

SUPREMECOURTOFNIGERIA
12THDECEMBER, 1995.SC. 163/1993
S.M.A.BELGORE,A.B. WALL,M.E. OGUNDARE,
E.O.OGWUEGBU,S.U. ONU,JJSC.

NWODE NKPUMA APPELLANT
AND	
THE STATE RESPONDENT

APPEALS - Grounds of appeal - Need to obtain leave - Before new grounds can be argued.

APPEALS - Issue of law - Can be raised by the Supreme Court suo motu - But where there is no reason to interfere with the lower courts' sentence of death - Appeal will be dismissed.

CRIMINAL PROCEDURE - Choice of counsel for the accused - Granted under s.33 (6) (c) of the Constitution - Whether denied.

FACTS

The appellant complained to his deceased uncle about stomach ailments. His uncle took him to a herbalist. When appellant came back, he inquired from his uncle why he abandoned him at the herbalist's place. Suspicious that his uncle wanted him insane so that he can continue sitting on the estate of the appellant's late father, the appellant went to the house of the PW1 and gave several matchet cuts to his uncle who died on the spot.

Appellants made a confessional statement to the Police. He gave a different evidence during the trial. The trial Abakaliki High Court found the appellant guilty of murder and sentenced him to death. Appellant's appeal to the court of Appeal was dismissed. Appellant has further appealed to the Supreme Court on 5 proposed new grounds of appeal but failed to obtain leave to argue the grounds.

HELD (Unanimously dismissing the appeal per Lead Judgment of **BELGORE JSC**)

Grounds of appeal

1. The grounds are completely on new matters and have been raised in the two courts below and no special leave was sought to file and argue them. By just simply averring that leave would be sought to file and argue certain grounds of appeal merely intimates the court of the intention of the party but that does

not manifest into the grounds being presumed filed. That is the purport of Order 6 rule 5(1) (c) Supreme Court Rules. The net result is that grounds not filed are incompetently in the Brief of Argument and go to nothing in this appeal. (p. 2123 C)

Choice of counsel for the accused

2. I think the issue of s.33(6)(c) of the Constitution of the Federal Republic of Nigeria 1979 implying the appellant had no counsel of his choice is too overblown. As I set out in the beginning of this judgment, the appellant on being first brought before me Court had the charge read and explained to him in the language he understood, and he understood the charge and pleaded not guilty. Trial Judge diligently gave instruction as to representation of the accused by counsel. The subsequent proceedings especially the hearing evidence was with full appearance of a competent counsel for the appellant and at no time did he raise question of representation by counsel or question of s.33(6)(c) of the Constitution as to interpretation of the proceeding (p. 2123 E)

Appeal - Issue of law

3. There is nothing precluding this Court from raising suo motu any issue of law not raised in the Courts below if the end of justice will thus be served. But in this case now on appeal I have no reason, on the whole written record, to disturb or interfere with the decision of Court of Appeal which upheld the trial Court's decision. I see no merit in this appeal and I accordingly dismiss it. (p. 2124 A)

REPRESENTATION

Yusuf O. Alli, for the Appellant

Chief Onyeabo Obi, D.P.P., Ministry of Justice, Enugu, for the Respondent

CASES REFERRED TO

R v. Onyemaizu (1958) NRNL 93

Uzodima vs. Commissioner of Police (1992) 3 NCLR 327-329

The State vs. Garba (1985) 6 NCLR 193

Asanya v. The State (1991) 3 NWLR (Pt. 180) 422 466-7

Akpan vs. The State (1991) 3 NWLR (Pt. 182) 646, 657

Gabriel v. The State (1989) 12 SCNJ 32

Gwonto v. The State (1982) 3 NCLR 312

Adio v. The State (1986) 2 NWLR (Part 24) 581

Enitan v. The State (1986) 3 NWLR (Part 30) 604

Abasi v. The State (1992) 4 NWLR (Part 260) 383

STATUTES & RULES REFERRED TO

Criminal Codes s. 319(1)

