

SUPREME COURT OF NIGERIA

18TH JULY, 1997. SC. 133/1995

**CORAM:- A. B. WALL, I. L. KUTIGI, U. MOHAMMED,
S. U. ONU, A. I. IGUH, JJSC.**

YAHAYA MOHAMMED ACCUSED/APPELLANT

V.

THE STATE RESPONDENT

COURTS - *Extraneous matters - Trial judge was wrong to consider extraneous matters - In arriving to his conclusion.*

CRIMINAL LAW - *Insanity - Murder - Lack of motive - Whether on the balance of probabilities - Appellant discharged the onus of proving insanity.*

CRIMINAL LAW - *Insanity - Whether there was sufficient evidence - To prove that appellant was insane - At time of the alleged offence.*

CRIMINAL PROCEDURE - *Insanity - Presumption of sanity - Though prosecution made no attempt to contradict the evidence of insanity adduced - Appellant succeeded in displacing the presumption of sanity.*

EVIDENCE - *Insanity - Competence of a witness - Where the issue of one's insanity is under consideration - He cannot be a competent witness.*

STATUTES REFERRED TO

Criminal Code ss. 319(1), 28, 27

Evidence Act ss. 140 (2), 137(1), 141(3)(c)

FACTS

Before the Ikole-Ekiti High Court, the appellant was charged with the offence of murder of one Janet Nwafor. Appellant pleaded not guilty to the charge and raised the defence of insanity. The prosecution called 5 witnesses while appellant testified and called 2 other witnesses. From the narration of how the incident occurred presented by PW2, and from the evidence given by DW1, it appeared the appellant was insane at the time he committed the offence. The trial court considered the evidence of insanity that was given but relied on other extraneous matters in believing that the appellant was not insane.

The appellant was therefore convicted and sentenced to death by the trial court. Appellant's appeal to the Court of Appeal was unanimously dismissed. He has further appealed to the Supreme Court on a single issue.

ISSUE FOR DETERMINATION

Whether the Court of Appeal was right in holding as it did above, that the appellant had failed to discharge the onus of proof of the defence of insanity raised by him or in other words whether or not the learned Justices of the Court of Appeal rightly affirmed the conviction and sentence of death by the trial court based on the rejection of the defence of insanity by the two courts.

HELD (Allowing the appeal per lead judgment of **KUTIGI JSC**, Onu and Iguh JJSC dissenting)

Courts - Extraneous matters

1. There was no doubt at all that the learned trial judge did consider the evidence of insanity given by DW.1, but his conclusion that - *The evidence of DW.1 did not go far enough to establish that the accused was insane at the relevant time he committed the crime*", is what baffled me. The record shows that the learned trial judge considered other extraneous matters not in evidence before him to arrive at that conclusion as he did. (p. 1777 B)

Insanity - Whether there was sufficient evidence

2. I am clearly of the view that the evidence of the native doctor, DW.1, and that of PW.2, the eye witness, went sufficiently far to prove as they did, that the appellant was insane at the time the alleged offence was committed. The fact that DW.1 predicted a re-surgence of the illness which was later proved to be true, and that he warned the appellant's father, DW.3, to come for a final treatment were all uncontroverted. I repeat that the evidence of PW.2 set out above also went to buttress the evidence of DW.1 that the appellant must be insane at the relevant time. (p. 1777 E)

Presumption of sanity

3. The prosecution led no evidence whatsoever nor made any attempt to contradict or dislodge the evidence of insanity adduced by the defence. The prosecution merely relied on the presumption of sanity as laid down in section 27 of the Criminal Code thus - *Every person is presumed to be of sound mind, and to have been of sound mind at anytime which comes in question, until the contrary is proved.*" But the appellant by the evidence adduced on his behalf had negated or displaced that presumption. (p. 1777 G)

Insanity - Competence of a witness

4. I have refrained from commenting on the extra judicial statement (Exhibits 3 & 4) of the appellant and his oral evidence in court, because when the question here is as to the sanity or insanity of the appellant himself, he cannot be

a competent witness on that issue vide MAKOBA v. THE STATE (1969) 1 All NLR 363 and ONYEKWE V. THE STATE (1988) 1 NWLR (part 72) 505. (p. 1777 H)

Murder - Lack of motive

5. It is also noteworthy that the evidence of PW.2 under cross-examination clearly showed that there was no motive on the part of the appellant to have committed the offence when he did. I am therefore on the whole inclined to agree with the appellant's counsel, Mr. Akhidenor, that on the totality of evidence led, the appellant on the balance of probabilities discharged the burden on him of proving that he was insane at the relevant time when the offence charged was committed. Section 28 of the Criminal Code therefore clearly availed the appellant. (p. 1778 A)

NOTABLE POINTS OF INTEREST

WALIJC

1. Insanity - Legal test of responsibility

The legal test of responsibility is always whether the accused is capable of knowing the nature of the act or that he is doing wrong. It is by this and not by the medical test that the criminality is determined. A distinction must therefore be drawn between cases in which there is credible evidence after previous inactivity where the question is the degree of responsibility and the cases when the defence is raised by a person for the first time. Where previous insanity is established, the court must consider whether there was deliberation and preparation for the criminal act, whether it was done in a manner showing a desire to conceal it, whether afterwards the accused showed consciousness of guilt and made effort to avoid detection, and whether he offered false excuses and made false statement. (p. 1780 G)

2. Insanity - Competence of accused to testify

On an issue relating to the defence of insanity it has been shown through court's decisions that an accused person is not a competent witness as regards his mental status. But where there is independent relevant admissible evidence confirmative of the accused's mental status, the evidence given by him may be given some weight. (p. 1782 A)

3. Doubt - Is to be resolved in accused person's favour

On the evidence, there was at least some doubt as to the appellant's actual mental state at the time of the killing. So the question to decide was whether the evidence sufficiently established the plea of insanity or merely created

some doubt as to his mental state at the relevant time the act was committed, in which case the doubt should be resolved in the appellant's favour. (p. 1783 H)

IGUHJSC (Dissenting)

4. Insanity - Burden of proof is on the accused

Although Section 137 (1) of the Evidence Act provides that the proof of the commission of a criminal offence beyond reasonable doubt is on the prosecution, this is made subject to the provision of Section 141 (3) (c) of the same Act which provides that the burden of proof of the defence of insanity and of intoxication is on an accused person. However unlike the burden on the prosecution to prove its case beyond reasonable doubt, this onus on the accused to establish the defence of insanity or intoxication is merely as in civil cases, that is to say, on the preponderance of evidence. (p. 1798 C)

5. Insanity - Evidence of accused not to be given much value

Accordingly evidence by an accused person of his own mental infirmity is usually suspect and unreliable for establishing his insanity. I entertain no doubt that the appellant is hardly a competent witness on the issue of proof of his own insanity and, although there was nothing intrinsically wrong in the reception of his evidence on the point by the trial Court, the learned trial Judge, was in my view, right when he felt "rather weary in attaching much probative value to his evidence. (p. 1799 D)

6. Opinion of an expert - Where challenged

It ought to be pointed out that the evidence of opinion of an expert, such as D.W.I. claims to be, is relevant; but it stands to reason, particularly where the professional competence of such expert is challenged or put in issue, that he must state his qualifications and experience and satisfy the court that he is indeed an expert on the subject in which his opinion has come into question. He must also state clearly the reasons for his opinion otherwise his evidence may hardly carry much reliability, or weight. (p. 1802 B)

7. Failure to prove insanity at the time offence was committed

As I have already pointed out, it is not enough to show that an accused was suffering from a disease which is capable of affecting the will without showing that his will was in fact affected at the material time. In the present case there is total lack of evidence as to whether or not the appellant at the time of the murder on the 3rd day of June 1987 was suffering from any mental disease or infirmity and if that was so, whether it in fact affected his will at the material

8. *Insanity - Onus of proof is not on the prosecution but on the accused*

Even if the prosecution led no evidence on the issue of the sanity of the appellant, this would not have been any matter of great moment. This is because it is a presumption of law that every person is of sound mind; there is therefore no legal necessity for the prosecution to call evidence to prove the sanity of an accused person unless the state of evidence in a particular case irresistibly so demands. It is for the accused to prove his insanity; and it is open to him to call any prison officials he deserves to call as a witness or any Doctor who had had him under observation, if any. See Philip Dim. V.R. (1952) 14 W.A.C.A. 154. There is no onus on the prosecution to prove the sanity of an accused. As the lord Chief Justice of England put it, and rightly so, in R.V. Fred de Vere 2 Cr. A.R. 20:- "It is for the defence to prove insanity, not for the prosecution to prove sanity." Accordingly, it can now be taken as settled that it does not appear a sine qua non for the state to call evidence of insanity although any material evidence in their possession in that regard should be place at the disposal of learned counsel for the accused person to be used by him if he so desires. Insanity, if relied upon by the defence, must therefore be established by the accused person. (pp. 1804 H & 1805 G)

9. *Murder - Absence of motive - Does not establish insanity*

The mere absence of any evidence of motive for a crime is not a sufficient ground on which to infer insanity. See Egbe Nkonu v. The State (1980 3-4 S.C. L. The burden on the accused is not discharged merely by showing that his act is without motive, bizarre or entirely inexplicable on rational grounds. (p. 1806A)

10. *Insanity - Assertion of evil spirit's influence is not enough proof*

At all events, if such an assertion be conclusive evidence of insanity, then it may simply be too convenient for any murderer or criminal on being arrested to simply repeat that hallowed assertion that it was the evil spirit that influenced him with a view to evading the long arms of the law. I cannot, with respect, accept that there is any thing in the evidence of P.W 1 which, no matter how remotely pointed conclusively to the appellant's insanity. The same is true of the evidence of P.W. 2, not to mention the evidence of either the appellant or D.W. 1, both of whom were disbelieved on the issue of the appellant's insanity. (p. 1808 E)

II. Evidence - Court not to supply possibilities

It is clear to me that the evidence of .D.W. 1 in this case, even if it had been accepted, did not categorically assert that the appellant was insane at the time of the commission of the offence charged. And neither in a criminal cause nor in a civil action is it the function of a Court, whether a trial or appellate Court, but its own exercise or ingenuity to supply or arrive at evidence or to work out B a possible answer which only evidence tested under cross-examination could supply or to speculate on possibilities which are not supported by evidence. (p. 1811 C)

REPRESENTATION

L. O. Akhidenor with E. I Esene for the appellant
Mrs. Oyebisi Omoleye (D.P.P. Ekiti State) for the respondent

CASES REFERRED TO

R. v. Omoni 12 WACA 511
Aiworu v. The State (1987) 2 NWLR (Part 85) 526
Oladele v. The State (1993) 2 KLR 93
Aruna v. The State (1990) 6 NWLR (Part 155) 123
Makoba v. The State (1969) 1 ALL NLR 363
R. v. Echem 14 WACA 151
Sodeman v. R (1936) 2 ALL ER 1138
R v. Nasamu 6 WACA 74
Onyekwe v. The State (1988) 1 NWLR (Pt. 72) 505
R v. Ball (1911) A.C. 47
Loke v. The State (1985) ALL N.L.R. 1 at page 9

STATUTES REFERRED TO

Criminal Code ss. 319(1), 28, 27
Evidence Act ss. 140 (2), 137(1), 141(3)(c)

LEAD JUDGMENT BY KUTIGI JSC

In the High Court of Justice holden at Ikole-Ekiti, the appellant was charged with the offence of murder of one Janet Nwafor contrary to section 319(1) of the Criminal Code. He pleaded not guilty to the charge. At the trial the prosecution called five witnesses to prove its case while the appellant H testified on his own behalf and called two other witnesses in support.

