

SUPREME COURT OF NIGERIA
7TH MARCH, 1997. SC. 16/1996
CORAM:- A.B. WALL, M.E. OGUNDARE, U. MOHAMMED,
S. U. ONU, A. I. IGUH, JJSC

ADAMU GARBA APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Evidence - Accused person's failure to give evidence - Whether Court of Appeal's inference therefrom - Violated appellant's right under s. 33(II) of the 1979 constitution.

CRIMINAL PROCEDURE - Statement to the Police Exh. 8 - Where appellant did not give evidence - Trial court may attach greater weight - To the incriminating aspect of the confessional statement.

CRIMINAL PROCEDURE - Statement of the accused - That is extra judicial - Should be considered as a whole by the court - With liberty to reject any explanation in the statement.

CRIMINAL PROCEDURE - Provocation and private defence - Where considered and concurrently rejected - Supreme Court will not interfere.

FACTS

The appellant was charged before the Sokoto high court with culpable homicide punishable with death. Appellant was alleged to have used a matchet in wounding the deceased fatally. While being conveyed to the hospital, the deceased died on the way. The prosecution called several witnesses to prove the charge. The appellant did not testify nor call any witness to rebut the prosecution's evidence.

In convicting the appellant, the trial court relied on the incriminating aspect of Exhibit - appellant's confessional statement. The appellant's appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court raising 4 issues.

ISSUES FOR DETERMINATION

"1. Whether it was right and indeed fair for the Court of Appeal to have drawn damaging and negative inferences from the appellants exercise of his constitutional right not to be compelled to give evidence and if a negative answer is returned, whether the position taken by the court of Appeal did not

affect its consideration of the appellants appeal and thereby occasioned a miscarriage of justice? Etc, see p. 533

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

Accused person's failure to give evidence

1. There is nothing in S. 33(11) above which either directly or implied suggests that a court cannot or should not comment or draw justifiable inference from the evidence when an accused person elects to take advantage of the provision of subsection (11) of S. 33 of the Constitution. The subsection is very clear and unambiguous in that it prohibits the compelling of any person who is being tried for a criminal offence from giving evidence unless he voluntarily elects to do so. S. 236(1)(c) of the CPC is not in conflict with S. 33(11) of the Constitution, and there is great wisdom in that provision when it prohibits the prosecution from commenting on an accused person's failure to give evidence to avoid the influencing of the court's approach in deciding the case. It will be absurd to accept the learned Senior Advocate's suggestion that the comment or inference draw by the learned Justice of the Court of Appeal of the appellant's failure to give evidence is a violation or infringement of the appellant's fundamental human rights guaranteed by S. 33(11) of the 1979 constitution.

(p. 535 D)

Statement to the Police Exh. 8

2. In the present case the appellant did not give evidence to enable the prosecution cross-examine him on the correctness of the statement - exhibits 8. It is therefore only natural that the trial court should only attach greater weight to the confession of the incriminating aspect than to the exculpatory explanation contained therein after it had considered exhibit 8 as a whole. It is the duty of the jury where jury is involved in the trial or the trial judge, where jury system is not in use, to consider the case and then to make a finding whether in their/his view on the facts, the accused was guilty of manslaughter or murder. (p. 537 C)

Extra judicial statement of the accused

3. The purport of the statement (supra) made by the Federal Supreme Court is that the court must consider the extra - judicial statement made by an accused person as a whole, but did not say that in the course of its consideration, it cannot reject any explanation contained therein having regard to the other evidence in the case, particularly when the accused elects not to give evidence to enable the prosecution test it. (p. 537 G)

Provocation and private defence

4. Suffice it to say that both the trial court and the Court of Appeal had considered the questions of private defence and provocation and rejected them. These are issues hinging basically on facts. In my view there is no miscarriage of justice or violation of some principle of law or procedure that will justify my interference with these finding. (p. 540 H)

NOTABLE POINTS OF INTEREST**MOHAMMED JSC***1. Degree of comment on failure to give evidence*

The law is that a judge may, in his discretion, comment on the defendant's failure to give evidence. R. v. Voisin (1918) I. K.B. 531. However, a strong and excessive comment which conveys to the jury that failure to give evidence is inconsistent with innocence or that the only reasonable inference to be drawn is that the defendant is guilty may result in getting the conviction quashed. (p. 542 A)

IGUHJSC*2. Incriminating and exculpatory aspects of a confessional statement*

What the authorities, inclusive of R. v. Duncan and Queen v. Itule, supra would appear to have laid down is that both the incriminating and exculpatory aspects of a confession are admissible and must be considered together by the court before deciding where the truth of the matters therein claimed lies. I cannot see that the issue goes any further than that. In my view, the law on the subject, as I understand it, cannot be that both the incriminating and the exculpatory aspects of a confessional statement must either swim or sink together. It cannot be that they must together, either be accepted and acted upon as true, or otherwise rejected as unreliable, even where there is other evidence which makes it abundantly clear that one is established whilst the other is unreliable. (p. 545 G)

