. The appellant accompanied the deceased, and not long after the two had gone into the hush, following a minor misunderstanding, the appellant seized, a matchet which the de- C ceased was holding and used it to hack her to death.

The learned trial Judge, after considering the evidence adduced by the prosecution and the defence put up, convicted the appellant of the offence of murder and sentenced him to death. On appeal to the Court of Appeal, learned counsel for the appellant made the following submission:

D *"With the greatest responsibility. I have had to read through the records several times to see whether there is any way I can fault the evidence admitted or the judgment. After many anxious moments. I am professionally bound to say that I see nothing to urge your Lordship (sic) in their appeal"*

E All the same, the Court of Appeal considered all the issues raised in the appeal and dismissed it. It is against that decision that the appellant has now appealed to this Court. Learned counsel for the appellant, Mr. Kanu Agabi, filed three amended grounds of appeal. This appeal hinges on the way those grounds were couched and the issues raised against them. It F is pertinent therefore to reproduce them in full:

"1) The learned trial Judge erred in law when he ordered that Counsel be arranged for the appellant.

PARTICULARS OF ERROR:

G *a) It was not evident that the appellant was indigent or required such representation or could not defend himself.*

b) There is no power in the Court to assign or impose counsel without reference to an accused or without prior consultation with him.

H *c) There was no criteria for the choice of counsel nor was it apparent that the choice was dictated by the best interest of the appellant.*

2) The learned trial Judge erred in law when he held that the Statement alleged to be the confessional statement of the appellant was corroborated by:-

i) the evidence of P.W.2 that the appellant and the deceased went out together.

ii) the fact that the injuries which caused the death of the deceased were identical with those described by the appellant in the confessional statement.

iii) the verification of the confession by a Superior Police Officer.

B

Particulars of Error

a) The evidence of P.W.2 itself required to be corroborated and was not.

C

b) The Police had themselves seen the corpse before obtaining the "confession" and could quite easily substitute their description of the injuries for that of the appellant if they were minded to obtain a confession by all means as alleged by the appellant.

c) Verification of a Statement by a Police Officer does not amount to corroboration of it.

D

3) The learned Justices of the Court of Appeal erred in law when they assigned counsel to prosecute the appellant's appeal to that court in violation of the appellant's right to prosecute his appeal either by himself or by counsel of his own choice; and counsel so chosen exceeded the bounds of E duty when in a capital offence he made fundamental concession without being so instructed and without consulting the appellant."

Three issues were raised by the learned counsel for the determination of this appeal. Respondent' counsel. Mrs. Ekpo Deputy Director of Public Prosecutions, Ministry of Justice, Akwa Ibom State adopted the F issues raised in the appellant's brief.

The issues are:

Issues for Determination

1) Whether the court of first instance was entitled to impose G counsel on the appellant or assign counsel to defend the appellant without consultation with him and if so, whether that power was exercised with due regard to the interest of the appellant.

2) Whether the lower court was entitled to assign counsel to prosecute the appeal in that court without consultation with the H appellant and if so, whether such counsel could concede without being so instructed.

3) Whether the confessional statement ascribed to the appellant was rightly admitted as such.

It is evident that grounds 1 and 2 are complaining about error in law made by the learned trial Judge. This court receives appeals from the Court of Appeal and not the High Court. See Section 213(1) of the Constitution of Nigeria. 1979. The two grounds of appeal are therefore incompetent. *Amusa Adio and Another v. The State* (1986) 2 NWLR (Pt.24) 581 at 587.

B Issues 1 and 3 are incompetent because an issue formulated for the determination of appeal must fall and be confined within the grounds of appeal. Since grounds 1 and 2 from which issues 1 and 3 had been raised are incompetent the issues too cannot be considered and accordingly they are struck out. This Court has made several decisions on issues not formulated on ground of appeal. See *David Ogunlade v. Ezekiel Adeleye* (1992) 8 NWLR (Pt. 260) 409 at 420; *Aja v. Okoro* (1991) 7 NWLR (Pt. 203) 260.