Constitution of the Federal Republic Nigeria 1979 s. 33(6) (c)

Supreme Court Rules 0.6 r. 5(l) (c)

LEAD JUDGMENT BY BELGORE JSC

The appellant was convicted and sentenced to death for the offence of murder under s. 319(1) of the Criminal Code Law (Cap. 30, Laws of Eastern Nigeria 1963 applicable to former Anambra State). The trial, at Abakaliki Judicial Division of High Court of Anambra State was before Offiah J and the accused person pleaded not guilty to the charge. When he was arraigned before the Court on 23rd day of February 1984 the following was recorded by learned trial judge:

Accused in Court. Umearokwu for the State. Charge is read and explained in Ibo to the accused who perfectly understands the same and pleads not guilty to the charge.

Court: Case referred to the Legal Aid Council c/o Ministry of Justice, Abakaliki. Legal Aid Council to arrange for legal representation of the accused. Registrar is to write accordingly. Proof of evidence to be forwarded to the Counsel."

A month later the Court started receiving evidence. The summary of the evidence is that on 26th March 1983 at Ugbo Nzashi Echara Ikwo, the appellant, Nwode Nkpuma, murdered his uncle Nweji Elom (hereinafter referred to as "the deceased") by inflicting on him several matchet wounds one of which virtually decapitated him. The accused had complained to the deceased of claim of certain stomach ailments whereby he was taken to a herbalist – referred to as native doctor - at Obeagu. The accused seemed not satisfied with the treatment and returned home feeling the deceased had abandoned him. He enquired from the deceased why he was so abandoned but the deceased never gave an answer. The deceased left for the house of Abba Ntेशi (P.W.I) a relation of both the appellant and the deceased. As he was settling down at P.W.I's house the appellant came in. P.W.I was an old man and about two years before this time had become blind but he could recognize persons by their voices as both the deceased and the appellant were relations of his and lived near each other. As P.W.I was discussing generally with the deceased the appellant came in and called out the deceased "Nweji, come out" P.W.I recognize distinctly the voice

of the appellant, because, as he said “*I knew it was Nwode Nkpuma’s voice that I heard.....because I live with them*” There followed a struggle with P. W.1 trying to separate the appellant and the deceased. In the struggle the deceased seemed to have picked a stick that the P. W.1 used in holding his door. But he heard the sound of matchet being used and finally somebody falling B down. He raised an alarm by shouting, “Ogbuekwaya”! “Ogbuekwaya”! Meaning “He has killed him. He has killed him”. The appellant ran away from the scene, and by the time Nweke Oke (P. W. 2) got to the scene after hearing the alarm raised by P.W.1. the appellant was no longer there but he saw the deceased on the ground with several matchet wounds and lying in a pool of his C own blood. A report was made to the Police and thereafter the medical officer (P. W. 6) performed the post mortem examination. The deceased apparently died on the spot. The autopsy found multiple deep cuts all over the deceased’s body e.g. on the left hand that almost severed the little and middle fingers, very deep one about 8 cm long across the right side of the face exposing the oval cavity, D multiple deep cuts in the chest well and finally” a very deep cut on the right side of the neck severing the neck but for a thin flap of skin.” All the wounds were inflicted by sharp object and he died of severe blood loss as a result of the multiple wounds.

The appellant made a voluntary statement to the police which he confirmed E before a superior police officer who read it to him. The statement was admitted as Exhibit A and it is very clear what the appellant complained about. The deceased, his uncle, must be responsible for his illness as wanted him insane so that he would not be able to ask him for the estate of his late father on which the deceased and his son sat. His two sisters we given out in marriage and the F dowries on them were collected by the deceased who never accounted to him. He also alleged that the deceased and his son chased him to the compound of P. W. 1 and he therefore picked his and inflicted a cut on the deceased’s shoulder, whereby he fell. He that the deceased also inflicted a wound on him with a knife. However, his evidence in Court he abandoned the claim that the G deceased and his chased him to Abba Ntेशi’s house but that he found the deceased in house. He then narrated how the deceased tried to attack him with a and a stick leading to a struggle in which he succeeded in wrestling matchet from the deceased before he gave him a cut.