The facts of the case are as stated by the single eye witness, who testified as PW.2. She was called Eunice Adenike Agbeniyi. She testified thus:-

"I knew one Janet Nwafor. She was my mother. She is now dead. I know the accused person. ON 3/5/87 at about 5 p.m. , I returned from school. I sat at the backyard carrying a child of one woman living in our house. She is Mrs. Adeoye. The accused was where I sat down. A woman then came and stood at the Sabo where Hausa people collect to sell their goods. She called B the accused, wishing to buy beans from him. He did not respond. The woman told me to help her call the accused. I then informed the accused that the woman was calling him. He suddenly gave me a slap (on my face) Mrs. Adeoye and Baba Aina were there. I started weeping and was cleaning my face. I did not know who went to call my mother. When she got to me, she C asked what happened to me. Mrs. Adeoye was still there. She narrated to my mother how the accused came to slap me. That she did not know what the witness did to the accused to warrant the accused slapping the witness. Before my mother turned her back, the accused had gone inside to bring out an axe and hit my mother with it. He hit my mother on the forehead and ribs' D side. My mother fell down after she had been hit with the axe. Baba Aina is called Shehu. He wanted to seize the axe from the accused telling him that my mother had not done anything to warrant the accused hitting my mother with the axe. The accused left my mother and faced the Baba Aina and hit him with the axe. Witness identified Exhibit 1. My mother was then uncon-
E scious."

Under cross-examination she continued thus:-

"I have known the accused for less than two years before the date of the incident. It is about a year I knew him before the date of incident. There was no misunderstanding between him and us within that year. I never F spoke with him. To my knowledge there was no quarrel between my mother and the accused. I was not seeing him every time. I never heard nor knew that the accused had mental derangement. I was not aware of this. I and the accused were not accustomed to talking to each other. I saw Exhibit 1 on that day. That was why I could identify it today."

G The incident happened on 3/6/87 while the deceased died in hospital on 20/6/87. Dr. Paul Aderemi Adekoje performed autopsy on the dead body. His report was admitted as Exhibit 2 in evidence. In his opinion the cause of death was:-

H "due to infection of the brain due to fracture to the skull bone caused by a sharp object."

In the course of police investigations also the appellant volunteered a statement to the police in Yoruba which was later translated into English. These were tendered as Exhibits 3 & 4 respectively by police Sergeant Mathew Oluwole Olawoyeye, who testified as PW.5 at the trial.

The defence of the appellant was in short that of insanity.

At the end of the trial, the learned trial judge in a considered judgment found the appellant guilty as charged and sentence him to death. The defence of insanity put up by the appellant was rejected when he observed:-

"Though the onus that rests upon the accused is the civil one, in my view, this onus has not been discharged. Having held that the accused's evidence attracts no probative value upon the authorities, having also held that the evidence of DW.3 supports the prosecution's case that the accused was sane rather than insane between 1984 and the time of the incident. I am left with the evidence of DW.1 which I have held did not go far enough to establish that the accused was insane at the relevant time he committed the crime."

Whether or not the evidence of DW.3 wholly supported prosecution's case and whether the evidence of DW.1 amongst others, actually fell short of what was required to establish the defence of insanity will soon be examine.

Aggrieved by the decision of the High Court, the appellant appealed D to the Court of Appeal holden at Benin-City. One of the five issues submitted for determination in that Court was:-

"5. Whether the learned trial judge properly considered relevant evidence relating to the defence of insanity before him and whether he was right in his judgment that there was no evidence on which the defence of E insanity could be founded."

In a unanimous judgment the Court of Appeal considered all the issues raised before it and dismissed the appeal. Conviction and sentence of the High Court were then confirmed.

On the defence of insanity, the court observed:-

"The learned trial judge in his judgment has considered most dispassionately the defence set up by the appellant and when he put the evidence adduced by the accused and the prosecution on an imaginary scale since the accused has to prove insanity by preponderance of evidence or balance of probability, he has rightly found that of the prosecution to be of G heavier weight - see MOGAJI v. ODOFIN (1974) 4 SC. 91".

Still aggrieved by the decision of Court of Appeal, the appellant has now further appealed to this Court. Counsel on both sides filed and exchanged their briefs of argument as provided by Rules of Court. These were adopted at the hearing and oral submissions offered in addition.

Only one issue was submitted for determination in the appeal. And it is whether the Court of Appeal was right in holding as it did above, that the appellant had failed to discharge the onus of proof of the defence of insanity raised by him or in other words whether or not the learned Justices of the

Court of Appeal rightly affirmed the conviction and sentence of death by the trial court based on the rejection of the defence of insanity by the two courts.

Mr. Akhidenor learned counsel for the appellant strenuously argued that there was enough evidence on the record which show that the appellant at the time of the commission of the offence was deprived of his capacity to understand or control his actions. That he was a mad man at the material time. He said in addition the appellant had a history of mental insanity as narrated by both DW.1 & DW.3 and whose evidence remained uncontradicted. He said the evidence of the single eye witness PW.2 was also supportive of the mental abnormality of the appellant. The following authorities were cited - R. v. OMONI 12 WACA 511 AIWORO v. THE STATE (1987) 2 NWLR (part 85) 526. OLADELE v. THE STATE (1993) NWLR (part 269) 294. KUREE v. THE STATE (1988) NWLR (part 71) 404.

It was further submitted that when there was evidence of mental illness before the incident and there was no expert medical evidence to contradict the evidence of the traditional healer as in this case, there was a doubt as to whether the mental illness had ceased or was still on when the offence was committed and that such doubt ought to be resolved in favour of the accused in view of the uncontradicted evidence of DW.1 herein. He said the Court of Appeal erred when it affirmed the decision of the High Court when in fact the mental history of the appellant more than enough rebutted the presumption of sanity. We were urged to allow the appeal, set aside the judgments of the lower courts and in their places enter a verdict of "Not guilty" by reason of insanity. He relies on section 28 of the Criminal Code.

Responding Mrs. Omoleye, learned Director of Public prosecution submitted that the evidence in the case was strong enough to negative the defence of insanity. She said none of prosecution witnesses who testified spoke of any abnormality in the behaviour of the appellant on the fateful day. That the herbalist (DW.1) who claimed to have treated the appellant sometime in 1984 could not say categorically that it was that same insanity that led the appellant to kill in 1987. She said DW.3 also described the condition of the appellant after treatment as "normal". It was therefore submitted that the appellant had failed to prove insanity as laid down in section 28 of the Criminal Code. She referred to the cases of -

IBRAHIM v. THE STATE (1991) 5 SCNJ 121 AIWORO v. THE STATE (1987) 2 NWLR (part 85) 526 ADELUMOLA v. THE STATE (1988) 1 NWLR (part 73) 683 KUREE v. THE STATE (supra)

She said the concurrent findings of facts by the lower courts should not be disturbed as they were neither perverse nor a violation of any principle of law or of procedure. She referred to ARUNA v. THE STATE (1990) 6 NWLR

(part 155) 123 and urged us to dismiss the appeal for lack of merit.

Now, section 28 of the Criminal Code reads-

"A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not do the act or make the omission.

A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was introduced by the delusions to believe to exist."

The question I will first ask is - where is the evidence of insanity led by the appellant at the trial? I think it is to be found mainly in the testimony of one Samuel Adigun who testified as DW.1. He said:-

"I am Samuel adigun. Chief Asogo of Akure, the president of Ondo State Herbalist. I live at Obaluaye Traditional Hospital, Oba-ile Road, Akure. I am a Traditional doctor. I specialize in curing the insane. I know the accused. One man brought him to me tied up with rope. It was in 1984 I treated him for insanity. On completion of treatment, I told the father that there remained a final treatment for him - apaku or apagbe. The father told me he had no money then and that he would come for it when he could finance it - when he had money. He did not come back for it. I told the accused's father that the spirit possessing the accused was very strong because the accused broke all the glasses in my house on the day he was brought to me. I told the father that if he failed to take the final treatment, the re-emergence of the spirit over the accused would be too serious on him. I have certificates for my profession. I also have my receipt booklet. I was not warned to come to court with my certificates. The accused must have committed the murder as a result of his insanity.

Under cross-examination the witness continued thus:-

"I inherited my knowledge from my late father. I had been in the cause since my youth. I knew that he was being controlled by the evil spirit when I consulted my Ifa Oracle. It revealed that the disease had origin from either his father and mother's lines. The accused was all right when I completed my treatment. But I knew that the ailment would re-emerge. When the accused is under the spell, he would not appreciate his action. He can't identify the action. I am not surprised that the accused appreciate the cause of his committing the murder and he revealed it to the police that he did so

under the control of evil spirit. I keep a record or case note of my patients. Here is my record. (Counsel says he is shown a receipt) I did not bring my record book to the court."

You only need to read the evidence above carefully, as I have done, to arrive at the conclusion that it contained everything needed to show that B the appellant was insane at the material time he committed the offence.

Mustapha Mohammed who also testified as DW.3 said in part:-

"I know the accused. He is my friend's son. His father is already dead. I know DW.1 when the accused was taken to him for treatment for his insanity sickness. The accused was tied with ropes. DW.1 treated the ac- C cused. The accused was normal. I went there to collect the accused home. DW.1 told me that there was need for a final treatment - apaku. I never went beck because on his return home, he the accused was normal and carried on his trading business."

This witness confirmed what DW.1 said to the effect that the appel- D lant had suffered from insanity which was treated and that unless the appel- lant took a final treatment - apaku, the insanity would return. The final treat- ment was not taken and the sickness returned. Is there anything wrong with a prediction that turned out later to be true? I believe even medical doctors these days make predictions about patients suffering from certain illnesses or E diseases that unless certain steps are taken or certain rules or conditions are observed, certain things may happen!

I shall now reproduce here again what the eye witness Eunice Adenike Agbeniyi (PW.1) said in her examination in-chief:-

"The accused was where I sat down. A woman then came and stood F at the Sabo where Hausa people collect to sell their goods. She call the accused - wishing to buy beans from him. He did not respond. The woman told me to help her call the accused. I then informed the accused that the woman was calling him. He suddenly gave me a slap on my face....."

I started weeping and was cleaning my face. I did not know who G went and call my mother. When she got to me she asked what hap- pened..... Before my mother turned her back, the accused had gone inside to bring out an axe and hit my mother with it. He hit my mother on the forehead and ribs side. My mother fell down after she had been hit with the H axe. Baba Aina is called Shehu. He wanted to seize the axe from the ac- cused..... The accused left my mother and faced Baba Aina and hit him with the axe."

Again this evidence by PW.1 pointed irresistibly to the only conclu- sion that the appellant was insane at the time he committed the offence. A

normal person would not have behaved in the way narrated by PW.1 above!

The learned trial judge in his judgment made it abundantly clear that he believed the evidence of PW.2 and accepted it. In addition he said her evidence "was not contradicted during cross-examination howsoever". The learned trial judge also made it clear that he was going to consider, as he in fact did, the evidence of DW.1 above and ascribe thereto any probative value it attracted as there was nothing in our laws which rendered such evidence inadmissible and that medical evidence is not an imperative to prove insanity vide R. v. INYANG 12 WACA 5 at 7, I think he was right. **There was no doubt at all that the learned trial judge did consider the evidence of insanity given by DW.1, but his conclusion that -**

The evidence of DW.1 did not go far enough to establish that the accused was insane at the relevant time he committed the crime", is what baffled me. The record shows that the learned trial judge considered other extraneous matters not in evidence before him to arrive at that conclusion as he did. For example he said (1) the appellant showed no sign of abnormality during trial (which was between 1989-1990 while the offence was committed in 1987), (2) that when the appellant was asked why he did not kill his blood relations, the appellant did not answer (3) that there was no report from federal prisons where the appellant was detained saying that he behaved abnormally while there, (4) that the appellant if insane would not have waited to attack Alhaji Shehu until the latter wrestled the axe (Exhibit 1) from him, (5) that the appellant killed the deceased because she wanted to know why he slapped her daughter (PW.2), just to mention a few.

I am clearly of the view that the evidence of the native doctor, DW.1, and that of PW.2, the eye witness, went sufficiently far to prove as they did, that the appellant was insane at the time the alleged offence was committed. The fact that DW.1 predicted a re-surgence of the illness which was later proved to be true, and that he warned the appellant's father, DW.3, to come for a final treatment were all uncontroverted. I repeat that the evidence of PW.2 set out above also went to buttress the evidence of DW.1 that the appellant must be insane at the relevant time. The prosecution led no evidence whatsoever nor made any attempt to contradict or dislodge the evidence of insanity adduced by the defence. The prosecution merely relied on the presumption of sanity as laid down in section 27 of the Criminal Code thus -

Every person is presumed to be of sound mind, and to have been of sound mind at anytime which comes in question, until the contrary is proved." But the appellant by the evidence adduced on his behalf had negated or displaced that presumption. I have refrained from commenting on the extra judicial statement (Exhibits 3 & 4) of the appellant and his oral evidence in

court, because when the question here is as to the sanity or insanity of the appellant himself, he cannot be a competent witness on that issue vide MAKOKA v. THE STATE (1969) 1 All NLR 363 and ONYEKWE V. THE STATE (1988) 1 NWLR (part 72) 505. It is also noteworthy that the evidence of PW.2 under cross-examination clearly showed that there was no motive on the part of the appellant to have committed the offence when he did. I am therefore on the whole inclined to agree with the appellant's counsel, Mr. Akhidenor, that on the totality of evidence led, the appellant on the balance of probabilities discharged the burden on him of proving that he was insane at the relevant time when the offence charged was committed. Section 28 of the Criminal Code therefore clearly availed the appellant.