REPRESENTATION

J. B. Daudu, S.A.N. with U.N. Agomoh (Miss) and G. N. Bako Esq., for the Appellant
Nuhu Adamu, D.C.L. Sokoto State for the Respondent

CASES REFERRED TO

Rabiu v. The State (1980) 2 NCLR 117 AT 133
A. G. of Ontario v. A.G of Canada (1912) A.C. 571 at 583 - 584
Mandilas & Karaberries Ltd. v. I.G.P. (1958) SCNLR 335 at 359

The Queen v. Ijoma (1962) All NLR 402 at 408

Chukwu v. The State (1992) 1 NWLR (pt. 217) 255 at 270

Egboghonome v. The State (1993) 11 KLR 1

Kasa v. The State (1994) 9 KLR 84

Obiode v. The State (1970) NSCC 31 (1970) All NLR 36

B Holmes v. DPP (1946) Cr. App. R. 123

The Queen v. Itule (1961) All NLR 462

Woluchem v. Gudi (1981) 5 SC 291

R. v. Mutch (1973) 1 All E.R. 178

C STATUTES REFERRED TO

Penal Code s. 221(b)

Constitution of Nigeria 1979 s. 33(11)

Criminal Procedure Code s. 236(1)(c)

D

LEAD JUDGMENT BY WALI JSC

In the trial court, the appellant was charged with following offence:-

"That you Adamu Garba on or about the 28th June, 1986, along Gabatawa/kadassaka road of Gwadabawa Local Government Area within the Sokoto Judicial Division did commit culpable homicide punishable with death in that you caused the death of one Garba Ibrahim by doing an act to with striking him with a cutlass/matchet with knowledge that his death would be the probable consequence of your act and thereby committed an offence contrary to section 221(6) of the penal Code."

F The appellant pleaded not guilty to the charge and the case proceeded to trial. The prosecution called the witness to prove the charge. The appellant neither called witnesses nor did he testify to rebut the prosecution's evidence.

The prosecution's case in brief is as follows-

G It was the deceased's practice to go an annual trading trip from Sokoto to Yola in the then Gongola but now in Adamawa State. In 1986 the deceased went on a similar trip and on his way back home, and in the early hours of 28th June, 1986 he was found fatally wounded in a farm along Gabatawa/Kadassaka Road in Gwadabawa Local Government Area of Sokoto State, by Umaru Abdu (P. W. 4). P. W. 4 was later joined by Garba Aliko (P. W. 3), a brother to the H deceased. They put the deceased on the back of a donkey with which P. W. 3 came to the farm and carried him to Kadassaka, the home village of the deceased. From the village they took him to Gada Hospital and on the way the deceased died. P.W.3 said the body of the deceased was returned to Kadassaka village and the incident was reported to police at Gada. The deceased body

was taken to Gada from where it was conveyed to Gwadabawa Hospital. After necessary identification of the deceased's body it was examined by a Doctor who thereafter issued a medical report.

The dead body was released to the relations of the deceased and was buried in Kadassaka village.

At the end of the case put up by the parties, the learned trial Judge B meticulously examined the evidence adduced and found the appellant guilty as charge and sentenced him to death.

The appellant's appeal to the court of Appeal Kaduna Division was unsuccessful. It was dismissed and the conviction and sentence of the death was affirmed. As a result the appellant has now further appealed to this court. C

In compliance with the Rules of this court, the parties filed and exchange brief of argument. In the brief filed for and on behalf of the appellant, the following issues have been formulated for determination:-

"1. *Whether it was right and indeed fair for the Court of Appeal to have drawn damaging and negative inferences from the appellants exercise of his constitutional right not to be compelled to give evidence and if a negative answer is returned, whether the position taken by the court of Appeal did not affect its consideration of the appellants appeal and thereby occasioned a miscarriage of justice?*

"2. *Whether the failure by the appellant to testify in his defence disqualified him from relying on the defences of provocation and private defence particularly as there existed before the court Exhibit 8 and 9, the alleged confessional statement which contained incriminating and exculpatory statements?*

"3. *Whether the Court of Appeal as indeed the trial court was not under a duty to accord both the incriminating and exculpatory parts of Exhibits 8 and 9 the same weight even in the absence of the appellants testimony viva voce?*

"4. *Whether the Court of Appeal was correct when it rejected the appellant's reliance on the defences of provocation, private defence and sudden fight?*

The respondent's brief also contained the following three issues for determination:-

1. *Whether it is unconstitutional for the Court of Appeal to draw an inference from the election by the appellant not to give evidence in his own defence.*

2. *Whether a Court after a careful consideration can believe a portion of the statements of the accused person and reject another.*

3. *Whether the Court of Appeal was right in rejecting the defences*

raised in the statement of the Appellant who refused to give his defence on oath.

