

SUPREME COURT OF NIGERIA
FRIDAY 13TH DECEMBER, 2002. SC. 158/2001
CORAM:- S. M. A. BELGORE, A. I. IGUH, U. A. KALGO,
S. O. UWAIFO, A. O. EJIWUNMI, JJSC

1. DOMINIC PRINCENT APPELLANTS
2. MICHAEL UDOH
V.
THE STATE RESPONDENT

COURTS - Charges - Amendment of - Criminal Procedure Code s. 208(1) - Empowers court to amend charge - Any time before judgment is delivered (H1)

CHARGES - Amendment - Vital consideration - Amendment can be made suo motu by court - Or on application by prosecution - Provided injustice is not done to accused (H2)

CHARGES - Amendment - Fresh plea - Procedure - The amended charge is read over and explained to accused - And his fresh plea taken (H3)

CHARGES - Amendment - Witnesses - Recall - Whenever there is amendment - Accused is permitted to recall witnesses who had earlier testified - For further cross examination (H4)

FAIR HEARING - Charges - Amendment - Appellants were not prejudiced by the fact of amendment - Since trial court adopted a proper procedure (H5)

EVIDENCE - Contradiction in - Effect - Contradiction in evidence of prosecution must be substantial - For same to be fatal to its case (H6)

APPEALS - Concurrent findings - Supreme Court does not interfere - Unless there is miscarriage of justice - Or a violation of some principles of law or procedure (H7)

FACTS

The case for prosecution/respondent was that accused/appellants viciously attacked the deceased and PW3 following an argument that erupted among the parties at the residence of PW5. Appellants had insisted that the deceased and PW3 must communicate to PW5 in English language. However, PW3 objected to this insistence which infuriated appellants. A fight broke out which eventually led to the murder of the deceased by appellants. Appellants were therefore arraigned before the High Court of Kano State, holden at Kano for the offence of Culpable Homicide punishable with death contrary to section 221 of the Penal Code.

At conclusion of addresses of counsel, the learned trial judge pursuant to section 208 of Criminal Procedure Code directed an amendment of the charge in the interest of justice to bring it in line with evidence led. Following the amendment, appellants took fresh plea, their counsel also recalled and further cross examined two prosecution witnesses and further addressed the court in the light of the amendment. At the end of trial, the court found appellants guilty as charged and thus sentenced them to death. Not satisfied, appellants filed appeal at the Court of Appeal, Kaduna Division. The appeal was dismissed and judgment of trial court was confirmed. Aggrieved, appellants appeal to Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether or not in the circumstances of this case the Appellants were not denied fair hearing in their trial, conviction and sentence when the court of first instance suo motu after addressed of parties directed the prosecution to amend the charge against the Appellants to include an offence of Joint Act so as to ground a basis for their conviction and sentence to death.

2. Whether or not the provision of Section 208 of the Criminal Procedure Code, Cap 30, Laws of Northern Nigeria in the circumstances and application in this case is not in conflict with Section 33 of the 1979 Constitution of Nigeria as amended.

3. Whether or not the material contradictions in the evidence of the prosecution witnesses in this cases relating to the charges against the Appellants did not create enough doubt on the guilt of the Appellants and whether the prosecution had proved its case beyond reasonable doubt against the Appellants”.

HELD (unanimously dismissing the appeal per **IGUH**

JSC)

Charges - Amendment of

1. Unquestionably, Section 208(1) of the Criminal Procedure Code of Northern Nigeria gives the court discretionary power to alter, add to or indeed, to frame a new charge by way of amendment at any time before judgment is delivered.

In my view, therefore, the trial Court was perfectly right not only to have directed but also to have allowed the amendment sought by the prosecution in the present case after the addresses of learned counsel for the parties but before the delivery of judgment in the case so long as all the relevant mandatory rules concerning what a court must do after granting such an amendment of a charge were complied with. I think that the learned trial judge was entitled to amend the charge before the delivery of judgment in the charge.