This appeal therefore has merit and it succeeds. I allow it. The judgments of the lower courts are set aside. Conviction and sentence are also set aside. The verdict of NOT GUILTY by reason of insanity shall be substituted therefor. I direct that the said Yahaya Mohammed be kept in prison custody or be taken to a psychiatric Hospital for observation and treatment pending the order of His Excellency the Governor or Administrator of Ekiti State.

E **WALI JSC**

I am privileged to have read before now the lead judgment of my learned brother Kutigi, JSC and I agree with his reasons for allowing the appeal.

The facts involved in this case as contained in the evidence of PW2, Eunice Adenike, the daughter of the deceased which has been reproduced in the lead judgment and therefore requires no further recapitulation by me.

The defence raised in this case is that the appellant was, at the time he committed the murder, insane as defined by S.28 of the Criminal Code of Ondo State. It is to be borne in mind that the Nigerian law as set out in S.28 of the Criminal Code is not completely the same as laid down in the rules, of McNaughtan's Case. See R. Omoni 12 WACA 11.

S.28 of the Criminal Code of Ondo State reads:-

"A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions, or of capacity to know that he ought not to do the act or made the omission.

A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not

otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist."

Under the Nigerian law, in order to establish a defence of insanity, the defence has to prove that at the relevant time of committing the offence, the accused B was suffering either from mental disease or from natural mental infirmity, and, secondly, that the mental disease, or natural mental infirmity was such that at the relevant time, the accused was, as a result, deprived of capacity -

(1) to understand what he was doing, or

(2) to control his actions; or

(3) to know that he ought not to do the act or make the omission. C

Where the defence raised is that of partial delusion the provisions of second part of S.28 which are similar to the rules in M'Naughton's case, are applicable.

The presumption under the law is that every person is presumed to D be of sound mind at any time and responsible for his acts or omissions. In S.27 of Criminal Code the burden of proving the existence of circumstances bringing the case within the exception is on the accused. The burden of such proof is not so heavy on the defence and is not higher than the burden on a person to civil proceedings. See S.140(2) of the Evidence Act and the cases of E Onakpoya v. R. (1959) 4 FSC. 150, R. v. Echem 14 WACA 151 and Sodeman v. R. (1936) 2 All ER 1138.

From the facts in this case as revealed by the prosecution's evidence, the murder for which the appellant was tried and convicted was committed without any motive. See R. v. Inyang 12 WACA. 5, where the West African Court F of Appeal while considering the question of motive referred to the English case of R. v. Haynes 1F & F 660 wherein it was stated -

"When there is much evidence indicative of insanity rather than the opposite as there was in this case, the absence of any evidence of motive may become relevant to the point in issue."

The statement (supra) was adopted and applied in R. v. Ashigifuwo 12 WACA. 389, where the facts are that the appellant left his house carrying an axe and went to the house of the deceased, an old woman whom, the appellant admitted, she was like a mother to him; and then for no apparent reason whatever, axed her to death; and that shortly afterwards he was seen in the vicinity H washing blood stains from his wrapper.

The defence called certain witnesses as to the past history of the appellant who testified that the appellant a year earlier became mad and that he was treated with native medicine and recovered. A brother of the appellant

also gave evidence that four days before committing the murder, the appellant went out of his senses. There was evidence also that a night before the incident, the appellant kept disturbing his brother. The Chief Warder of the prison in which he was kept before trial gave evidence that he laughed irregularly. The doctor who examined the appellant six months after the incident B expressed the opinion that his mental behaviour was normal.

In his own evidence the appellant said he did not know why he was in court nor did he also know anything about the killing of the deceased with an axe.

The learned trial Judge observed that "some degree of feeble-mindedness was proved but went on to find that he had no doubt that at the time of the trial the appellant knew that he had murdered the deceased and his act of doing so was wrong. He then concluded -

"The accused's conduct throughout appears to be consistent with the view that he was doing and knew that it was wrong he knows now D what he did and that it was wrong."

On appeal to the West African court of Appeal against the trial court decision, it considered in full the provision of S. 28 of the Criminal Code and the decisions in R. v. Nasamu 6 WACA. 74 and R. v. Afonja WACA of 22nd February 1947 (unreported) and concluded:

"It does not appear from the judgment in this case that the learned E Judge took into consideration either the particular provisions of the local statute as to criminal responsibility or the decisions of this Court as to the measure of proof."

Taking into consideration all the evidence in this case, together F with the Judge's conclusion as to the feeble-mindedness of the appellant, we are of the opinion that the evidence is indicative rather of insanity as defined by section 28 of the Criminal Code than the opposite, that the absence of any evidence of motive becomes material to the issue and that in all the circumstances it is "most probable" that the appellant was by natural mental G infirmity deprived at the time he killed the woman of his capacity to understand what he was doing. We are therefore of opinion that in this case the conviction and sentence must be set aside."

The legal test of responsibility is always whether the accused is capable of knowing the nature of the act or that he is doing wrong. It is by this and not H by the medical test that the criminality is determined. A distinction must therefore be drawn between cases in which there is credible evidence after previous inactivity where the question is the degree of responsibility and the cases when the defence is raised by a person for the first time. Where previous insanity is established, the court must consider whether there was delib-

eration and preparation for the criminal act, whether it was done in a manner showing a desire to conceal it, whether afterwards the accused showed consciousness of guilt and made effort to avoid detection, and whether he offered false excuses and made false statement.

In this case, the evidence of insanity came from the evidence of DW1, DW3 and the appellant himself. B

DW1 testified as follows:-

"I am a traditional doctor. I specialize in curing the insane. I know the accused. One man brought him to me tied up with rope. It was in 1984 I treated him for insanity. On completion of treatment, I told the father that there remained a final treatment for him - apaku or apagbe. The father told me he had no money then and that he would come for it when he could finance it - when he had money. He did not come back for it. I told the accused's father that the spirit possessing the accused was very strong because the accused broke all the glasses in my house on the day he was brought to me. I told the father that if he failed to take the final treatment, the re-emergence of the final treatment, the re-emergence of the spirit over the accused would be too serious on him." C D

Under cross-examination the witness said -

"I inherited the knowledge from my late father. I had been in the cause since my Youth. I knew that he was being controlled by the evil spirit when I consulted my Ifa Oracle. It revealed that the disease had origin from either his father and mother's lines. The accused was all right when I completed my treatment. But I knew that the ailment would re-emerge. When the accused is under the spell, he would not appreciate his action. He can't identify the action. I am not surprised that the accused appreciate the cause of his committing the murder and he revealed it to the police that he did so under the control of evil spirit." E F

DW3 is Mustapher Mohammed who described himself as a friend of the father of the appellant and gave the following evidence of the mental condition of the appellant- G

"I know the accused. He is my friend's son. His father is already dead. I know d.w.l. I knew the d.w.l. when the accused was taken to him for treatment for his insanity sickness. The accused was tied with ropes. D.w.l. treated the accused. The accused was normal. I went there to collect the accused home. D.w.l. told me that there was need a final treatment - apaku. I never went back because on his return home, he the accused was normal and carried on his trading business. On 3/6/87, I did not witness the incident though I was a home, I was called up, I went there and met the accused in ropes, I ran to the police Station and reported the matter to the police." H

On an issue relating to the defence of insanity it has been shown through court's decisions that an accused person is not a competent witness as regards his mental status. See Makosa v. The State (1996) 1 All NLR. 363 and Onyekwe v. The State (1988) 1 NWLR (PT. 72) 505. But where there is independent relevant admissible evidence confirmative of the accused's mental status, the evidence given by him may be given some weight.

In the present case, the learned trial judge accepted the evidence of PW2 Eunice Adenike, the daughter of the deceased wherein she said -

"I knew one Janet Nwafor. She was my mother. She is now dead. I know the accused person. On 3/6/87 at about 5 p.m. I returned from School. I sat at the backyard carrying a child of one woman living in our house. She is Mrs. Adeoye. The accused was where I sat down. A woman then came and stood at the Sabo where Hausa people collect to sell their goods. She called the accused; wishing to buy beans from him. He did not respond. The woman told me to help her call the accused. I then informed the accused that the woman was calling him. He suddenly gave me a slap (on my face) Mrs. Adeoye and Baba Aina were there. I did not know who went to call my mother. When she got to me, she asked what happened to me. Mrs. Adeoye was still there. She narrated to my mother how the accused came to slap me. That she did not know what the witness did to the accused to warrant the accused slapping the witness. Before my mother turned her back, the accused had gone inside to bring out an axe and hit my mother with it. He hit my mother on the forehead and ribs' side. My mother fell down after she had been hit with the axe. Baba Aina is called Shehu. He wanted to seize the axe from the accused telling him that my mother had not done anything to warrant the accused hitting my mother with the axe. The accused left my mother and faced the Baba Aina and hit him with the axe."

When she was cross-examined she further stated -

"I have known the accused for less than two years before the date of incident. It is about a year I knew him before the date of incident. There was no misunderstanding between him and us with that year. I never spoke with him. To my knowledge, there was no quarrel between my mother and the accused. I was not seeing him every time. I never heard nor know that the accused had mental derangement. I was not aware of this. I and the accused were not accustomed to talking to each other."

The defence is that the accused was insane at the material time he committed the offence. It is not necessary that a man shall have been insane for a long period before the Crime in order to establish that he did not know the nature of his act. Unconsciousness of mind may be temporary.

In this case there is no evidence on mental condition of the appellant

by a qualified medical witness either before or immediately after he had committed the criminal act. It is essential that a qualified Doctor in the field should have examined the appellant as soon as it was possible after the commission of the act when he would be as far as possible in the same state of mind as when he committed it and not when his state of mind might have changed. It is for him in his position as expert to depose to the existence, nature and extent of the unconsciousness of mind of the accused. A medical witness who has not seen the accused may be asked whether certain facts, proved or assumed, indicate the existence of any particular type of insanity or delusions.

In this case the learned trial judge admitted the evidence of appellant and that of a native herbalist who testified as to the previous mental condition of the appellant and the treatment he gave him followed by a warning that

"The spirit possessing the accused was very strong because the accused broke all the glasses in my house on the day he was brought to me. I told the father that if he failed to take the full treatment, (apaku or Apagbe) the re-emergence of the spirit over the accused would be too serious to him."

There is also the evidence of the unprovoked and un-explained assaults on PW2, the deceased and DW3.

The appellant in his evidence in court said-

"I did not know what happened then. On the following morning I was prepared to go to the market but my father ordered me to refrain from doing so. I then stayed in the shop selling goods. Customers came to buy beans. I then went home to sleep. I do not know what happened in the sleep when I woke up thereafter, I was at the police station that I knew what happened I was tied with a rope -hands and feet. I did know what happened at the time of the incident, I can't say that I knew the time PW1 said I slapped him, I was preserved by the evil spirit suddenly. The spirit could appear like a snake or fire. It terrified me immediately it appeared."

If the defence is one of partial insanity {as it is in this case} the provisions of second part of S.28 (supra) are applicable See R. v. Ashingifuwo (supra) where WACA held that, if the facts proved by the defence were such as to make it "most probable" that the accused by reason of mental disease or natural mental infirmity was deprived of his capacity to understand what he was doing or control his actions, then the defence has discharged the burden of proof required to establish the defence of insanity.

On the evidence, there was at least some doubt as to the appellant's actual mental state at the time of the killing. So the question to decide was whether the evidence sufficiently established the plea of insanity or merely created some doubt as to his mental state at the relevant time the act was committed, in which case the doubt should be resolved in the appellant's

favour. See Christian Emenyi v. The State (1973) ALLNLR 127.