The three issues formulated in the respondent's brief are covered by the four issues in the appellant's brief and for purpose of disposing this appeal I shall adopt and follow the sequence in which the issues have been argued in the appellant's brief.

Under issue I the Complaint by learned Senior Advocate for the appellant is against the comment made by Ogebe JCA in his lead judgment that:-

"From the facts, the appellant acted in a cruel and unusual manner by dealing death blows on an unarmed man. The trial court was therefore right in rejecting such defences. It was clear from the proceedings that the appellant had a lot to hide that is why he chose to give evidence and he must abide by the consequence of his choice."

He argued that though S. 236 (1)(c) of the Criminal procedure Code authorises courts to draw any negative inference from the accused person's exercise of his constitutional right not to give evidence, it is his submission that the provision referred to (supra) is contrary to the provision of s. 33(11) of the 1979 Constitution and therefore unconstitutional. He said that the decision in *Mandilas Karaberis Ltd. v. L.G.P.* (1958) SC NLR 335, the except of which he quoted from P 339 thereof reinforces his submission. Learned Senior Advocate Cites S. 2(4) of the Constitution (Suspension and modification) Decree No. 107 of 1993; *Labiya v. A. Retiola* (1992) 8 NWLR (pt. 258) 164 at 107-177; *Nafiu Rabi v. The State* (1980) 2 NCLR 117 at 133; *A.G. of Ontario v. A. G. of Canada* (1912) A.C. 571 at 583 - 584 to further buttress his argument. It is also his contention that the Court of Appeal failed to properly consider the confessional statement of the appellant so as to ensure a distillation of the inculpatory parts from the exculpatory portions but chose to base its decision on the appellant's failure to testify in Court, thereby disregarding the defence contained in the statement which he said is fundamental irregularity that occasioned breach of justice and cites the decisions in *Buraimoh Ajayi and 1 or. v. Zaria N. A.* (1963) 1 All NLR. 168 at 172 and *Abdu Dan Sarkin Noma v. Zaria N. A.* (1963) NNLR 97 at 103. He urges that the issue be resolved in the appellant's favour.

In the respondents reply to the appellant's arguments on this issue, it is the submission of the learned DCL of Sokoto State that S. 236(c) of the Criminal Procedure Code Law is neither contrary nor in contravention of S. 33(11) of (1979) of the Constitution. He said S. 33(11) of the Constitution was enacted to protect an accused person from being compelled to give or call any evidence in his defence. It did not prohibit the court from drawing any reasonable conclusion from the accused person's failure to testified as provided

in S. 236 of the Criminal Procedure Code. Learned DCL cited and relied on Mandilas & Karaberis Ltd. v. I. G. P. (1958) SCNLR 33 at 359; Usman v. C.O.P. (1969) SCOPE 100 and The Queen v. Ijeoma (1962) All NLR 402 at 408.

S. 236(1)(c) provides thus:-

"An accused person shall be a competent witness on his own defence in any inquiry or trial, whether he is accused alone or jointly with another person or persons, and his evidence may be used in proceedings against any person or persons tried jointly with him; and the following provisions shall have effect:-

(a)

(b)

(c) *the failure of the accused to give evidence shall not be made the subject of any comment by the prosecution, but the court may draw such inference as it thinks fit;"*

While S. 33(11) of the 1979 Constitution enacted as follows:-

"33(11). No person who is tried for a Criminal offence shall be compelled to give evidence at the trial."

There is nothing in S. 33(11) above which either directly or implied suggests that a court cannot or should not comment or draw justifiable inference from the evidence when an accused person elects to take advantage of the provision of subsection (11) of S. 33 of the Constitution. The subsection is very clear and unambiguous in that it prohibits the compelling of any person who is being tried for a criminal offence from giving evidence unless he voluntarily elects to do so. S. 236(1)(c) of the CPC is not in conflict with S. 33(11) of the Constitution, and there is great wisdom in that provision when it prohibits the prosecution from commenting on an accused person's failure to give evidence to avoid the influencing of the court's approach in deciding the case. It will be absurd to accept the learned Senior Advocate's suggestion that the comment or inference draw by the learned Justice of the Court of Appeal of the appellant's failure to give evidence is a violation or infringement of the appellant's fundamental human rights guaranteed by S. 33(11) of the 1979 constitution (supra). Our law Reports are replete with the decisions of our superior courts of record containing inferences drawn from the accused person's failure to give evidence in explanation to some proved facts which only he can offer. See Mandilas & Karaberis Ltd. v. I. G. P. (1958) SCNLR 335 which both parties refereed to in their respective briefs.