H The learned trial judge, in a judgment that reviewed the evidence made findings came to the conclusion that the case for the prosecution been proved beyond reasonable doubt and that the evidence of the defence could not be believed. He therefore found him guilty of murder and sentenced him to death.

The appeal to the Court of Appeal was dismissed as the counsel for the appellant, after summarizing the evidence had nothing to urge in favour of the appellant. Thus the appeal to this Court. It must be pointed out, however, that both the trial Court and the Court of Appeal found no substance in the defence of either self defence or provocation because the evidence before the trial Court pointed to the appellant as the aggressor. At any rate, the injuries inflicted on the deceased that caused his death were completely disproportionate to any imagined provocation. (R vs. Onyemaizu (1958)NRNLR 93)

On appeal to this Court, learned counsel for the appellant in his brief of argument wrote as follows:

"In the same vein leave to argue the following additional grounds of appeal shall be sought at the hearing, that is:

ADDITIONAL GROUNDS OF APPEAL

1. The Learned Justices of the Court of Appeal erred in law by affirming the decision of the trial court which convicted the appellant of the offence of murder when the arraignment and trial of the appellant was unconstitutional and therefore a nullity.

PARTICULARS

(i) The appellant was arraigned before the trial court on 23rd February, 1984 without a Counsel of his choice contrary to the provisions of Section 33(6) (c) of the Constitution of the Federal Republic of Nigeria, 1979.

(ii) There was failure to interpret the charge to the appellant before he pleaded to same as required by Section 33(6) (e) of the Constitution of the Federal Republic of Nigeria, 1979.

(iii) There was a total failure of justice and a grave miscarriage of justice against the appellant.

(iv) The provisions of the Constitution on the right to Counsel and interpretation of the proceedings are mandatory and inviolate.

(v) Proper arraignment of an accused is a condition precedent to a valid trial and exercise of jurisdiction by the trial Court.

2. The learned Justices of the Court of Appeal erred in law when they affirmed the decision of the trial Court convicting the appellant of the offence of murder when there was no observance of the mandatory provisions of section 215 of the Criminal Procedure Act and decided authorities thereby rendering the trial and conviction of the appellant confirmed by the Court below a nullity.

PARTICULARS

(i) There was non-compliance with the mandatory provisions of Section 215 the Criminal Procedure Act.

(ii) The non-compliance renders the whole trial a brutum fulmen.

(iii) The non-compliance was not an irregularity but a failure of a condition precedent to the lawful trial of the appellant.

(iv) The appellant was prejudiced and a grave miscarriage of justice B ensured against the appellant.

(v) The welter of authorities from this court makes the arraignment herewith to be fundamentally defective.

3. The learned Justices of the Court of Appeal erred in law in affirming the decision of the trial court by holding that the trial court considered adequately C all the defences open to the appellant when from the circumstances such was not the case.

PARTICULARS

(i) The trial court did not consider adequately the defences of self-defence and provocation that were apparent from the pre-trial statement of the appellant D and his testimony in open court.

(ii) The trial court and the court below did not resolve the question of “who struck who first” as between the appellant and the deceased.

(iii) The appellant maintained in his pre-trial statement that it was the deceased that first gave him a cut on his fingers with a knife.

(iv) The defences of self-defence and or provocation could have availed E the appellant in the circumstances of this case.

4. The learned Justices of the Court of Appeal erred in law by their failure to hold that the pre-trial statement of the appellant and his oral testimony at the trial contradicted each other materially and both should have been held as F unreliable for all purposes at the trial. **PARTICULARS**

(i) There were material contradictions between the pre-trial statement of the appellant and his testimony at the trial.

(ii) If the trial Court and the Court below had held that the statement and the oral testimony were not evidence upon which they could rely, there would G have been no evidence on which to convict the appellant.