It is for these and the more detailed reasons in the lead judgment of my learned brother Kutigi, JSC that I also hereby allow the appeal.. I accordingly find that the appellant committed the act alleged, but I find him not guilty of murder on the ground of unsoundness of mind when he committed the act.

B It is ordered that he be kept in custody and that the case be reported to the Military Administrator/Governor of Ekiti State for his order.

MOHAMMED JSC

C I am in entire agreement with the opinion of my learned brother, Kutigi, J.S.C., in the judgment just read. I have had the advantage of reading the judgment in draft and I agree that this appeal ought to be allowed.

In a case of murder where the prisoner puts up a defence of insanity the cardinal issue is whether the prisoner was sane or insane, in the legal D sense, at the time the act was committed. This is a question of fact dependent upon the previous and contemporaneous acts of the prisoner. Therefore, the evidence on the previous history of the prisoner's mental condition and behaviour will denote all the mental elements requisite to an offence. The appellant's part during trial was to adduce evidence (or draw attention to the E evidence adduced by the prosecution) which raised doubt as to his sanity during the commission of the crime. In this regard the testimonies of pW.2 Eunice Adenike Agbeniyi, D.W.I, the local herbalist and traditional doctor, are very relevant.

P.W.2 narrated what happened before the appellant took an axe and F broke the heads of Janet Nwafor, alias Iya Idowu, and Alhaji Shehu Ibrahim. The evidence of these two witnesses had been reproduced in the lead judgment of my learned brother, Kutigi, J.S.C. It is however very clear from the testimony of PW2 that there was no motive for the violent attack on these two victims. I know that mere absence of any evidence of motive for a crime is not G sufficient ground on which to infer mania. However, when there is as much evidence, for example, the testimony of the herbalist who examined the appellant previously, indicative of insanity rather than the opposite, the absence of any evidence of motive may become relevant to the point at issue and material to it. R. v. Inyang (1946) 12 W.A.C.A. 5. Although the prosecution do not H have to prove motive, evidence of motive is always admissible in order to show that it is more probable that the accused committed the offence charged. Lord Atkinson stated the position clearly in the case of R. v. Ball (1911) A.C. 47 here he held:

"Surely in an ordinary prosecution for murder you can prove previ-

ous acts or words of the accused to show that he entertained feelings of enmity towards the deceased, and this is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his "malice aforethought," in as much as it is more probable that men are killed by those that have some motive for killing them than by those who have not."

In the case of Loke v. The State (1985) All N.L.R. 1 at page 9 this court referred to the case of Rex v. Inyang (supra) and considered the history of mental condition of Loke in establishing the previous and contemporaneous acts of the prisoner before allowing his appeal and finding that he was not guilty of the offence of murder by reason of insanity.

The picture in the case in hand, in my view, is the same. The appellant, by the description of his act at the time of the commission of the offence could not be adjudged to be a person in control of his acts. His behaviour was definitely abnormal.

A normal person cannot slap a girl because she drew his attention to a woman who wanted to buy his beans. His savage attack on the girl's mother and Alhaji Shehu Ibrahim with an axe for no reason at all is a clear indication of mental sickness. It is relevant to observe that the prosecution had not called any evidence to counter any suggestion that the appellant was not normal and sane at the time he committed the offence. This could be done by putting him under doctor's observation or that of a prison warder where he was detained pending trial. All these will help in knowing whether the appellant had mens rea to commit the offence charged.

For these reasons and fuller reasons in the lead judgment of my learned brother, Kutigi, J.S.C., this appeal succeeds and it is allowed. The conviction for murder and the sentence of death are hereby quashed. In their place I substitute a verdict of Not Guilty by reason of insanity. The appellant is hereby ordered to be confined in a safe custody and during the pleasure of the Governor of Ekiti State.

ONU JSC (DISSENTING)

This is an appeal from the Court of Appeal Benin Division which affirmed the conviction of the appellant by the High Court of Ondo State holden at Ikole for the murder of one Janet Nwafor on 3rd June, 1987 and sentenced him to death vide section 319(1) of the Criminal Code. Of the lone

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issue submitted by the appellant as arising for our determination which the respondent adopts, I regard the second option submitted by the respondent which covers the appellant's two grounds of appeal, for which leave was later sought and granted, as the more appropriate and I adopt the same for the consideration of this appeal. The issue asks:

B *"Whether or not the learned trial justices of the Court below rightly affirmed the conviction and sentence of death by the trial court based on both court's rejection of the defence of insanity."*

The facts of the case are as fully and comprehensively stated in the dissenting judgment of my learned brother Iguh, JSC. I respectfully adopt the same in my consideration of this appeal as there is nothing I can usefully add thereto except as to his reasoning and conclusion to which I make the following humble contribution of mine.

A traditional healer - one Samuel Adigun, Chief Asoga of Akure, who was the 1st Defence witness, gave evidence of previous treatment (some D three years earlier) which the administered on the appellant but with a warning that the patient had not been completely cured and that unless he was brought back for the final treatment he would experience a more potent relapse. This final injunction having been ignored some three years after the treatment, the appellant struck the deceased on the head with an axe, causing a wound from E which she later died, brutally wounding another, both acts being motiveless.

In the case now on appeal, the appellant was convicted of murder as hereinbefore stated. The main argument as I see it, is whether the appellant could take sanctuary under section 28 of the Criminal Code to prove that he was insaneschizophrenia under our law being a defence.

F I am respectfully unable to agree with the judgment just delivered by my learned brother Kutigi, JSC to the effect that the appellant at the time he committed the offence charged was insane or under any insane delusion and so entitled to a discharge and acquittal (it should rather be that he be detained at the Governor's pleasure).

G The law of insanity and proof thereof is elementary enough to need re-statement. Suffice it here to say that as this court has decided in many cases, one of which is Okunnu v. The State (1977)3 SC. 151 at 161, the burden of proving insanity as defined in section 27 of the Criminal Code as a defence to a criminal charge lies on the accused. See also Rex v. Nasamu 4 WACA 74 H at 77. It was also held in the latter case, that the onus of establishing insanity rests on an accused in law and that this onus is discharged on a mere balance of probabilities as in civil proceedings. Absence of motive in itself alone and by itself alone is not evidence of insanity. So held this court in Michael Aiworo v. The State (1987) 2 NWLR (Part 58) 526.

After giving a painstaking and careful consideration to the case both for the prosecution and the defence, the learned trial Judge in his judgment held inter alia as follows:-

"Now, the accused was charged for murder. In his submission, the learned counsel for the accused submitted that to prove a case of murder the following elements or ingredients must be proved, namely:

(a) death of the victim

(b) that the act of the accused caused the death

(c) the killing must be unlawful; and

(d) that the accused was of sound mind at the time of commission of the crime.

He admitted that (a) - (c) had been proved in the case; implying that (d) has not been proved. As will be seen later in this judgment, the prosecution need not prove sanity of the accused as this is presumed by law until the contrary is proved. The proof must be by the accused. Thus the issue to be decided has been narrowed down to one of insanity.

Learned Counsel for the accused submitted however that the defence of insanity put up by the accused has not been dislodged by the prosecution. He relied on the statutory provision of Section 28 of the Criminal Code and some decided cases."

A little way down in his judgment, after defining Section 28 of the Criminal Code, the learned trial Judge continued:

"The onus is on the accused to prove insanity. See Section 27 of the Criminal code which is in these terms:

"Every person is presumed to be of sound mind, and to have been of sound mind at any time which come in question until the contrary is proved." Therefore the accused herein is presumed to have been sane i.e. of sound mind at the time he committed murder subject matter of this proceeding. It is for the accused to prove the contrary. See section 140(3) of the Evidence Act" (Underlining above is mine.)

The learned trial Judge thereafter went on to quote from the case of Adamu Kumo v. The State (per Bairamian, JSC) who held inter alia that -

"In a case of homicide there is no need for the prosecution to prove that there is motive. Lack of evidence on motive is not, by itself, any reason for thinking that a person who killed might have been insane at the time of killing. If there is other evidence of insanity, lack of motive may help in leading one to think that probably the killer might have been insane. In this case there was no evidence of insanity at all, and with much respect to the learned trial Judge we think that what he said in this regard is unwarranted."

Alluding to the evidence of D.W.1, the traditional doctor, the learned trial Judge held as follows:-

"It is on record that this witness testified in closing his evidence in chief thus:

The accused must have committed the murder as a result of his B insanity."

Does this amount to the witness testifying that the accused was insane within Section 28 of the Criminal code? In my view it does not. It does not go far enough to say categorically that the accused was insane at the time he committed the crime. The witness was not making a statement of fact but was C either assuming or conjecturing or both, if not pontificating. The situation herein compares with that in the case of Richard Willie (supra) the portion of which I have quoted earlier on in this judgment and which for emphasis I reproduce herein once more"

Continuing, the learned trial Judge maintained as follows:-

"In my opinion d.w.1's evidence does not establish that the accused D was insane at the time he killed the deceased. It did not, like Dr. Stevenson's evidence, go far enough to reach that height.

The accused himself testified that he was insane (he had a black E out) namely that whenever he saw an object like fire or snake he would lose consciousness. He said it was during one of such an occurrence that he committed the crime. He said that he did not know what transpired on the night of the incident and only knew what he had done when he discovered himself at the Police Station and he was in ropes hands and feet. It is pertinent to note that the accused testified that his illness could not occur F daily, weekly or monthly. If this were so, why had there been no evidence of any insane behaviour before the killing of the deceased by the accused either before his alleged treatment by d.w.1 in 1984 or between then and 3/6/87 the day he killed the deceased? Apart from the evidence of d.w.1 that the accused destroyed the glasses in his house when he was brought for G treatment in 1984, (even if accepted for what is worth, which I do not so accept, because of the general doubt created by the witness in not proving his status or producing evidence of the accused's treatment), there is evidence adduced by d.w.3 who is in loco parents to him that the accused behaved normally before the killing on 3rd day of June, 1987. Assuming all H these facts are true it is highly improbable that two acts of abnormality of 1984 and 1987 - three years are capable of establishing insanity either of disease of the mind or natural mental infirmity. Even had the evidence of the accused being (sic) "overwhelming," because of the self-preservation that is naturally involved and self interest of the accused in assuming his defence I

should be rather worry (sic) in attaching much probative value to his evidence." (Underlining is also mine for emphasis).

Before finally proceeding to arrive at his verdict of guilty of murder, the learned trial Judge held, inter alia thus:

"The accused herein would want to save his neck from the noose. Like the learned State Counsel submitted he must offer something in his defence in order to achieve this. Striking enough but not surprising, when the accused was cross-examined as to why the evil spirit did not lead him to kill either of the people he lived with - his "father", sisters and brothers, the accused kept completely mute. He gave no answer. This muteness does violence both to the evidence of the accused and his case rather than advance it. One is tempted to conclude that this evidence of the fact that the accused knew what he was doing at the time of the incident and also that he knew that he ought not have done it. Or, at least, it was indicative of the fact that he then (in the witness box) realized at the trial that he had done that which he ought not to have done, the same being unlawful."

After a most thorough and meticulous examination of past authorities and the consideration of the defence of irresistible impulse, the learned trial Judge concluded his judgment as follows:-

"On the other hand, the prosecution adduced evidence that the accused was normal all through the period of his arrest and the investigation of the case. D.W.3 also testified that the accused behaved normally since he was treated in 1984 and carried on his business - trading - normally."

Putting the evidence (sic) adduced by the accused and the prosecution on the imaginary scale (since the accused has to prove insanity by preponderance of evidence or balance of probability) as enunciated in Odofin v. Mogaji (1978) 4 SC. 91 in my judgment, that of the prosecution has greater weight, I prefer it. In consequence therefore, I hold that the plea of insanity fails because the accused has not discharged the onus that rests on him. I, therefore, hold that the prosecution has proved its case against the accused beyond reasonable doubt, more so, since the defence had conceded that the prosecution had proved that:

- (a) there was the death of the victim
- (b) the act of the accused caused the death of the victim and
- (c) the killing was unlawful."