I have carefully read through the other authorities cited in support of the appellant's case and have found them not apposite.

Issue 1 is therefore resolved in the negative against the appellant.

Issue 2 and 3 of the appellant's brief have been taken together. It is the

submission of learned Senior Advocate in his brief that both the trial court and the Court of Appeal did not properly consider Exhibit 8 well to appreciate the reason why the appellant used the matchet Exhibit 1 on the deceased to wit - that the deceased who was a complete stranger to the appellant, held the latter's private part in the early dark hours of the morning of the day the incident happened. He submits that since exhibits 8 contains evidence that caused the death of the deceased as well as evidence which led the appellant to use Exhibits 1 on the deceased which act caused the latter's death, the Court of Appeal as well as the trial court were wrong in picking and choosing the incriminating part of Exhibit 8 while rejecting its exculpatory part. He submits that the procedure adopted by the two courts below in accepting part of Exhibit 8 and rejecting the other part was a fatal misdirection of law that ultimately affected their consideration of the defence of provocation raised in Exhibit 8. Learned Senior Advocate cited and relied among others, on the following cases to support his submissions:- R. v. Duncan (1981) 1 73 CR. APP. D R. 350, R. v. McGregor (1967) CR APP R. 338 at 341; Chukwu v. The State (1992) 1 NWLR (pt. 217) 255 at 270; Olubu v. The State (1980) 1 NCR 309 at 315 - 316, The Queen v. Itule (1961) All NLR (Reprint) 481 at 485; Egboghonome v. The State (1993) 7 NWLR (Pt. 306) 383 at 435; Kasa v. The State (1994) 5 NWLR (pt.344) 569 at 286 - 287 and R. v. Basil Ranger Lawrence 11 NLR 6. He urges that Issues 2 and 3 be resolved in the appellant favour.

The learned DCL in answer to the submissions above, submits that the trial Court and the Court of Appeal can believe a portion of a confessional statement and reject the other portion, especially when there are other pieces of evidence which tend to make the exculpatory part of the statement unreliable. He contents that there are compelling circumstantial evidence in the case in hand which tend to make the exculpatory part of the confession unreliable.

With regard to the decision in R. v. Duncan (1981) 73 CAR 359 and R. v. Itule (1961) 1 All NLR 481, the learned DCL contends that they are distinguishable from the present case because what was decided therein is that both the incriminating and the exculpatory aspects of a confession are admissible and that they must be considered by the Court; but did not say that the exculpatory aspect must be taken as true when there is clear evidence to make it unreliable. He cites and relies on Obiode & Ors. v. The State (1970) NSCC 31; H (1970) All NLR 36 which emphasized the principle that the court can believe a portion of an accused person's statement and reject the other part for good reasons.

I have carefully read the decisions cited by and relied on by the learned Senior Advocate to buttress his submissions and have come to the conclusion

that none of them made his case any better.

In R. v. McGregor (supra) the portion cited and relied on by the Senior Advocate which was a statement made in Jones and Jones (1927) 2 C. and P 338 at 347 to wit - "There is no doubt that if a prosecutor uses the declaration of a prisoner he must take the whole of it together and cannot select one part and leave another... and if there be no other evidence in the case, or no other evidence incompatible with it the declaration so adduced in evidence must be taken as true. "Is no longer authority as Court of Appeal went on to state in McGregor's case (supra) on the same p. 341 that:

"As stated in paragraph 1128 of Archbold's Criminal Pleadings etc. (36th Edi.) "The better opinion seems to be that as in the case of all other evidence the whole should be left to the jury to say whether the facts asserted by the prisoner in his favour be true". The Court is satisfied that the passage in Archbold sets out the true position."

In the present case the appellant did not give evidence to enable the prosecution cross-examine him on the correctness of the statement - exhibits 8. It is therefore only natural that the trial court should only attach greater weight to the confession of the incriminating aspect than to the exculpatory explanation contained therein after it had considered exhibit 8 as a whole.

It is the duty of the jury where jury is involved in the trial or the trial judge, where jury system is not in use, to consider the case and then to make a finding whether in their/his view on the facts, the accused was guilty of manslaughter or murder. See Holmes v. DPP (1946) Cr. App. R 123.

As I have said earlier, I have read through the authorities relied on by the appellant, particularly R. Lawrence and Chukwu v. The State (supra) and have found them not apposite in the present circumstance. Also in the case of The Queen v. Itule (1961) All NLR 462 the trial court did not make any finding as to whether the retracted Statement of the appellant in that case was admissible in evidence or not and therefore it was not considered. The Federal Supreme Court made a finding that the retracted Statement was admissible, admitted and considered it and came up with the following conclusions:-

"There was evidence of provocation which the trial judge ought to have considered. It may well be that he would have rejected it."