C Issue 2 has been formulated against ground 3. The issue is therefore competent and is questioning the power of the learned Justices of the Court of Appeal to assign counsel to prosecute the appeal of the appellant. Learned D counsel adopted the argument he submitted in support of issue 1 for the sake of this argument and made further submissions. It should be noted that issues 1 and 2 are inter-related and during the hearing of this appeal learned counsel conceded that the law permits courts to assign a legal representative to an accused who is charged with a capital offence. I shall E however, consider the argument of learned counsel in the appellant's brief for whatever it is worth. Mr. Agabi, referred to section (3)(6)(c) of 1979 Constitution which provides that:

"Every person who is charged with a criminal offence shall be entitled to defend himself in person or by legal practitioners of his own choice;" and submitted that in the instant case the appellant, if at all, defended himself by, a legal practitioner hut not one of his choice. Mr. Agabi went further and argued that had the legislature intended that the power be vested in the Court to assign counsel irrespective of the views of the accused, it would have said so. It is immaterial that when the court G ordered that counsel be assigned it was with a view to helping the accused. The Court cannot exercise a power which it does not have even if its motives are honest or beneficial.

We drew the attention of the counsel to the provisions of section 352 of the Criminal Procedure Act which reads:

H *"352. Where a person is accused of a capital offence the state shall, if practicable, be represented by a law officer, state counselor legal practitioner and if the accused is not defended by a legal practitioner the court shall, if practicable, assign a legal practitioner for his defence."*

Mr. Agabi is aware of this law, but he argued that the provision did

not negate from the accused person's Constitutional right to choose his own counsel. It seems that Mr. Agabi had not read the opening proceedings of the trial of the appellant before Arikpo.J. The proceedings were recorded thus:

"Accused person present.

Charge read and explained to the Accused in Ibibio who appears to understand same and pleads not guilty.

G. Christopher Esq .. for the State.

Accused in person.

Order: Case adjourned for mention on 1/7/87.

Legal aid Counsel to be arranged for the accused who is to be remanded in prison custody."

Thereafter a lawyer. Mr. A. E. Ekpenyong began to represent the appellant. The appellant who was present in Court throughout the trial had not objected to the appearance of Mr. Ekpenyong. And from the proceedings it is quite clear that Mr. Ekpenyong did his best. He cross-examined all the prosecution witnesses rigorously, helped the appellant to put up a spirited defence and at the close of the trial addressed the court over the evidence adduced before it. The learned counsel from the records had performed his assignment creditably. In *R. v. Uzorukwu* (1958) SCNLR 319; (1958) 3 FS.C. 14, this Court made the following pronouncement:

"We wish to make it known. However, that in our view no more important professional duty, and we emphasize the word "duty", falls to members of the Nigerian Bar than that of representing persons charged with murder and that once counsel accepts instruction in such a case he is expected to give it priority to all other engagements however important or lucrative they may be,"

It is pertinent therefore to look into the performance of Dr. E. E. J. Okereke, learned counsel who represented the appellant, at the Court of Appeal in order to ascertain whether he had put up what his professional duty expected him to do in a case of this nature. From the brief filed by the appellant in the Court of Appeal, learned counsel raised two issues for the determination of the appellant's appeal. Issue 1 was whether the circumstantial evidence was sufficient and cogent to link the accused with the murder in the absence of an eye witness. On issue 2, counsel questioned whether the trial court gave adequate consideration to the defences open to the accused in a murder trial.

Dr. Okereke made both legal and factual submissions having regard to the evidence adduced before the learned trial Judge and stated that

on a critical analysis of the facts and the evidence adduced before the trial

court he was in total agreement with the findings of the trial court. The learned counsel considered the confessional statement made by the appellant and the overwhelming circumstantial evidence which pointed to his guilt and concluded that he had nothing to urge in favour of the appellant.

After going through the proceedings before the trial court and the Court of Appeal, I am of firm view that Dr. Okereke is right that the appellant's trial was fair and that he has been rightly convicted.

In the result, the Court of Appeal is right to dismiss the appeal. This appeal therefore fails and it is dismissed. I affirm the judgment of the court below.

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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 too feel that the appeal has no merit. Accordingly it is hereby dismissed and the decision of the Court of Appeal is hereby affirmed.

WALI JSC

E I have seen and read in draft the judgment of my learned brother, Uthman Mohammed, JSC. and I agree with his reasoning and conclusion for dismissing the appeal.