(pp. 3429 G/3430 E)

CHARGES - Amendment - Vital consideration

2. I think the point must be stressed that the vital consideration which governs the amendment of a charge whether suo motu by the court or on the application of the prosecution after addresses by counsel but before judgment is that such amendment may be made without injustice to the accused. In this regard, the various sections of the Criminal Procedure Act, Cap 80, Laws of the Federation of Nigeria, 1990, such as Section 164 and 165 and those of the Criminal Procedure Code, Cap. 30, Laws of Northern Nigeria, such as Section 208(2), 209, 210 and 211, all of which prescribe the necessary procedure a court shall adopt on granting the amendment of a charge must be strictly complied with. These, to a large extent, are to ensure that the accused person is neither prejudiced nor suffers any injustice by virtue of the amendment. Accordingly, an amendment to a charge pursuant to the provision of Section 208 of the Criminal Procedure Code, Cap. 30 may be made at the instance of either the prosecu-

tion or, suo motu by the court. However, once the charge is amended, a host of rights inure to the accused as carefully laid down in Section 208(2), 209, 210 and 211 of the Criminal Procedure Code. Those rights, it seems to me, are in-built safeguards with a view to ensuring that an accused person by virtue of an amendment is not thereby prejudiced or misled, that no injustice is occasioned to him and that his constitutional right to fair hearing pursuant to the provisions of the Constitution is fully preserved. See too *Okosun v. The State* (1979) 3-4 S.C. 36.

In the present case it is clear from the record of proceedings that the provisions of Section 208(2), 209, 210, and 211 of the Criminal Procedure Code under which the appellants were charged were meticulously complied with by the learned trial judge. (pp. 3431 E/3432 B)

CHARGES - Amendment - Fresh plea - Procedure

3. It is clear from the above that the amendment in issue was not only granted without any objection, a fresh plea of the appellants in respect of the amended charge was duly taken after the same was read over and explained to them. It ought to be pointed out that this procedure is of great significance as failure to call on the accused to plead to the charge as amended renders the whole proceedings null and void. (p. 3433 E)

CHARGES - Amendment - Witnesses - Recall

4. The prosecution indicated after the fresh plea was taken that they did not intend to recall any witnesses. The appellants, on the other hand, were not only granted an adjournment of two months on their application to study the amended charge, they were subsequently granted leave to recall all the prosecution witnesses they desired to examine further in the light of the amendment. In the result, P.W.3 and P.W.6 were on their application recalled and duly cross-examined by their learned counsel. This was obviously in compliance with the provisions of Section 211 of the Criminal Procedure Code. Beside, it is trite law that whenever there is an amendment to a charge

after the commencement of a trial, it is the right of the accused to be permitted to recall witnesses who had already testified before the amendment for further cross-examination and also to call further witnesses that the court may consider to be material in the light of the amendment. (p. 3433 G)

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FAIR HEARING - Charges - Amendment

5. It is clear to me that the amendment in issue was for the purpose of meeting the evidence already led in the case. The appellants were neither misled or prejudiced thereby nor was failure of justice occasioned to them by virtue of the amendment in question.

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I think the Court of Appeal cannot be faulted when it upheld the validity of the amendment by the learned trial judge and consequently arrived at the conclusion that the appellants were not denied their right to fair hearing by the trial court. Nor am I persuaded in any way to accept that the provisions of Section 208 of the Criminal Procedure Code is an infraction on the appellants' right to fair hearing under Section 33 of the 1979 constitution as contended by their learned counsel. Accordingly issues 1 and 2 must be resolved in favour of the respondent. (p. 3434 G/3435 A)

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EVIDENCE - Contradiction - Effect

6. I have, myself, closely considered the entire evidence led on behalf of the prosecution in this case and can find no contradictions which are substantial or capable of disturbing the verdict of the trial court as affirmed by the Court of Appeal in this case.

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The law is firmly settled that for any conflict or contradiction in the evidence of the prosecution witnesses to be fatal to its case, such conflict or contradiction must be material, substantial and fundamental to the main issues in controversy between the parties before the court thus creating some doubt that the accused is entitled to benefit from. Where conflict or contradictions in the evidence of the prosecution witnesses raise no doubts as to the guilt of the accused, the only duty of the trial judge is to observe and comment on them

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as such and no more. Such contradictions are not fatal to the prosecution's case. (p. 3438 A)

APPEALS - Concurrent findings

7. The learned trial judge most carefully considered the so called items of contradictions alluded to by the appellants and described them as immaterial and unsubstantial. This view of the trial court was upheld by the Court of Appeal and I can find no reason to disturb them. In my opinion the entire findings of fact of the trial court as affirmed by the Court of Appeal are copiously supported by evidence before the court and cannot be faulted.