The purport of the statement (supra) made by the Federal Supreme Court is that the court must consider the extra - judicial statement made by an accused person as a whole, but did not say that in the course of its consideration, it cannot reject any explanation contained therein having regard to the other evidence in the case, particularly when the accused elects not to give evidence to enable the prosecution test it. The following findings of the

learned trial judge on the issues of provocation and self defence cannot be faulted -

"In the present case, the accused met the deceased in the early hours of the morning. The accused was carrying Exhibit 'I' a matchet. The deceased was carrying Exhibit II a carton. The deceased was returning from his annual trade journey. Exhibit 'I' was sufficiently described in Exhibits 6 and 7. The accused used Exhibit 'I' to inflict the injuries seen on the body of the deceased by the prosecution witnesses. These injuries were fully described by the medical evidence in Exhibit '10'. I have also seen exhibit 'I'. It is a strong and big cutlass/matchet. Without doubt Exhibit 'I' is a very dangerous weapon. It is the more dangerous in the hands of the accused who by his appearance before me is a strong person. The accused as a reasonable man, must have known that to use exhibit 'I' on the body and head of the deceased and inflict such multiple and deep injuries as described in Exhibit '10', death would be the natural and normal effect of that act.

The accused did not give evidence. Nor did the defence call any witnesses. The only evidence before the court therefore, was that of the prosecution. I have accepted the testimonies of the prosecution witnesses as the truth of what happened. Nevertheless, it is the duty of the court to examine the evidence before it with a view to finding any available defence for the accused person. This is so even where no such defence is raised for the accused- APISE, 6 ORS. VS THE STATE (1971) ALL NLR 53.

In his submission, the learned counsel for the accused stated that the accused found himself in a life and death encounter and was therefore exercising the right of private defence against the deceased whom he believed was a wizard. Morose, according to the learned counsel the accused did not inflict more harm than was necessary in the circumstances. Furthermore, there was no time for the accused to have recourse to public authority as the fight took place the night and in the bush.

On the other hand, the prosecution submitted that the right of private defence was not open to the accused person -R. vs ADAMU (1944) 10 W.A.C.A., 161. and that he the accused was the aggressor OJI vs. QUEEN (1961) N.N.L.R. 93.

Evidence before me showed that at the time the accused inflicted the fatal and innumerable fatal wounds on the deceased the deceased was unarmed. Yet the accused continued inflicting fatal wounds, all over the body of the deceased. All what the deceased had was a carton containing what he got from his trade journey.

P.W.2 said in his testimony and I quote:-

"The accused came to me and told me that he had a fight with a wizard.

The wizard had bitten him all over his body."

This was the only statement pertaining to the submission that the accused was attacked by a wizard. And this was the only time the accused told anybody or - said anything about being attacked by a wizard. More surprisingly, was the accused's failure or refusal to say anything about a wizard in his statement Exhibit 8 and 9, which were recorded soon after the incident. One could therefore infer that the accused himself must have been (sic) the unreasonable of such a line of defence soon thereafter and drooped it.

In Exhibits 8 and 9, the accused said:-

".....he then held my private part....."

This seemed to be new line of defence by the accused. The accused is free to state as many lines of defence as he so wished but the court can draw reasonable inferences from such actions. Even if the accused believed that the deceased was a wizard I am of the view that such a belief was most unreasonable in the circumstances. What he told P.W.2 was only part of his effort to hide the truth. I do not believe that it was because the deceased hold his private part that was why he inflicted such wounds on him - R. VS REUBEN ENYI JINOBU (1961) ALL N.L.R. 627. I also could not see any element of provocation in the present circumstances - QUEEN, VS. ALIJA ELEGBA OLEWURI (159) E.N.L.R. VOL. V. 17. In the light of this I found that the accused had no reason to believe that there was on the part of the deceased a very definite intention to kill him or that he was engaged in a life and death struggle. In view of this, the defence of right of private defence could not be open to the accused.

When the accused was arrested, he made an extra judicial statement to the Police. PC. Joseph Kimsa recorded statement Exhibit 8 and translated it into English per Exhibit 9. The statement being confessional was endorsed by the D.P.O. Gwadabawa- one Alhaji Bello Bungudu. The statement was tendered and admitted without objection. The statement as I said earlier confirmed that the accused hit the deceased with a cutlass/matchet. This confession was clear, unequivocal, direct and voluntary PHILLIPS KANI, VS THE KING 14 W.A.C.A 30."