The evidence adduced, considered and accepted by the two lower courts is overwhelming and justified the conclusions reached thereupon.

F The concurrent findings of the two lower courts are unimpeachable. I shall also therefore, like my learned brother Uthman Mohammed, J.S.C. dismiss this appeal for want of merit. It is accordingly dismissed.

The conviction and sentence of the appellant is further confirmed.

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KUTIGI JSC

I agree with the judgment just read by my learned brother Mohammed JSC, a preview of which I had. The appeal is dismissed. Conviction and sentence are affirmed.

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IGUH JSC

I have had the privilege of reading in draft the lead judgment just

delivered by my learned brother, Mohammed, JSC, and I agree with him that this appeal is without substance and should be dismissed.

The main issue raised on behalf of the appellant in this appeal is whether the two courts below were entitled to “assign” counsel to defend the appellant without consultation with him and if so, whether that power was exercised with due regard to the interest of the appellant. It is the argument of his learned counsel that however competent counsel may be, he should not be assigned to defend any accused person who does not require his services. It was also argued that however indigent an accused person may be, he should be consulted before counsel is assigned to defend him.

The point must be made that there is no absolute or unqualified power in any court to “assign” counsel to defend an accused person in all criminal cases. Section 33(6)(c) of the 1979 Constitution provides as follows:-

“Every person who is charged with a criminal offence shall be entitled to defend himself in person or by a Legal Practitioner of his own choice.”

Prima facie, therefore, section 36(6)(c) of the 1979 Constitution imposes on an accused person in a criminal trial the primary duty or obligation to defend himself in person, or brief counsel of his own choice to conduct his defence. In my view, the provision is intended to ensure, in the interest of justice, that an accused person in a criminal trial is not denied the right to be defended whether by himself or by a legal practitioner.

There is, however the provision of section 352 of the Criminal Procedure Act which stipulates as follows:-

“Where a person is accused of a capital offence, the State shall, if practicable, be represented by a law officer or legal practitioner and if the accused is not defended by a legal practitioner, the court shall, if practicable, assign a legal practitioner for his defence.”

Where, therefore, the offence charged involves capital punishment on conviction and the accused person is not defended by a legal practitioner, the court under section 352 of the Criminal Procedure Act is enjoined and, indeed, bound to assign a legal practitioner for his defence. The assignment of counsel by the court to

an accused person in capital offences only arises when such an accused person is unable, or, has abandoned his right to brief a legal practitioner of his own choice to conduct his defence. The reason is because it is mandatory that an accused
B person shall be defended by a legal practitioner throughout his trial for an offence which involves capital punishment. Consequently, where in such a trial. An accused person fails to brief counsel, the court shall assign one for his defence as he cannot be kept in custody indefinitely without trial because he does not have
C a legal practitioner of his own choice to conduct his defence. I think I should add that this duty imposed on the court to assign counsel to defend an accused person who is unable to brief a legal practitioner for his defence in a capital offence
D does not, in my view, call for or require the consent of or any consultations with such an accused person before the same may be discharged.

In the present case, the appellant who was standing
E trial for the offence of murder contrary to section 319(1) of the Criminal Code was initially unrepresented by counsel at his trial whereupon the court, as it was entitled to do, directed that the Legal Aid Council should be contacted to arrange his defence. Thereafter, A. E. Ekpenyong Esq. of counsel commenced to ap-
F pear for the appellant and defended him throughout his trial. He was also unrepresented before the Court of Appeal as a result of which that court was obliged to assign the appellant with counsel for the prosecution of his appeal. The appellant at no stage ob-
G jected to his representation by his two learned counsel who, from the record of proceedings, conducted the entire defence of the appellant conscientiously and creditably. It seems to me plain that both the court of first instance and the Court of Appeal were en-
H titled in the circumstances of this case to assign counsel to defend the appellant, that no consultation with the appellant was necessary for both courts to exercise this duty imposed on them by the law and that the said duty was exercised by the two courts in the best interest of the appellant.

It is for the above and the more elaborate reasons contained in the lead judgment of my learned brother. Mohammed, J.S.C. that I, too, hereby dismiss this appeal and affirm the decisions of the courts below.

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