(iii) Without the alleged confession of the appellant in his statement Exhibit A, the prosecution did not prove the offence beyond reasonable doubt.

5. The learned Justices of the Court of Appeal erred in law in endorsing by implication the way and manner the trial court picked and chose from facts H contained in the pre-trial statement of the appellant Exhibit A. believing portions that are against the appellant and rejecting all the portions favourable to the appellant’s case.

PARTICULARS

(i) A trial court either believes the contents of a pre-trial statement of an accused wholly or disbelieves same.

(ii) The Court cannot pick areas that are against the accused from his pre-trial statement to use same against him and reject portions thereof favourable to him.

(iii) The appellant was prejudiced by the manner the trial court accepted portions of Exhibit a that were against the appellant's case but rejected or refused to give adequate consideration to the portions that are favourable to him.

(iv) A miscarriage of justice was engendered against the appellant."

The proposed new or additional grounds of appeal up to the time of C arguing the appeal have not been filed. No leave was sought to file the grounds. Secondly, the grounds are completely on new matters and have been raised in the two Courts below and no special leave was sought to file and argue them. By just simply averring that leave would be sought to file and argue certain grounds of appeal merely intimates the court of the intention of the party but D that does not manifest into the grounds being presumed filed. That is the purport of Order 6 rule 5(1) (c) Supreme Court Rules. The net result is that the grounds not filed are incompetently in the Brief of Argument and go to nothing in this appeal. But I must go further. Had the grounds been competently filed E what effect would they have on this appeal? I think the issue of s.33(6)(c) of the Constitution of the Federal Republic of Nigeria 1979 implying the appellant had no counsel of his choice is too overblown. As I set out in the beginning of this judgment, the appellant on being first brought before the Court had the charge read and explained to him in the language he understood, and he understood F the charge and pleaded not guilty. Trial Judge diligently gave instruction as to representation of the accused by counsel. The subsequent proceedings especially the hearing of evidence was with full appearance of a competent counsel for the appellant and at no time did he raise question of representation by counsel or question of s.33(6) (c) of the Constitution as to interpretation of G the proceedings. These are completely new matters and they can only be raised by the procedure laid down in the law and the Rules of Court. The appellant's H counsel in the Court of Appeal had nothing to urge in his favour and that Court, on very dispassionate review of what transpired at the trial Court, rightly found no reason to disturb the trial Court's decision. The cases of Uzodima vs Commissioner of Police (1982) 3 NCLR 327 - 329; The state vs Yusufu Garba (1985) 6 NCLR 193; NCLR 327-329; The State vs Yusufu Garba (1985) 6 NCLR 193; Francis Asanya vs The State (1991) 3 NWLR (Pt. 180) 422,466-7; Akpan vs The State (1991) 3 NWLR (Pt. 180) 422,466-7; Akpan vs The State (1991) 3 NWLR (Pt. 182) 646, 657; Gabriel vs The State (1989) 12 SCNJ 32; Gwonto vs the State

(1982) 3 NCLR 312 are matters completely irrelevant to this appeal. There is nothing precluding this Court from raising suo motu any issue of law not raised in the Courts below if the end of justice will thus be served. But in this case now on appeal I have no reason, on the whole written record, to disturb or interfere B with the decision of the Court of Appeal which upheld the trial Court's decision.

I see no merit in this appeal and I accordingly dismiss it. The conviction and sentence of death of the trial Court upheld by the Court of Appeal is affirmed.

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WALI JSC

I have been privileged to read before now the lead judgment of my learned brother Belgore, J.S.C. I entirely agree with the reasons he advanced for dismissing the appeal, and I adopt same as mine.

D The appeal lacks merit and I also dismiss it and the conviction sentence of death are hereby affirmed.

OGUNDARE JSC

E I have the privilege to read in advance the judgment of my learned brother Belgore JSC just delivered. I agree with his reasonings and conclusion this appeal is totally lacking in merit. I too dismiss the appeal and affirm judgment of the court below.