It is settled law that this court will not normally interfere with the concurrent findings of fact of the two courts below unless there is some miscarriage of justice or a violation of some principles of law or procedure.

No such miscarriage of justice or violation of any principle of law or procedure has been established in this case. (p. 3438 E)

REPRESENTATION

Kayode Olatunji Esq., for the Appellants
 Suraj Sa 'Eda Esq., (Director of Public Prosecution, Kano State) with
 Shuaibu Sule Esq., (Assistant Director of Public Prosecution), Mrs.
 Aisa Mahmoud (State Counsel) and Miss H. Y. Sani (State Counsel),
 for the Respondents

CASES REFERRED TO

- R. v. Kano (1951) 20 NLR 32
- Ayub-Khan v. The State (1991) 2 NWLR (Pt. 172) 127
- Echeazu v. C.O.P. (1974) 2 S.C. 55
- Okonofua v. The State (1981) 12 NSCC 233
- Okegbu v. The State (1979) 11 S.C. 1
- Okosun v. The State (1979) 3-4 S.C. 36
- Waldo Fox v. Commissioner of Police (1947) 12 WACA 215
- Edmund Eronini v. R. (1953) 14 WACA 366
- Nasamu v. The State (1979) 6-9 S.C. 153
- Onubogu v. The State (1974) 1 All NLR (Pt. 2) 5

Ibe v. The State (1992) 5 NWLR (Part 244) 642
 Azu v. The State (1993) 6 NWLR (Pt. 299) 303
 Wankey v. The State (1993) 5 NWLR (Pt. 295) 542
 Akpuenya v. The State (1976) 11 S.C. 269
 Emiator v. The State (1975) 9-11 S.C. 107

B

STATUTES REFERRED TO

Criminal procedure Act, 162 and 163
 Criminal Procedure Code, ss. 208, 209, 210 and 211
 Constitution of the Federal Republic of Nigeria 1999, s. 33
 Penal Code, ss. 79 and 221

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LEAD JUDGMENT BY IGUH JSC

The appellants were on the 4th day of October, 1989, arraigned before the High Court of Justice, Kano State, holden at Kano charged with the office of culpable homicide punishable with death contrary to Section 221 of the Penal Code.

The particulars of the offence charged, as amended, read as follows:-

“That you Dominic Princent and Michael Udoh on or about the 1st day of January, 1989, at Tsamiya Brigade Quarters in Kano Municipal Local Government Area within the Kano Judicial Divisional had formed a common intention to commit culpable homicide punishable with death in furtherance of which you caused the death of one Joseph Egbe by doing all illegal act, to wit: hitting him with iron rod, water pipe, axe and knife on the back of his head, face and other parts of the body with knowledge that death will be the probable consequence of your act and you thereby committed an offence punishable under Section 221(b) read with Section 79 of the Penal code”

Each of the two accused pleaded not guilty to the charge and the prosecution called a total of 8 witnesses and tendered several exhibits at the trial. The accused persons under affirmation testified on their own behalf and called one witness.

At the conclusion of the address of learned counsel, the learned trial Judge, Tijani Abubakar, J., as he then was, pursuant to the provisions of Section 208 of the Criminal Procedure Code. Cap. 30 Laws of Northern Nigeria, directed an amendment of the charge in

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the interest of justice to reflect an averment of joint act on the part of both accused persons under Section 79 of the Panel Code. Following this amendment, a fresh plea of both accused persons was taken accordingly. Thereafter, and on the application of learned defence counsel, two prosecution witnesses, to wit, P.W.3 and P.W. 6 were recalled and further cross-examined. At the end of this exercise, learned counsel for the accused persons, again on his application, was granted leave to further address the court in the light of the amendment and the evidence before the court.