These findings were confirmed by Court of Appeal in its unanimous judgement in which Ogebe JCA opined thus after reviewing the evidence and submissions by learned counsel:-

"I have given a very serious consideration to the submissions of the learned counsel on either side and it is clear from the record that the conviction of the appellant was based mainly on Exhibit 8, the Confessional Statement. In it the appellant confessed cutting of the deceased with a matchet when the deceased allegedly held his private part and was biting him.

The learned trial Judge did not believe that the deceased held the private part of the appellant and the main contention of the appellant's counsel is that this aspect of the appellant's story should have been believed.

It is a well known principle of law that it is the pre-eminent duty of the trial court to determine issues of credibility and not that of the appeal court.

B *See the case of Ekpenyong v. The State (1991) 6 NWLR (pt.200) 683. In this particular case, the appellant had his first opportunity to explain what happened when he went to P.W.2 to ask for iodine. He told him that he fought with a wizard who bit him all over the body. He did not tell P.W.2 that the deceased held his penis. I am therefore of the view that the trial court*
 C *was right in rejecting that aspect of the appellant's statement to the police. Even if the deceased held the appellant's penis, the amount of force used by the appellant by cutting the head, the shoulder, and the arm of the deceased with a cutlass in several places was far in excess of his right of private defence and the provocation if any given by the deceased was not grave*
 D *enough to reduce the gravity of the offence.*

The Medical report Exhibit 10 shows the ferocity of the attack on the deceased. It reads in part as follows:

"The deceased was said to have been accidentally found dead by his own Uncle who was on his way to the farm. Examination revealed 5 stab
 E *wounds on the extensor aspect of (L) forearm. Deep stab wound (R) eyebrow, and 4 on the head. He was also very pale.*

Under Section 62 of the panel Code, the right of private defence does not extend to the infliction of more injury than necessary for the purpose of the defence."

F *For the reasons stated I am satisfied that no case has been made to warrant interference with the findings of both the trial court and the Court of Appeal as regards issues 2 and 3. Ground 2 of the grounds of appeal from which the said two issues have been formulated fails .*

On issue 4 which is formulated from grounds 3 and 4 of ground of appeal,
 G *Learned Senior Advocate adopts arguments in respect of issues 2 and 3. He submits that evidence exists in abundance from which the defences of provocation and private defence can be sustained.*

I do not see the need to go over and review the arguments advanced in support of Issues 2 and 3 which the learned SAN adopted to support his issue
 H **No. 4. Suffice it to say that both the trial court and the Court of Appeal had considered the questions of private defence and provocation and rejected them. These are issues hinging basically on facts. In my view there is no miscarriage of justice or violation of some principle of law or procedure that will justify my interference with these findings** See Woluchem v. Gudi (1981)

5 SC 291; Adio & Anor. v. The State (1986) 2 NWLR (pt.24) 581 at 589 and Onyejekwe v. The State (1992) 4 SCR (pt. 1) 19.

I see no reason to differ from the judgments of the lower court and the court blow. The appeal therefore lacks merit and it is dismissed. The conviction and sentence of the appellant are hereby affirmed.

B

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Wali, JSC just delivered. I agree with his reasoning and his conclusion therein. I too dismiss the appeal as totally lacking in merit and I affirm the conviction of the Appellant for murder and the sentence of death passed on him by the trial High Court.

MOHAMMED JSC

D

I also agree to dismiss this appeal for the reasons advanced by my learned brother, Wali, J.S.C. in his judgement. I have had the preview of the draft of the judgment before now.

I only wish to comment on the submission of J. B. Daudu, S. A.N., that the provisions of Section 236(1) (c) of criminal procedure Code which says "the failure of the accused to give evidence shall not be made the subject of any comment by the prosecution but the court may draw such inference as it thinks just" is contrary to section 33 (11) of the Constitution. The learned Senior Advocate argued that it would have been absurd in the extreme for the constitution to have provided expressly for the exercise of a right viz, the right to remain silent and not be compelled to give evidence in one's own trial, and for a subordinate legislation to take away such right by providing that certain grave repercussions may accompany the exercise of such right. He referred to this court's decision in the case of Mandilas & Karaberries Ltd. v. I.G.P. (1958) 3 F.S.C. 20 in which Ademola FCJ. (as he then was) held thus:

G

"In some cases, the facts proved may be such that the court may be justified in saying that if there is an innocent explanation. The accused is the only person who can give it and that in the absence of any such explanation, the only reasonable inference from the evidence as a whole is that the accused is guilty but this principle has no application in a case where the facts proved are reasonably compatible with innocence. It is in every case a mistaken approach to say that the accused is under an obligation to explain himself or prove facts especially within his knowledge."