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OGWUEGBU JSC

The judgment just read by my learned brother, Belgore, J.S.C. was available to me in draft. I also agree that for the reasons given in the judgment, this appeal should be dismissed and I hereby dismiss it.

G Learned counsel for the appellant conceded at the hearing of the appeal that the only ground of appeal filed is incompetent. That notwithstanding the appeal has no merit. The judgment of the trial court which was affirmed by the court below, is hereby further affirmed.

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ONU JSC

I had the advantage of reading before now the draft of the judgment of my learned brother Belgore, J.S.C. just delivered. I am in entire agreement with

his reasoning and conclusions that the appeal fails and it is dismissed.

I wish, however, to add a few words of comments in expatiation thereto as follows:-

The facts of the case are briefly that the appellant and the deceased were related in that the deceased was appellant's uncle. The appellant had complained to the deceased that he was afflicted with belly-ache and the deceased took him to a native doctor at Obeagu for treatment. The appellant further alleged that he was abandoned at the native doctor's place. Such that when he (appellant) returned, he enquired from the deceased why he was so abandoned. The deceased did not give him an answer and soon left for the house of Abba Ntshi (PW1) where he later went himself.

PW1 was an old man whose residence was not far from the deceased's. He was the only person who was present when the incident took place. He (PW1) described how the deceased was discussing with him when he heard the sound of a matchet. He (being blind) heard someone say "Nweji come out" and the voice he identified was that of the appellant, an age long neighbour. Five other witnesses testified for the prosecution.

The appellant's statement to the police (Exh. A), which in effect established that he was at the scene of crime at the time alleged by the prosecution, would seem to confirm the prosecution's case that he wielded the matchet that killed the deceased. His claim of the semblance of accident or the defence of self-defence as well as provocation, having been discountenanced by the trial court, the appellant was convicted and sentenced to death by hanging.

The appellant's appeal to the court below was dismissed. Of significance however, is the fact that learned counsel for appellant had stated in his brief in that court that he had nothing to urge in his (appellant's favour).

The appellant has further appealed to this court on one original ground of appeal which learned counsel in his brief says he brought timelessly in exercise of his (appellant's) constitutional right albeit, that he admits it to be defective. Learned counsel for the appellant therefore submitted that since the conviction of the appellant attracts capital punishment this Court should allow the incompetent ground to be canvassed. He called in aid the cases of Adio v. The State (1986) 2 NWLR (Part 24) 581; Enitan v. The State (1986) 3 NWLR (Part 30) 604; Abasi v. The State (1992) 4 NWLR (part 260) 383 and Merotohun v. The State (1992) NWLR (Part 254) 443.

Learned Counsel for the appellant further argues that the: point becomes all the more imperative because on 15th June, 1994 this court had dismissed the appellant's application for leave to appeal and file new grounds of appeal. This court's reasoning, learned counsel pointed out, was to the effect

that since the counsel that represented the appellant in the court below did not urge anything in his favour, nothing of the sort could be so urged in this court at least, without leave being sought and obtained for the purpose.

Again, before us in the appeal herein are five proposed additional grounds of appeal set out in Appellant’s purported brief of argument dated 20th September, 1995 from which six issues are distilled. As no prior leave was sought and obtained to file the former and as these grounds are completely new and never were raised in the court below, one can but discountenance the whole prosed brief and fall back on the original brief wherein the lone issue formulated reads:

“Whether in all the circumstances of this case, the prosecution proved its case beyond reasonable doubt against the Appellant.”

That single issue distilled as it were, from the lone omnibus ground of appeal having been acknowledged by learned counsel for the Appellant to be predicated on the incompetent or defective ground, is in my judgment, inarguable. See Nwadike v. Ibekwe (1987)4 NWLR (Part 67) 718. It is for these reasons and those elaborately set out in the judgment of my learned brother Belgore, J.S.C. with which I had expressed my concurrence that, I too, dismiss this appeal and affirm the decision of the court below.

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