The substance of the case as presented by the prosecution is that the 1st appellant was the boy friend of P.W.5, one Miss Rita Eru. P.W.5 invited the 1st appellant to her residence with a view to their celebrating the New Year festivities together on the 1st January, 1989. The 1st appellant accepted this invitation. On the appointed date, the 1st appellant went to the residence of P.W.5 as arranged with his brother. The 2nd appellant. They were accompanied by the D.W. 3 Sylvester Aguko, who is one of their friends. While they were there, the deceased, one Joseph Egbe and his friend, Albert Eka, who testified as P.W.3 in this case, arrived. They both came from Igede in Benue State as well as P.W.5 and her two sisters. They met the two appellants together with P.W.5 and her two sisters. P.W.4 and P.W.6 in the room of the said P.W.5. The deceased and P.W.3 greeted the appellants in the English language. The deceased then went ahead to greet P.W.5. and her sisters in their Igede language. The 2nd appellant insisted that the deceased should not converse in their native language but in English. P.W.3 replied that they were not speaking to the appellants but that they were merely greeting P.W.4 their sister in their Igede language and that at all events they would soon take their leave. At this juncture, the 2nd appellant slapped P.W.3 on his face. As the deceased queried why the 2nd appellant slapped P.W.3. he, too, received his own slap from the 1st appellant and a fight ensued between the appellants of the one part and the deceased with P.W.3 of the other part. They were immediately separated and the fight was terminated. Thereafter the appellants together with D.W.3 left the premises to return home. All thought that was the end of the unfortunate incident. But it was not to be. The deceased and P.W.3 continued their conversation with P.W.5 and her sisters.

The deceased and P.W.3 were now about to go home when

from no where the appellants came back to the premises armed with very dangerous weapons which include Exhibits 4A, 4B and 4C. The 1st appellant was armed with an iron rod whilst the 2nd appellant held an iron pipe. The appellants suddenly charged on the deceased and P.W.3. The 1st appellant hit the deceased on the forehead with the iron rod, Exhibit 4A, whilst the 2nd appellant hit him at the back of his head with the iron pipe, exhibit 4B. The deceased as a result of this sudden attack instantly fell on the ground. Cold water was poured on him. He was rushed to the Murtala Mohammed Hospital, Kano, where the Medical Doctor on duty pronounced him dead. In the opinion of P.W.8, the Medical Doctor who performed post mortem examination on the body of the late Joseph Egbe soon after the incident, death was as a result of fracture of the skull and internal bleeding following the head injuries sustained by the deceased.

The case of the defence was that there was only one fight between them and the deceased with P.W.3 and that the latter party were at all material times the aggressors. They denied using the weapons, Exhibits 4A, 4B or 4C to assault the deceased. The 1st appellant claimed that it was P.W.3 who first slapped him. The 2nd appellant, on the other hand, claimed that P.W.4 hit him during the fight with a high-heeled shoe. She wanted to hit him a second time but he dodged and the shoe landed on the deceased. The appellants maintained that they never returned to the premises of P.W.5 a second time after the fight was stopped and they left the scene.

The learned trial Judge after an exhaustive review of the evidence on the 2nd day of October, 1990, found both appellant guilty of the offence of culpable homicide punishable with death as charged and accordingly sentenced them to death as prescribed by law. In his judgment, the learned trial Judge accepted as established the evidence of the prosecution witnesses against both accused persons. The defence evidence he dismissed as unreliable. Said he :-

“The oral evidence of the defence (D.W.1 and D.W.2) is materially inconsistent with their statements. Exhibits 1, 2 and 4 respectively. Consequently, I regard their evidence as unreliable.”

Of the prosecution’s case, the learned trial Judge commented:

“I believe that when the first fight was separated, the accused left the house. The deceased and P.W.3 were about to go when the accused came back and attacked him as a result of which he fell

unconscious”.

He went on :-

“The evidence before me which I believe is that the unarmed deceased did not fight back. He fell unconscious after the attack....The accused are the aggressors ...they left the scene only to get armed and return to fight”.

He concluded :-

“From the totality of the evidence before me the prosecution has proved its case beyond reasonable doubt and I am unable to find any defence open to the accused. I therefore find them guilty of the offence of culpable homicide punishable with death contrary to Section 221(b) read with Section 79 of the Penal Code as charge”.

Dissatisfied with this judgment of the trial court, the appellants appealed against their conviction and sentences to the Court of Appeal. Kaduna Division, which court in a unanimous decision on the 6th day of March, 1996, dismissed the appeals and affirmed the conviction and sentences passed on the appellants by the trial court. It is against this judgment of the Court of Appeal that the appellants have now appealed to this court.

Both the appellants and the respondent filed and exchanged their written briefs of arguments. In the appellants’ brief of argument, the under mentioned issues were set out for the determination of this court, namely:-

“1. Whether or not in the circumstances of this case the Appellants were not denied fair hearing in their trial, conviction and sentence when the court of first instance suo motu after addressed of parties directed the prosecution to amend the charge against the Appellants to include an offence of Joint Act so as to ground a basis for their conviction and sentence to death.