On appeal by the appellant to the court below, that court as I stated hereinbefore, unanimously affirmed the decision. It (per Ige, JCA concurred in by Akpabio and Ubaezonu, JJ.CA) held inter alia:

"The learned trial Judge was right in rejecting this evidence as

proof of insanity. The evidence of D.W.3 has done a lot of damage to the case of the Appellant in that it supports the case of the prosecution that the Appellant was sane rather than insane. He said the accused behaved normally since he was treated in 1984 and carried on his business - trading normally. As for the evidence of the Appellant himself in court, it was so vividly given that it could not have come from an insane person. Of what probative value can the evidence of an accused be in regard to his mental state? After referring to the very relevant case of this Court of Ogbu v. The State (1992) 8 NWLR (Part 259) 255 at 277 (per Omo, JSC) the learned Justice of Appeal further held that -

"The learned trial Judge in this case was right when he refused to attach much probative value to the evidence of the Appellant. He was well reinforced in his view by reference to the view of Coker, JSC in the case of Sule Noman Makosa v. The State (1969)1 ANLR 363 at 366 wherein he stated thus:-

.....
The burden of proof of insanity is satisfied when the facts proved by the Defence are such that makes it most probable "that the accused was at the relevant time insane within the meaning of Section 28 of the Criminal Code of Ondo State. This the Appellant has failed to discharge in this case - See R v. Omoni 2 WACA 511. The learned trial Judge in his judgment has considered most dispassionately the defence set up by the accused and the prosecution on the imaginary scale (since the accused has to prove insanity by preponderance of evidence or balance of probability) he has rightly found that of the prosecution to be of heavier weight - See MOGAJI V. ODOFIN (1978) 4 SC. 91"

I cannot agree more.

In the English translation of the appellant's Yoruba Statement (both received as Exhibits 3 and 4) which he made a day after the commission of the crime subject matter of these proceedings, he said:

"I know Alhaji Shehu (m) and I also know Mama Idowu (f) in fact I used axe to break the two people on their head (sic) yesterday 3/6/87. These people and I had no previous fight before; I took the axe from the kitchen attached to Iya Idowu's house; I do not know what actually happened to me (when) before I used the axe to hit them on their head. If I see Mallam H Mustapha that brought me to the station I will explain what happened.

xxxxxx R.T.I

xxxxx Yahaya Mohammadu

xxxxx 4/6/87."

It does not appear that the statement made in Exhibits 3 and 4 by the appellant

is that sallying forth from an insane person. Nor can such a mental condition or schizophrenia be inferred from the circumstances. It is for this reason that I rely on and adopt the position this court took in Paul Ojega v. The State (1985) 4 SC. (Part 2) 166 - a case of murder which is very identical to the case in hand. In that case, this Court dismissed the appellant's appeal following the appeals from the trial court up through the Court of Appeal, after each had B given detailed consideration to the defence of insanity and insane delusion under section 26 of the Criminal Code and found neither to be available to him. From the facts on record in Ojega's case (supra) the appellant there admitted that he matcheted to death Madam Joko at Jagun's Village in obedience to a voice urging him to go and get a cutlass and cut the deceased both in his C statement to the police exhibit A1 and in his evidence in court although obedience to a voice was not in Exhibit A.

In the instant case at the end of his examination. In Chief D.W.1 stated inter alia:

"..... The accused must have committed the murder as a result of D his insanity."

When subjected to cross-examination he said among other things that -

"..... But I knew that the ailment would re-emerge. When the accused is under the spell, he would not appreciate his action. He cant identify the action. I am not surprised that the accused appreciate (sic) the E cause of his committing the murder and he revealed it to the Police that he did so under the control of evil spirit."

Testifying as d.w.2, the appellant narrated how on 3/6/87 something suddenly happened to him for which he could not account any more. That as a result, his customers helped him to sell the balance of his goods. That his father F agreed to suggestions that he (appellant) should be stopped from attending the market any more. That after his father had agreed to his being taken for treatment elsewhere he had a bout of his sickness that evening; that he saw an object like a snake and fire which frightened him. That his father prevented him from going to market the following morning. That he stayed in the shop G selling his beans and did not know what happened in his sleep when he woke up and later found himself in the Police Station tied up in ropes - hands and feet. This narration is not contained in Exhibits 3 and 4 and what it is indicative of is that the long story told by the appellant ending with his seeing an object like a snake and fire which frightened him, is an afterthought and both H courts below so held.

With regard to the evidence of D.W.1 far from my refusing to uphold or looking down with derogation on the efficacy of native medicine, I must say with due respect that if from 1984 to 1987 - 3 whole years he no longer saw

the appellant or kept him under surveillance and treatment, the purport of his testimony as to the state of the appellant's mind when he committed this offence of murder is no more than a speculation to back up the appellant's afterthought. Medical evidence, it must be borne in mind, is not imperative to prove insanity. See Rex v. Inyang 12 WACA 5 at 7. In the case of Peter Johnny B Loke v. The State (1985) 1 NWLR 1 this court (per Coker, JSC) observed inter alia:

"The Court must consider the evidence upon the whole facts, including the nature of the killing, the conduct of the accused before, at the time of, and after it, and any history of mental abnormality. The task is to be approached from a broad common sense way."

Compare David Aganmonyi v. The State (1987) 1 NWLR (Part 47) 26. It has been held that a conviction for the offence of murder entered against an accused will not be justified and will be set aside in the light of evidence of a history of mental illness vide Ishola Karimu v. The State (1989) 1 NWLR (Part D 96) 124. However, what the law recognizes is that the insanity must be at the time of doing the act, not before. See The State v. Akinbamiwa (1967) NMLR 35. This burden that lies on the appellant in the instant case must be discharged by him vide section 140(3)(c) (now section 141(3)(c) of the Evidence Act, Cap. 112 Laws of the Federation 1990). The provisions of sections 223 E and 224 of the criminal Procedure Act which provide for the investigation of insanity, if the question arises at any stage, whether before the accused pleads to the charge or after and even after evidence has begun to be heard - investigation must be taken up immediately the question arises - the question ought to be resolved in evidence e.g. medical certificate - See The Queen v. Ogor F (1961) All NLR (Part 1) 70. This latter situation did not and does not call for consideration in the instant case since the burden of proof that lay on the appellant has not been so discharged. The appellant's statement to the Police a day after the commission of the offence in Exhibits 3 and 4 as well as his disposition including his demeanour at his trial where he made a trifle of the G serious charge against him by relying on seeing a snake and fire as pretext on which to hang his defence of insanity, did not make an impression and I so hold.

In conclusion, the decisions of the two courts below being concurrent findings on the facts, this court will be loath to disturb them by setting H them aside except for very strong reasons. This is because they have neither been shown to be perverse nor in breach of any procedural or substantive law as to amount to a miscarriage of justice. See Nwuzoke v. The State (1988) 2 SCNJ 344 at 346; Adjimora v. Ajufo (1988) 1 NSCC 1005 at 1016; The Stool of Abinabina v. Enyimadu (1953) 12 WACA 171 at 173; Nwangu v. Okonkwo

(1987) 3 NWLR (Part 60) 314 at 321; Osayeme v. The State (1966) NWLR 399 and Sanyaolu v. The State (1976) 6 SC. 37, to mention but a few. Furthermore, since it has not been shown that the conclusion arrived at is not supported by the evidence or that the judgments are unreasonable having regard to the evidence, this court will be loath to set aside the two decisions of the courts below. See the Federal Supreme Court case of Lengbe v. Rufai Imale & Anor. B (1959)1 WRNLR 325 at 328. See also Arisa v. The State (1988)3 NWLR (Part 83) 387, 399 and Balonwu v. Chinyelu (1991)4 NWLR (Part 183)30, 37. Besides, the two courts below disbelieved D.W. 1 who was the star witness for the defence as well as the appellant who testified as D.W. 2.

My answer to the lone issue in the appeal herein is rendered in the C affirmative.

It is for the above reasons that I am, with utmost due respect, unable to agree with my learned brother Kutigi, JSC whose judgment I had the privilege to read before now in draft.

In the result, I dismiss this appeal and affirm the decisions of the two D courts below.

IGUHJSC (DISSENTING)

I have had the privilege of reading in draft the leading judgment just E delivered by my learned brother, Kutigi, J.S.C. but deeply regret that I find myself unable to agree with the decision therein reached.

The appellant, Yahaya Mohammed, was arraigned before the High court of Justice of former Ondo State, holden at Ikole-Ekiti, charged with the offence of murder contrary to section 316 (2) and punishable under section F 319 (1) of the Criminal Code, Cap. 30, Volume 11, Laws of Ondo State of Nigeria, 1978. The particulars of the offence charged are as follows :-

"Yahaya Mohammed (M) on or about the 3rd day of June, 1987 at Market Road, Ikole-Ekiti in the Ikole-Ekiti Judicial Division murdered Janet Nwafor (F)" G

The accused pleaded not guilty to the charge and the prosecution called a total of five witnesses at the trial. The accused also testified in his own defence and called two witnesses.

The substance of the case as presented by the prosecution was that H on the 3rd June, 1987 at about 5 pm P.W.2, the daughter of the deceased saw a woman go to the accused's market stall. She called the accused, ostensibly wishing to buy beans from him but the accused did not respond. At the woman's request, P.W.2 assisted to call up the accused but the accused replied by giving P.W.2 a slap in the presence of one Mrs. Adeoye and Baba

Aina. As P.W 2 was weeping, her mother, the deceased, suddenly appeared and asked why she was crying, Mrs. Adeoye was narrating to the deceased how the accused, for reasons she did not know, slapped her. At this stage, the accused rushed into the kitchen and brought out an axe, Exhibit 1, with which he hit the deceased on her forehead and ribs.

B The deceased immediately fell down and became unconscious as her skull bone was fractured. Baba Aina wanted to seize the axe but the accused pounced on him and hit him too with the axe. The deceased was rushed to Ikole Hospital and later to Akure State Hospital where she eventually died on the 20th June, 1987 from the injuries she received from the accused. In the C opinion of P.W.4, Dr. Paul Adegoke, the police Medical Officer who performed postmortem examination on the body of the deceased, the cause of death was due to infection of the brain as a result of fracture of the skull bone caused by a sharp object. The accused was arrested on the 4th June, 1987 by P.W. 5, Sgt. No. 3358 Matthew Olowoyeye. He volunteered the Statements, Exhibits 3, 4, D 5a, and 5b respectively after he was duly cautioned.

P.W. 5 stressed that the accused comported himself well at the time of his arrest. P.W. 1, one of the Investigating police Officers testified that the accused said it was an evil spirit that caused his attack on the deceased. The witness did not however believe this claim. He cross-checked with people E around, especially customers of the accused person's father and they all confirmed that the accused was mentally fit and that he had never had any mental problem. P.W. 2, for her own part, testified that she had never heard that the accused suffered from any form of mental derangement.

The defence of the accused was that of insanity. Strange enough, he F was able to testify as to his own insanity or insane delusion. He said that on the date of this incident on the 3rd June , 1987, something happened to him suddenly as a result of which he could no longer account for his goods, his actions or his business, He got possessed by the evil spirit and saw objects like snake and fire which terrified him. The evil spirit could appear to him daily, G weekly or even monthly but he was never taken to a psychiatric hospital. He was only taken to D.W. 1, a herbalist, who once treated him in 1984.

On his discharge, he continued to sell his goods but he knew that he was not totally cured. Whenever he had a bout of this condition, he would be afraid. He had a bout of this sickness the evening of the fateful day. He saw H objects like a snake and fire which frightened him. He stayed in the shop selling his beans and later went home to sleep. He did not know what happened in his sleep when he woke up. It was at the police station that he knew what had happened at the time of incident. He did not know the time P.W.2 said he slapped her. The accused did not however answer the question in

cross-examination why the evil spirit did not push him to murder either of his parents, sisters or brothers with whom he was living. The learned trial Judge was however satisfied this was a case of mute of malice.