H

It seems that the decision in Mandilas v. I.G.P. (supra) referred to above

is contrary to the submission of the learned Senior Advocate. The law is that a judge may, in his discretion, comment on the defendant's failure to give evidence. R. v. Voisin (1918) 1 K.B. 531. However, a strong and excessive comment which conveys to the jury that failure to give evidence is inconsistent with innocence or that the only reasonable inference to be drawn is that the defendant is guilty may result in getting the conviction quashed. In R. v. Mutch (1973) 1 All E. R. 178 Lawton L. J. gave similar opinion, as Ademola FCJ held in Mandilas case, above, wherein the lord Justice said:

"..... if no explanation is given when the circumstances are such that an innocent man would be expected either to give explanation or deny the basic facts, this is a factor which can be taken into consideration - See Bessela v. Stern (1877) 2 CPD 265."

It is instructive to clarify that the comments a judge is allowed to make about the failure of an accused person to give evidence in his defence, in the witness box, depend on the facts of each particular case. In some cases a stronger comment is called for than in others. Salmon L. J. in the case of R. v. Sullivan (1966) 51 Cr. App. Rep, 102 at 105 pointed out thus:

"The line dividing what may be said and what may not be said is a very fine one, and it is perhaps doubtful whether in a case like the present it would be even perceptible to the members of any ordinary jury."

It is not therefore contrary to the provisions of section 33 (11) of the Constitution to provide in a subordinate legislation, as has been done in S. 236 (1) (c) of the Criminal procedure Code, that failure of the accused to give evidence shall not be made subject of any comment by the prosecution but the court may draw such inference as it thinks just. What is important is that the discretion whether the judge shall comment on the fact that the prisoner has not given evidence must not be exercised in such a way that it would imply that absence from the witness box is to be equated with guilt. The very fact that law does not permit the prosecution to comment on that fact shows that the judge must exercise extreme care in making such comments.

The comment which the appellant's counsel complained about is where Ogede, J.C.A., said in his judgment as follows:

"From the facts, the appellant acted in a cruel and unusual manner by dealing death blows on an unarmed man. The trial court was therefore right in rejecting such defence. It was clear from the proceedings that the appellant had a lot to hide that is why he chose not to give evidence and he must abide by the consequence of his choice".

This comment must be read with the facts of this case. The appellant confessed to have attacked the deceased with a cutlass which resulted in the deceased's death. There was no eye witness to the incident. In such a situa-

tion a comment from a judge as was done by Ogebe, J.C.A., is permissible to show that an inference can be drawn from uncontested or clearly established facts which point strongly to the guilt of the appellant. In a case like this one failure to explain when circumstances were such that an innocent man would be expected to give an explanation or deny the basic facts would justify a comment from the judge. The comment made by Ogebe, J.C.A., in my view, is not excessive to justify the disturbance of the conviction which the lower court affirmed. It is significant to note also that the comment was not made by the trial judge but by the appellate judge.

For these reasons and the fuller reasons given in the lead judgment this appeal fails and it is dismissed. I affirm the conviction and sentence passed by the trial court which the Court of Appeal affirmed.

ONUJSC

I had the privilege to read before now the leading judgment of my learned brother Wali, JSC. I am in complete agreement with him that the appeal lacks merit and ought therefore to fail.

In the result, I too, dismiss the appeal and affirm the decision of the Court of Appeal.

IGUHJSC

I have had the advantage of reading in draft the leading judgment just delivered by my learned brother, Wali, J.S.C., and I agree entirely with him that this appeal lacks merit and should be dismissed.

The straight forward facts of this case as found by the trial court and affirmed by the court below are that on the material date and time the appellant met the deceased who was returning from a trade trip in the early hours of the morning and attacked him for no given reasons. In the process the appellant inflicted multiple fatal matchet cuts all over the body of the deceased who at the material time was unarmed. It is not contested that the deep injuries inflicted on the deceased by the appellant caused his death soon after the savage attack. The deceased infact died the same morning on his way to the hospital.

The conviction of the appellant was based mainly on his voluntary Statement to the Police, Exhibit 8 soon after he was arrested, charged and cautioned. Its English translation is Exhibit 9. In it the appellant confessed to his matchet attack on the deceased. However, in an attempt to invoke the defence of provocation, the appellant further claimed in the same Exhibit 8 that he

inflicted the injuries on the deceased because the later held "his private part" and was "biting" him. Exhibit 8, therefore, was a mixed statement which consisted of both incriminating and exculpatory matters.

The appellant before the trial court gave no evidence. This he was perfectly entitled to do. Nor did he call any witnesses either. The only evidence B before the court, therefore, was that of the nine prosecution witnesses, inclusive of Exhibit 8.

In this regard, the learned trial court observed -

"The only evidence before the court, therefore was that of the prosecution. I have accepted the testimonies of the prosecution witnesses as the C truth of what happened. Nevertheless, it is the duty of the court to examine the evidence before it with a view to finding any available defence for the accused person. This is so even where no such defence is raised for the accused - APISE 6 ORS. VS. THE STATE (1971) A.N.L.R. 50."