D.W. 1, the herbalist, testified that he "specialized" in curing the insane. The accused was brought to him in 1984 and he treated him for insanity. On completion of treatment, he told the father of the accused that the latter needed a final medication dose to clear the sickness completely. He said that the accused was never brought back to him. According to D.W.I., the evil spirit worrying the accused was a very strong one because the accused broke all the glasses in his house on the day he was brought to him. He also warned the father of the accused that if the accused was not brought back for his final treatment, the re-emergence of the evil spirit would be too severe on the accused. D.W.I. claimed that it was his Ifa Oracle that revealed to him that the accused was being controlled by the evil spirit. Questioned as to his professional status and competence, D.W. I claimed that he was not warned to come to Court with his professional certificates which he left at home. In his opinion, the accused must have committed the murder as a result of his insanity. He stated that the accused was alright when he completed his course of treatment. He knew however that the sickness would re-emerge. The accused would not recognize his actions when under the spell of he evil spirit. He was not surprised that the accused knew and told the police that he was under the spell of the evil spirit when he committed the murder. He claimed that he kept records of his treatments. However when asked to produce them, he only showed a receipt book. D.W 3 who was in loco parentis to the accused testified that he behaved normally after his treatment in 1984 and carried on with his trading business.

At the conclusion of hearing, the learned trial judge, Akinyede, J, after an exhaustive and thorough review of the evidence on the 8th day of March, 1990 found the accused guilty as charged. He was of the clear view that having regard to all the evidence adduced before the Court and the demeanour and bearing of the accused, it was not established, on the balance of probability, that the accused was insane at the time he killed the deceased. He disbelieved the evidence of the herbalist, D.W.I, and the accused, D.W. 2 and accordingly found the latter guilty as charged.

Dissatisfied with this decision of the trial Court, the convict lodged an appeal against his conviction and sentence to the Court of Appeal, Benin City Division. The Court of Appeal in a unanimous judgment on the 28th day of April, 1995 dismissed the appeal. That Court, per the leading judgment of Ige, J.C.A., on the issue of insanity concluded as follows:-

" In the instant case, the learned trial judge's findings and direc-

tion on this issue cannot be faulted. He considered all the authorities submitted and the arguments of both prosecuting counsel and the Defence Counsel thoroughly, and rightly came to the conclusion that the Appellant failed to establish the defence of insanity. The burden of proof of insanity is satisfied when the facts proved by the Defence are such that make it "most
B probable" that the accused was at the relevant time insane within the meaning of section 28 of the Criminal Code of Ondo State. This, the Appellant has failed to discharge in this case- See R. V. Omoni 2 WACA 511."

It is against this judgment of the Court below that the convict, hereinafter referred to as the appellant, has now appealed to this Court.

C Both the appellant and the respondent filed and exchanged their respective written briefs of argument. In the appellant's brief, the under-mentioned issue was formulated for resolution, namely:-

"Whether the Court below was right when it held as follows, "The
D Learned Trial Judge in his judgment has considered most dispassionately the defence set up by the Appellant and when he put the evidence adduced by the accused and prosecution on the imaginary scale (since the accused has to prove insanity by preponderance of evidence or balance of probability) he has rightly found that of the prosecution to be of heavier weight see MOGAJI VS. ODOFIN (1978) 4 SC 91."

E The respondent, for its own part, also identified one issue in its brief of argument for the determination of this Court. This single issue which deals with the defence of insanity is framed in the alternative as follows:-

"Whether or not the evidence adduced by the prosecution at the
F trial has not negatived and / or stultified the defence of insanity put forward by the Convict/Appellant?" OR

Whether or not the learned Justices of the Court below rightly affirmed the conviction and sentence of death by the trial Court based on both Courts' rejection of the defence of insanity?"

G Without doubt, the lone issue for determination in this appeal, irrespective of the manner it has been formulated in both briefs of argument, is whether or not the defence of insanity was established by the appellant in this case.

At the oral hearing of the appeal, learned counsel for the appellant, Mr. Akhidenor relied on the appellant's brief of argument and proffered oral
H arguments in elucidation of the submissions therein contained. In the main, his contention was that this Court should upset the findings of both courts below and uphold the defence submission that the appellant was a victim of insanity, disturbed by "spirits" which D.W.1 had prophesied. Relying on the decision in Aiworo v. The State (1987) 2 N.W.L.R. (part 85) 526 at 538, learned

counsel submitted that although it would be disastrously dangerous to allow any fanciful defence of insanity to obstruct the course of justice, where no motive for the killing is established, coupled with the nature of evidence given by D.W.1 in this case, the Court below should have sustained the appellant's plea of insanity under Section 28 of the Criminal Code, Cap. 30, vol. 11, Laws of Ondo State of Nigeria 1978. He urged the Court to allow this appeal, set aside the conviction and sentence of the appellant and to enter a verdict of not guilty by reason of insanity under Section 28 of the said Criminal Code. B

Learned Counsel for the respondent, Mrs. Omoleye, D.P.P., Ekiti State, similarly adopted the respondent's brief and presented oral submissions in amplification thereof. She recalled that none of the prosecution witnesses who testified at the trial gave details of any alleged abnormality in the behaviour of the appellant before the 3rd June, 1987 on which date he axed the deceased to death. On the contrary, she argued P.W. 1, P.W. 2 and P.W.5 testified that he was a normal and sane human being with no mental problem. She stressed that even D.W.1, the herbalist, who claimed to have treated the appellant for insanity in 1984, three years before the date of the incident in issue, could not categorically or affirmatively testify that it was as a result of insanity to the exclusion of every other thing else that the appellant killed the deceased on the 3rd June, 1987. This is understandable as D.W. 1 never claimed to have seen or examined the appellant either on the 3rd June, 1987 or on any other date thereafter after he had allegedly treated him three years before the date of the incident. She stressed that all the witness was able to conjecture, surmise or guess was that the appellant "must have committed the murder" as a result of the appellant's insanity. She contended that the defence of insanity was not proved as laid down by Section 28 of the Criminal Code. F She submitted that both Courts below were ad idem on the facts that deceased died, that it was the act of the appellant that caused her death, that the insanity of the appellant at the time of the commission of the offence was not proved and that the killing was unlawful. She referred to the decisions of this Court in Audu Aruna v. The State (1990) 6 N.W.L.R. (part 155) 123 at 136-137 G and Ezekiel Adekunle v. The State (1989) 12 S.C.N.J. 104 and submitted that the above are concurrent findings of facts which this Court ought not to disturb unless a miscarriage of justice or a violation of some principles of law or procedure is established. She urged the court to dismiss this appeal.

As indicated earlier on in this judgment, the sole issue in this appeal H is whether or not the defence of insanity was established by the defence. In resolving this issue, it seems to me right to begin by reference to section 27 of the Criminal code, cap. 30, Volume 11, Laws of Ondo State of Nigeria, 1978 which provides as follows :-

"Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

(Underlining supplied for emphasis)

Accordingly, under Section 27 of the Criminal code, there is a presumption of law that every person, including the appellant, is of sound mind and, more importantly, to have been of sound mind at any time which comes in question, until the contrary is proved. An accused person who decides to contend that he is insane or that he suffers from insane delusions has the legal duty to rebut this presumption of law which fixes him with sanity until the contrary is proved. In other words, the onus squarely rests on him to establish the fact of insanity or insane delusion and until he discharges this onus to the satisfaction of the Court, he shall be presumed to be of sound mind and to have been of sound mind at all times which come in question. See R. v. Smith (Oliver) (1911) 6 Cr. App. R. 20 Philip Dim v. R. (1952) 14 W.A.C.A. 154. Although Section 137 (1) of the Evidence Act provides that the proof of the commission of a criminal offence beyond reasonable doubt is on the prosecution, this is made subject to the provision of Section 141 (3) (c) of the same Act which provides that the burden of proof of the defence of insanity and of intoxication is on an accused person. However unlike the burden on the prosecution to prove its case beyond reasonable doubt, this onus on the accused to establish the defence of insanity or intoxication is merely as in civil cases, that is to say, on the preponderance of evidence. See R. v. William Echam (1952) 14 W.A.C.A. 158, R. V. Matthew Onakpoya (1959) 4 F.S.C. 150, Silas Ukadike v. The State (1973) 3 F.S.C.L.R. 277, Emery v. The State (1973) 6 S.C. 215 at 216 and R. v. Nasamu 6 W.A.C.A. 74 at 77.

The defence of insanity or insane delusion is provided for in Section 28 of the Criminal Code. For the defence of insanity to succeed, under that Section of the Law, the accused must establish that he was at the time of commission of the offence in such a state of "mental disease" or "natural mental infirmity" as to deprive him of capacity:

- (i) to understand what he was doing, or
- (ii) to control his actions, or
- (iii) to know that what he was doing was wrong.

See too R. v. Omoni 12 W.A.C.A. 511 at 512 - 513 Sanusi v. The State (1984) 10 SC. 166 etc. The point that cannot be over-emphasized is that it must first and foremost be established that the accused was at the relevant time, that is to say, at the time of the commission of the offence, suffering from mental disease or infirmity of such magnitude that at the said relevant times, he was deprived of capacity to understand what he was doing, to control his actions or to know that he ought not to do the act or make the omission in question.

See R. v. Omoni, supra, at page 513. I will now examine to what extent the appellant was able to discharge the onus placed on him by law in proof of his defence of insanity.

First and foremost is the evidence of the appellant himself, the obvious content of which was to suggest that he was an insane person. According to him something unusual suddenly happened to him as a result of which he would no longer account for himself. He would have black out, instantly got possessed by the "evil spirit" and saw objects like snake and fire which terrified him. The "evil spirit" could appear to him daily, weekly or monthly at will and when this happened he would become afraid. He knew that it was during one such occurrence or bout of insanity or abnormality that he committed the crime for which he stood trial and subsequently convicted. He did not in fact know what transpired on the night of the incident in question.

The first point that I desire to stress is the fact that when the question is as to the insanity or otherwise of a person, it cannot be seriously doubted that such a person himself is scarcely a competent witness on the point and; in any case the probative value of such evidence must be considered low. See Sule Makosa v. The State (1969) 1 All N.L.R. 363 at 366. Accordingly evidence by an accused person of his own mental infirmity is usually suspect and unreliable for establishing his insanity. See Onyekwe v. The State (1988) 1 N.W.L.R. (part 72 - 505). I entertain no doubt that the appellant is hardly a competent witness on the issue of proof of his own insanity and, although there was nothing intrinsically wrong in the reception of his evidence on the point by the trial Court, the learned trial Judge, was in my view, right when he felt "rather weary in attaching much probative value to his evidence.

The above treatment of the evidence of the appellant by the trial Court with regard to his own insanity did also receive the approval of the Court below. Said the Court of Appeal:-

"As for the evidence of the Appellant himself in court, it was so vividly given that it could not have come from an insane person. Of what probative value can the evidence of an accused be in regard to his mental state? Omo J.S.C. (as he then was) has answered this question succinctly in the case of Ogbu v. The State (1992) 8 NWLR (pt. 259) at p. 277 when he opined thus :-

"The consequent injustice that can flow from acceptance of the IPSE DIXIT of an accused person as to the State of his mind in proof of his mental infirmity is too obvious to require further comment. It will be easy, were that permitted, for a vicious but imaginative murderer to establish a defence of Insanity."

The learned trial judge in this case was right when he refused to attach much probative value to the evidence of the Appellant. He was well reinforced in his view by reference to the view of Coker J.S.C. (as he then was) in the case of Sule Noman Makosa v. The State (1969) 1 ANLR 363 at 366 wherein he stated thus :-

B *"It is impossible to impugn the direction and findings of the learned trial judge in the aspect and it is well to point out that when the question is as to the sanity or otherwise of a person, such a person himself is scarcely a competent witness on this point and in any case the probative value of such evidence must be considered low."*

C I need only state that I am in full agreement with the observations of both Courts below on the issue and fully endorse them.

In the second place, the appellant testified that his mental instability could occur daily, weekly or monthly at will. It is surprising that there was no evidence of any particulars of abnormal or insane behaviour on his part by D any independent witnesses either before his alleged treatment by D.W. 1 in 1984 or between the said 1984 and the 3rd June, 1987 on which date he killed the deceased. There was also no such evidence of the appellant's alleged insanity between the said 3rd June, 1987 and the 23rd January, 1990 on which date he closed his defence at his trial. This failure on the part of the appellant E to call any witnesses to testify and give evidence of particulars of his alleged insanity seems to me of significance in view of the onus placed on him by the law to prove his insanity and in further view of the provisions of Section 148 (d) of the Evidence Act.

Dealing generally with the evidence of the appellant, the learned trial F Judge having observed and watched his bearing and demeanour in the witness box concluded as follows :-

"The accused herein would want to save his neck from the noose. Like the Learned state counsel submitted, he must offer something in his defence in order to achieve this. Striking enough but not surprising, when G the accused was cross-examined as to why the evil spirit did not lead him to kill either of the people he lived with - "father", sisters, and brothers, the accused kept completely mute. He gave no answer. This muteness does violence both to the evidence of the accused and his case rather than advance it. One is tempted to conclude that this is evidence of the fact that the H accused knew what he was doing at the time of the incident and also that he knew that he ought not have done it. Or, at the least, it was indicative of the fact that he then (in the witness box) realized at the trial that he had done that which he ought not to have done, the same being unlawful. On the face of these and upon the authority of the above case, evidence given by the

accused in his defence of insanity must be treated or considered with extreme caution. It is not one to which any sizeable probative value can be ascribed. He is not a competent witness in this regard. I ascribe no probative value to it. I reject it."

It cannot be disputed that for cogent reasons, fully and carefully advance by the trial Court, the evidence of the appellant was quite rightly, in my view, B rejected.

In the third place, the other purported evidence of the appellant's insanity was given by D.W.I, the herbalist who claimed to have treated him in 1984 and D.W.3 who is in loco parentis to the appellant. The long and short of the evidence of D.W.I is that the appellant was treated by him in 1984 for C insanity, that it was his "Ifa" oracle that revealed to him that the appellant was controlled by the "evil spirit" and that the evil spirit worrying the appellant was a very strong one as the appellant broke all the glasses in his house on the day he was brought to him. He however advised that the appellant should be brought back to him for his final treatment and warned that if he failed, the D re-emergence of the evil spirit would be too serious on the appellant. The appellant did not come back to him as advised and he conjectured that the appellant must have committed the murder as a result of his insanity.

It is clear from the record that the evidence of D.W.I was rejected by the trial Court as unreliable said the learned trial judge:- E

"Apart from the evidence of D.W.I that the accused destroyed the glasses in his house when he was brought for treatment in 1984, (even if accepted for what it is worth, which I do not so accept, because of the general doubt created by the witness in not proving his status or producing evidence of the accused's treatment), there is evidence adduced by d.w.3 F who is in loco parentis to him that the accused behaved normally before the killing on 3rd day of June, 1987."

Earlier on in his judgment, the learned trial judge had said of D.W.I as follows:-

"He claimed to be a traditional doctor specializing in the treatment and cure of insanity. He said that he treated the accused sometime in G 1984- three years before the date of incident. He said he advised the accused's father to come for the final dose of the prescription lest the disease reoccur. He said the accused did not come for the final dose. Like the learned State Counsel submitted, because of the time lag, it is difficult to see the nexus between the accused's state of health in 1984 and the act of killing in 1987. H However, it is very striking that the witness did not produce any evidence of treating the accused. He testified that he was not requested to produce the record which he kept and was at home. This is not true because the subpoena duces tecum in the case file issued on him requested him to "bring any

document (if any) that may assist in his evidence". In my view a person who claims to be a traditional specialist of the kind of this witness should assume that, unlike the orthodox medical practitioner, or specialist, his qualification and his practice would be subject to some more serious or stricter scrutiny and proof to reach the standard of that of the orthodox practitioner.

B In the absence of the record it will be rather rash to accept his evidence of treating the accused or that of his qualification and professional competence."

It ought to be pointed out that the evidence of opinion of an expert, such as D.W.I claims to be, is relevant; but it stands to reason, particularly where the professional competence of such expert is challenged or put in issue, that he must state his qualifications and experience and satisfy the court that he is indeed an expert on the subject in which his opinion has come into question. He must also state clearly the reasons for his opinion otherwise his evidence may hardly carry much reliability, or weight. D.W.I knew that he was going to testify as an expert witness. He did testify and, not unnaturally, he was questioned as to his professional competence and qualification. He answered:-

"I have certificates for my profession. I also have my receipt booklet. I was not warned to come to Court with my certificate. This accused must have committed the murder as a result of his insanity".

A little later in his evidence D.W.I stated:-

"The accused was alright when I completed my treatment. I keep a record or case file as my patients. Here is my record, (Counsel says he is shown a receipt) I did not bring my record book to the Court."

This witness who could have been recalled at some later stage of the proceedings to tender his alleged professional certificates and the record or case file of his patient, the appellant was never recalled. I think there is ample material on record upon which the learned trial judge declined to accept the evidence of D.W.I as reliable.

At all events, the evidence of D.W.I, even if it had been believed, and it is clear it was not, is that he saw the appellant in 1984, treated and discharged him. There was no evidence that he saw the appellant again whether in 1987 on which date the appellant murdered the deceased or soon afterwards with a view to determining precisely whether or not the appellant was suffering from mental disease or infirmity such as deprived him of capacity to understand what he was doing, or to control his actions or to know that what he was doing was wrong. As I have already pointed out, it is not enough to show that an accused was suffering from a disease which is capable of affecting the will without showing that his will was in fact affected at the

material time. See Philip Upetire v. Attorney-General of Western Nigeria (1964) 1 All N.L.R. 204. In the present case there is total lack of evidence as to whether or not the appellant at the time of the murder on the 3rd day of June 1987 was suffering from any mental disease or infirmity and if that was so, whether it in fact affected his will at the material time he murdered the deceased.

B

In this regard, the Court of Appeal per the leading judgment of Ige, J.C.A. with which Akpabio and Ubaezonu, JJ.C.A. agreed disposed of the issue as follows:-

"In the instant case the evidence of D.W.I and that of the Appellant are such that could not satisfy the requirements under section 28 of the Criminal Code. D.W.I a traditional doctor gave evidence that he treated the Appellant sometime in 1984, 3 years before the date of incident. He said the Appellant was to come back for a final dose of his prescription to avoid a recurrence of the disease, but he was never brought back for same. No record of treatment was produce by this witness who was on subpoena to produce any document he may have in his possession. The witness also did not indicate the likely period of re-currence after his treatment hence how could one take his last statement at the close of his evidence in chief as the gospel truth. The record of that portion of his evidence went thus:-

D

"The accused must have committed the murder as a result of insanity."

E

This witness I am afraid was not in a position to say confidently and convincingly that the accused was insane at the time he committed the crime or murder. He treated him 3 years before the date of incident. He never followed up his treatment after 1984 until 1987 when he heard that the accused had axed down Janet Nwafor, he then came forward to confirm his prediction that the insanity would recur and has recurred.

F

This witness was not present at the scene neither had he made any recent observations about the behaviours of the accused to confirm that he (accused) was deprived of the capacity to understand or control his action. The learned trial judge was right in rejecting this evidence as proof of insanity."

G

I agree entirely with the above observations of the Court of Appeal and fully endorse them.

There is finally the evidence of D.W.3 who stands *in loco parentis* to the appellant. His evidence was that he took the appellant to the herbalist, D.W.I, for treatment for his insanity. He however gave no single detail of those abnormal aspects of the appellant's behaviour from which he came to the conclusion that the appellant suffered from or required treatment for insanity. According to this witness, the appellant behaved normally since his alleged treatment in 1984 and carried on with his routine business until the

H

date of this incident. I agree with both Courts below that the evidence of this witness appears more favourable to the prosecution than to the appellant, particularly as there was no suggestion from him that the appellant's mental state as at the date of the incident on the 3rd June, 1987 was in any way abnormal.

B As against the evidence of the appellant and his two witnesses, there was that of the prosecution where P.W.1, P.W. 2 and P.W.5 testified in clear terms that the appellant was a normal person and suffered from no insanity. P.W.I., Police Corporal No. 81689 who assisted in the investigation of this case and recorded one of the appellant's written statements to the police C under caution testified thus:-

The accused's statement was take in form of questions from me and answers from him. He said that it was a spirit that ordered him to kill the deceased I did not believed him in this claim. I cross-checked with people around him especially a woman customer to his father. They all confirmed D that he was mentally fit and that he had never had mental derangement".
P.W.2 for her own part stated:-

"I have known the accused for less than two years before the date of the incident. It is about a year I knew him before the date of the incident I have heard nor know that the accused had mental derangement.
E *I was not aware of this."*

Perhaps, the most relevant of these witnesses was P.W.5, Sgt. No. 3358 who led in the investigation of the case. He saw the appellant almost immediately after the case was reported. He arrested the appellant the day after the murder on the 4th June, 1987 and obtained his statement under caution the F same day. He testified as follow:-

".....On the 4th June, 1987, the accused was arrested by me. He volunteered a statement after I had cautioned him in Yoruba language On the 5th June, 1987 I recovered the axe the accused person used on the victims. I showed it to the accused. He agreed to make additional statement G The accused comported himself well at the time of arrest".

I should add that the testimony of those three witnesses was accepted by the learned trial judge as truthful. It cannot therefore be correct that the prosecution led no evidence nor attempted to dislodge the purported evidence of insanity adduced by the defence.

H In this connection, however, I should state that even if the prosecution led no evidence on the issue of the sanity of the appellant, this would not have been any matter of great moment. This is because it is a presumption of law that every person is of sound mind; there is therefore no legal necessity for the prosecution to call evidence to prove the sanity of an accused person

unless the state of evidence in a particular case irresistibly so demands. It is for the accused to prove his insanity; and it is open to him to call any prison officials he deserves to call as a witness or any Doctor who had had him under observation, if any. See Philip Dim. V. R. (1952) 14 W.A.C.A. 154. There is no onus on the prosecution to prove the sanity of an accused. As the lord Chief Justice of England put it, and rightly so, in R.V. Fred de Vere 2 Cr. A.R. 20:- B

"It is for the defence to prove insanity, not for the prosecution to prove sanity."

It was also suggested that it was the duty of the prosecution to call a prison Doctor, if any, or a prison official in proof of the issue of the sanity of an accused person. With profound respect, I cannot accept this proposition C as well founded. This aspect of the law would appear to have been laid to rest by the judgment of the West African Court of Appeal in Philip Dim V. R., supra, where Jibowu, Ag. S.P.J. (Nigeria), delivering the judgment of Court stated as follows:-

"At one time, the practice of calling prison Doctors to prove insanity D arose and the practice was referred to by the lord Chief Justice in his judgment in Rex V. Oliver Smith 6 Cr. A. R. at P. 20 as follows: The question came up 7 or 8 years ago, when the practice arose of the Crown calling the Prison Doctor to prove insanity. All the judges met and resolved that it was not proper for the crown to call evidence of insanity, but that any evidence in E possession of the crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit. The question is, is it right or is not, where there is some suggestion of insanity, for counsel for the crown to ask for a ruling as to whether or not there is evidence of insanity to go to the jury. The court stated that the only general rule that could be laid down was that F insanity, if relied upon by the defence, must be established by the defendant."

The judgment was referred to in Rex V. Casey 32 Cr. A. R. 81, which decided that the practice of calling the prison Doctor as a witness for the Crown on the question of insanity in order that he might be cross-examined by the counsel for the defendant is irregular and should not be followed but G that the ruling laid down in Rex V. Oliver Smith, supra be followed."

I must with respect, endorse the above statement of the law as well founded. Accordingly, it can now be taken as settled that it does not appear a sine qua non for the state to call evidence of insanity although any material evidence in their possession in that regard should be place at the disposal of H learned counsel for the accused person to be used by him if he so desires. Insanity, if relied upon by the defence, must therefore be established by the accused person.

The issue of motive was raised. The point being made was that it is

noteworthy that the evidence of D.W.2 showed there was no motive on the part of the appellant to have committed the offence at the time he did it thus implying that the appellant was therefore suffering from mania. Again, with respect, I must disagree, it being long settled that the mere absence of any evidence of motive for a crime is not a sufficient ground on which to infer insanity. See Egbe Nkonu v. The State (1980 3-4 S.C. I. The burden on the accused is not discharged merely by showing that his act is without motive, bizarre or entirely inexplicable on rational grounds. See Ngene Arum V. The State (1979) 11 S.C. 91. Indeed in Philip Dim V. R (1952) 14 W.A.C.A. 154, the learned trial judge, as in the present case, did not accept the appellant's evidence, of a blackout at the time of commission of the offence, having regard to the evidence in the case. It was held that the apparent absence of motive was not necessary an indication of insanity as, quit rightly, there might have been a motive known only to the appellant. This must be so for as the saying goes, not even the devil knoweth what is in the heart of a man. And so in Robert Ugiakha V. The State (1984) 2 S.C. I. at pages 2 and 5, the only defence set up by the appellant, as in the present case, was that he had a blackout at the time of the commission of the murder in question. It was held by this court that mere absence of any evidence of motive for a crime is not sufficient ground upon which to establish mania. The onus remained on the appellant to establish insanity by credible evidence.