He went on -

D *"The accused is free to state as many lines of defence as he so wished but the court can draw reasonable inferences from such actions. Even if the accused believed that the deceased was wizard, I am of the view that such a belief was most unreasonable in the circumstances. What he told PW. 2 was only part of his effort to hid the truth. I do not believe that it was because the E deceased held his private part that was why he inflicted such wounds on him - R. Vs. REUBEN ENYI JINOBU (1961) ALL N. L. R. 627. I also could not see any element of provocation in the present circumstances - QUEEN. VS. ALIJA ELEGBA OLEWURI (1959) E. N. L. R. VOL. V17..... In view of this, the defence of right of private defence could not be open to the accused:*

F The Court of Appeal, per the leading judgment of Ogebe, J. C. A., with which Opene and Muhammad, JJ.C. A. agreed, dealt with the matter as follows-

"It is a well know principle of law that it is the pre-eminent duty of the trial court to determine issues of credibility and not that of the appeal court. G See the case of Ekpenyong v. The State (1991) 6 NWLR (pt. 200) 683. In this particular case, the appellant had his first opportunity to explain what happened when he went to P. W. 2 to ask for iodine. He told him that he fought with a wizard who bit him all over the body. He did not tell P. W. 2 that the deceased held his penis. I am therefore of the view that trial court was H right in rejecting that aspect of the appellant's statement to the police. Even if the deceased held the appellant penis, the amount of force used by the appellant by cutting the head, the shoulder, and the arm of the deceased with a cutlass in several places was far in excess of his right of private defence and the provocation, if any, given by the deceased was not grave

enough to reduce the gravity of the offence"

It concluded thus-

"From the facts, the appellant acted in a cruel or unusual manner by dealing death blows with a cutlass on an unarmed man. The trial Court was therefore right in rejecting such defences."

The main contention of Learned Senior Advocate of Nigeria, J. B. Daudu B Esq., for the appellant, is that both courts below were in error to have employed the incriminating parts of Exhibit 8 against the appellant while at the same time rejecting the exculpatory aspects thereof which raised the defences of private defence and provocation.

The law appears settled that where a mixed statement is under consideration in a case where an accused person has not given evidence, the court should advert its mind to the fact that the whole statement, both the incriminating parts and the excuses or explanations therein must be considered together in deciding where the truth lies. See R. v. Duncan (1981) 73 Cr. App. R. 359. See too Queen v. Itule (1961) All N. L. R. 481 at 485. A trial court however D is entitled to accept an incriminating portion of a confessional statement as established while rejecting another portion of the same statement, especially where, upon a consideration of the entire evidence before the court, there exists overwhelming credible evidence in support of such incriminating portion of the confessional statement, as well as other pieces of evidence which E render the rejected exculpatory part clearly unreliable.

It seems to me plain, in the present case, that there are strong cogent and compelling circumstantial evidence which portray the exculpatory part of Exhibit 8 as unreliable. No single mark of human bite or injury on either the penis or any other part of the appellant's body was established before the trial court. F It was also not shown that the appellant suffered or was treated for any injuries, no matter how slight, as a result of the alleged violent grip of his penis by the deceased. There was neither oral nor circumstantial evidence in proof of these unfounded allegations which the courts below in my view, rightly rejected. G

What the authorities, inclusive of R. v. Duncan and Queen v. Itule, supra would appear to have laid down is that both the incriminating and exculpatory aspects of a confession are admissible and must be considered together by the court before deciding where the truth of the matters therein claimed lies. I cannot see that the issue goes any further than that. In my view, the law on H the subject, as I understand it, cannot be that both the incriminating and the exculpatory aspects of a confessional statement must either swim or sink together. It cannot be that they must together, either be accepted and acted upon as true, or otherwise rejected as unreliable, even where there is other

evidence which makes it abundantly clear that one is established whilst the other is unreliable. I think that a trial court can accept or believe a portion of the statement of an accused person and reject another if, for good reason, this course of action is warranted by clear evidence before the court.

In the present case, both the trial Court and the Court below painstakingly considered the defences raised by the appellant in the confessional statement, Exhibit 8 and properly rejected them as not established. The facts of the case present a clear case of murder for which the appellant has no answer. I entertain no doubt that he was properly convicted of the offence of culpable homicide punishable with death contrary to Section 221 (b) of the Penal Code. It is also clear to me that the court below rightly affirmed his conviction and sentence by the trial court.

It is for the above and the more detailed reasons contained in leading judgment of my learned brother, Wali, J. S. C., that I too, dismiss this appeal and abide by the consequential order therein made.

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