Still on the issue of motive, the trial court viewed the question from yet another angle and was prepared to hold that a more critical examination of the evidence would appear to reveal that there was indeed a motive in the killing. Said the learned trial judge:-

"But looking further into the matter one is tempted to hold that indeed there was a motive in the killing. P.W. 2 assisted the customer of the accused to attract him to sell his product to that customer. The accused suddenly slapped her. Mrs. Adeoye and one Shehu (Baba Aina) were then present P.W.2 was crying when her mother, the deceased, got there. On her inquiry Mrs. Adeoye was still explaining to the deceased the unprovoked slapping of P.W. 2 by the accused. In no time-in P.W.2's words: before the deceased could turn her back, the accused had gone in for an axe, exhibit I, and hit the head of the deceased with it causing the fatal blow that eventually caused her death. The question is: since there were four people present at the time of the incident namely-P.W.2, Baba Aina (Alhaji Shehu), Mrs. Adeoye and the deceased, why was it that the accused did not strike any other person except the mother of P.W. 2 which P.W. 2 he had assaulted-slapped? He knew whom he wanted to attack out of the four. He picked up the deceased the attack of whose daughter by him was being explained to

her upon her querying it. It will not be far fetched to deduce from this that the accused attacked the deceased because of her querying his attack on her daughter.

"Again, considering the matter a bit further still, if the accused were to have run amok, he would not have waited to attack Alhaji Shehu until the latter wanted to wrestle the axe, exhibit I, from him. He would have attacked the other people present there indiscriminately.The fact that the accused picked up none other than the mother of P.W.2. whom he had assaulted and for which her mother queried his action in this behalf, it will neither be irrational nor injudicious to hold that he had a grudge against the deceased for his killing her on the fateful day. This, to my mind constitutes motive for such killing and shows that the accused knew what he was doing then."

I need only state that the above analysis of the evidence by the learned trial judge cannot be dismissed summarily. However motive or no motive, the onus rested squarely on the appellant to prove the defence of insanity as provided by Section 28 of the Criminal Code. There was next the suggestion that the appellant failed to take his "final treatment" and that as a result his sickness "consequently" recurred. With the greatest respect, I find it extremely difficult to subscribe to this view. In this connection, it is necessary to restate that the ascription of probative value to evidence is a matter primarily for the court of trial and not the business of an appellate court to substitute its own views of undisputed facts in a case for those of the trial court unless of course, the issue relates to one where an appellate court is in as good a position as the trial court to evaluate the evidence which has been given in the case. This situation will arise where the issue is a matter of inference that can be drawn from proved facts not resting on the credibility of witnesses as a result of their demeanour or bearing in Court or of the impression of them by the trial Judge. See Okafor v. Idigo 111 (1984) 5 S.C. 1 at 36. The Registered Trustees of the Apostolic Faith Mission and Another v. James and Another (1987) 2 N.W.L.R (Part 61) 556 at 567. A trial Court having had the opportunity of hearing and watching the demeanour of witnesses in the witness box is entitled to evaluate their testimony and to select witnesses to believe or facts it finds proved and the appellate Court should not interfere with such facts unless they are perverse or the appellant satisfactorily established that they are wrong.

In the case on hand, the appellant's evidence on his own insanity was rejected by the learned trial Judge and affirmed by the Court of Appeal. The evidence of D.W.1, the herbalist who claimed to have treated the appellant was also disbelieved by the trial Court and affirmed by the Court below. In

other words, the evidence of both the appellant and D.W. 1 on the appellant's alleged insanity was rejected by the learned trial Judge and affirmed by the Court of Appeal. It is clear to me that this court cannot now interfere with these concurrent findings except there is established a miscarriage of justice or violation of some principles of law or procedure. See National Insurance Corporation of Nigeria v. Power and Industrial Engineering Co. Ltd. (1986) 1 N.W.L.R. (Part 14) 1 AT 36, Enang v. Adu (1981) 11 - 12 S.C. 25 at 42, etc.

No miscarriage of justice or violation of any principle of law or procedure has been established by the appellant in this case. I cannot therefore find my way clear in reversing the findings of both Courts below to the effect C that it was not established either that the appellant was treated for insanity by D.W. 1 in 1984 or that the appellant's alleged mental sickness recurred in 1987 on the date he murdered the deceased.

The argument was also presented that the evidence of P.W. 1 pointed irresistibly to the only conclusion that the appellant was insane at the time of D the commission of the offence. I can only state that I find nothing in the evidence of P.W. 1 which conclusively may be said to point to the appellant's insanity. It is this witness, after all, who categorically testified that his investigations confirmed that the appellant was "mentally fit" and "had never had mental derangement". Although the appellant told him it was the "evil spirit" E that directed him to kill the deceased, the witness made it clear that he did not believe this claim. At all events, if such an assertion be conclusive evidence of insanity, then it may simply be too convenient for any murderer or criminal on being arrested to simply repeat that hallowed assertion that it was the evil spirit that influenced him with a view to evading the long arms of the law. I F cannot, with respect, accept that there is any thing in the evidence of P.W. 1 which, no matter how remotely pointed conclusively to the appellant's insanity. The same is true of the evidence of P.W. 2, not to mention the evidence of either the appellant or D.W. 1, both of whom were disbelieved on the issue of the appellant's insanity.

G I think I must at the risk of repetition stress that for an accused person to avail himself of the defence of insanity, it is not sufficient for him to establish that he was simply mentally abnormal sometime in the past, he must go further to establish that at the time of the commission of the offence complained of, he was in fact insane within the meaning of Section 28 of the H Criminal Code. The insanity pleaded must be proved to exist at the time the accused committed the crime. It cannot be proved if it is entirely speculative and grounded on conjecture or suspicion. To discharge the onus placed on him, the accused must, by credible evidence, show, that is to say, prove that he was insane - either that he was suffering from mental disease or natural

mental infirmity at the time he committed the crime as to deprive him of capacity to understand what he was doing or control his actions. To succeed in this defence the evidence in most cases is usually tendered of the accused's past history or behavioural pattern and as to his conduct immediately before and after the act constituting the crime. See R. v. Ashigifuwo (1948) 12 W.A.C.A 389.

B

Now, what is the evidence given in respect of this matter. Put shortly, this is that the appellant immediately before and after the killing of the deceased was a normal human being. The appellant's own witness, D.W. 3 and P.W.5, the investigating Police Sergeant, testified respectively as to this fact with regard to the appellant's conduct before and after the commission of the offence with which he was charged. The learned trial Judge so found. Said he:-

C

"As I have said above, there has been no credible evidence adduced attesting to the accused's insanity in form of history before the date of the incident or at the time of the incident. Indeed the prosecution has testified that there was no such situation either anterior to, contemporaneous or simultaneous with or posterior to the time the offence (killing) was committed by the accused."

D

Later on in his judgment, although this cannot on its own alone be said to relate to the appellant's mental state at the time of the commission of the offence, the learned trial Judge observed:-

E

"In addition to the above, I have carefully watched the demeanour of the accused during the whole trial. He exhibited the highest degree of sobriety, coolness and understanding. There was no sign of abnormality showing in him during the whole trial. He exhibited no sign of violence whatsoever. Indeed as I said above, when he was cross-examined as to why the evil spirit did not incite or lead him to kill any of this blood relations he did not proffer an answer but he kept mute. I watched him then especially to discover and note his demeanour via the reaction. I noticed that he was rather cool collected and unperturbed. As I have also said earlier on in this judgment this shows remorse on the part of the accused which is not apposite to insanity."

F

G

The observation does however indicate the appellant's state as found by the trial Court as at his trial, well after the commission of the offence charged.

I cannot conclude this judgment without making reference once more to the decision of this court in Upitire v. Attorney General of Western Nigeria (1964) N.S.C.C. 145 at 148 on the issue of the onus placed on an accused person who relied on insanity for his defence. Said Taylor, J.S.C. in that case:-

H

"The only point in issue is whether on preponderance of evidence,

it has been shown that the appellant was at the time of the offence unable to control his action That he was suffering and had been so suffering from the disease geroderm from birth, that such a disease also carries with it some degree of mental trouble, and that such condition grows worse as the patient grows older are facts amply established by the evidence of the medical expert. Where the evidence fell short of what is required by law is as to the extent to which the disease - geroderm, - had affected the appellant's will, and his ability to control his action, at the time of the act complained of."

In the present case both Courts below are in agreement that the defence of C insanity at the time of the commission of the offence was not proved by the appellant. The learned Judge in concluding this aspect of his judgment with which the Court of Appeal unanimously agreed observed thus:-

"It is on record that this witness testified in closing his evidence in chief thus:-

D "The accused must have committed the murder as a result of his insanity."

Does this amount to the witness testifying that the accused was insane within Section 28 of the Criminal Code? In my view, it does not. It does not go far enough to say categorically that the accused was insane at the time he committed the crime. The witness was not making a statement of fact but was either assuming or gesticulating or both if not pontificating. The situation herein compares with that in the case of Richard Willie (supra) the portion of which I have quoted earlier on in this judgment and which for emphasis I reproduce herein once more:

F "In our view to avail himself of the defence of insanity under Section 26 it is not sufficient for the appellant to establish that he was mentally abnormal at the time of his trial he must go further to show that at the time of doing the act complained of he was insane within Section 26.

G In the present case the offence was committed on 13th November, 1966 and there is nothing in the evidence of Dr. Stevensons to suggest that the appellant on whom the onus of proof lies was insane on the date.

Indeed on the 26th November, 1966, Dr. Stevensons observed that the appellant was normal, and on the 23rd July, 1967 he also observed that the appellant talked normally and sensibly. Taken at his highest Dr. Stevenson's evidence does not tend to show that the time of killing his mother the appellant was in such state of mental disease or natural mental infirmity"

Although the Court below had specifically disbelieved the evidence of D.W.1 and the appellant on the defence of insanity, the learned trial Judge to drive his point home proceeded to consider that defence in the alternative. He then

examined the probative value of the evidence of D.W. 1, even if it were accepted as reliable, a position he clearly did not take, and came to conclusion that it did not go far enough to say categorically that the appellant was insane at the time he committed the offence. I think, with respect, that both Courts below were clearly right in the above observation.

Even if the evidence of D.W. 1 was accepted that he treated the B appellant for a type of mental problem in 1984, there was evidence that the said appellant thereafter became alright and went about his normal business. There was no evidence of the appellant's insanity on the 3rd June, 1987 on which date the deceased was murdered. On the contrary, there was evidence that the C appellant after the killing was absolutely normal. It is clear to me that the evidence of .D.W. 1 in this case, even if it had been accepted, did not categorically assert that the appellant was insane at the time of the commission of the offence charged. And neither in a criminal cause nor in a civil action is it the function of a Court, whether a trial or appellate Court, but its own exercise or ingenuity to supply or arrive at evidence or to work out a possible answer D which only evidence tested under cross-examination could supply or to speculate on possibilities which are not supported by evidence. See The State v. Ibong Okoko and Another (1964) 1 ALL N.L.R. 631, Iteshi Onwe v. The State (1975) 9 - 11 S.C. 23 at 31 - 32, George Ikenye and Another v. Akpala Ofune and Others (1985) 2 N.W.L.R. 1. E

To conclude, the learned trial Judge heard the evidence and had the opportunity of observing the appellant and his witnesses during the trial and as they testified in the witness box and was not satisfied that the appellant was at the time of the commission of the offence in such a state of either F mental disease or natural mental infirmity as to deprive him of the capacity to control his actions. This finding of the trial Court was affirmed by the Court of Appeal. In my view, the issue under consideration must be resolved against the appellant.

It is for the above reasons that I find myself, with profound respect, totally unable to agree with the leading judgment of my learned brother just G delivered.

If the decision in this appeal were to rest with me, I can see no other option open to me than to dismiss the same. Consequently, this appeal fails and it is hereby dismissed. The conviction and death sentence passed on the appellant by the trial Court and affirmed by the Court of Appeal are hereby H further affirmed.