2. Whether or not the provision of Section 208 of the Criminal Procedure Code, Cap 30, Laws of Northern Nigeria in the circumstances and application in this case is not in conflict with Section 33 of the 1979 Constitution of Nigeria as amended.

3. Whether or not the material contradictions in the evidence of the prosecution witnesses in this cases relating to the charges against the Appellants did not create enough doubt on the guilt of the Appellants and whether the prosecution had proved its case beyond reasonable doubt against the Appellants”.

The respondents, for its own part, similarly submitted three issues in its brief of argument for the resolution of this appeal. These issues are framed thus:-

“1. *Whether the Court of Appeal was right in holding that the appellants were given fair trial?*

2. *Whether from the circumstances of this case the Court of Appeal was right in holding that, it has not been brought to light that Section 208 of the CPC is an infraction on the appellants’ right to fair hearing?*

3. *Whether the Court of Appeal was right when it held that there were no material contradictions in the evidence of the prosecution witnesses as to cast lingering reasonable doubt in the respondent’s case?”*

It is evidence that both sets of issues touch essentially on the same questions and it will make no difference which of them is adopted for the determination of this appeal. I propose, however, in this judgment to consider the issues as formulated by the appellants for my determinations of this appeal.

At the oral hearing of the appeal on the 10th day of October, 2002, learned counsel for the appellants, Mr. Kayode Olatunji, simply adopted the appellants brief of argument and urged the court to allow the appeal of each of the appellants. He had contended with regard to issue 1 in the appellants’ brief of argument that the trial court by directing an averment of the charge preferred against the appellants the right to fair hearing guaranteed under Section 33 of the Constitution of the Federal Republic of Nigeria, 1979. Relying on the decision of this court in *Ayub-khan v. The State* (1991) 2 NWLR (Pt. 172) 127 at 144 he stressed that the position of a Judge is that of an unbiased umpire who is bound to do nothing to promote the case of either party. In his submission, the court below was in error to have ignored the breach of the appellants’ right to fair hearing by affirming the conviction and sentence of death passed on the appellant. Learned counsel under issue 2 attacked the constitutionality of Section 208 of the Criminal Procedure Code, Cap. 30. Laws of Northern Nigeria in the circumstances of its application in this case whereby the trial court invoked it to amend the charge preferred against the appellants at the close of the case for the parties. He argued that Section 208 of Cap. 30 aforementioned was inconsistent with Section

33 of the 1979 Constitution and is to the extent of such inconsistency invalid, unconstitutional and null and void. He referred to what he called “material contradictions” in the evidence of the prosecution witnesses in the case and submitted that the prosecution failed to prove its case beyond reasonable doubt as required by law. He urged
B this court to resolve all three issues in favour of the appellants and consequently to allow this appeal, set aside the conviction and sentences passed on the appellants and to acquit and discharge them of the offence charge.

C Learned counsel for the respondents, Suraj Sa’Eda, Esq, Director of Public Prosecution, Kano State similarly adopted the respondent’s brief of argument and urged the court to dismiss the appeal of each of the appellants. On issue 1, learned counsel conceded in his brief that an application to amend the charge was filed and
D served after the close of evidence by the parties and the addresses of counsel. The application was not opposed and was accordingly granted pursuant to the powers conferred on the court under the provisions of Section 208 of the Criminal Procedure Code, Cap. 30, Laws of Northern Nigeria. He stressed that as required by law, fresh plea of
E the appellants was taken after which learned appellants’ counsel, as he was entitled to do, recalled two of the prosecution witnesses for further cross-examination. Additionally, the appellants applied for and were granted leave to address the court on the amended charge. The learned Director of Public Prosecution submitted that the Court
F of Appeal was right in holding that the appellants were given fair hearing by the learned trial Judge in accordance with the provisions of the law. Turning to issue 2, learned counsel contended that by no stretch of the imagination could it be suggested that the provisions of
G Section 208 of the Criminal Procedure Code, Cap, 30, Laws of Northern Nigerian which deal with amendment of proceedings generally are in conflict with the provisions of Section 33 of the Constitution of the Federal Republic of Nigeria, 1979. On the question of contradictions in the evidence of the prosecution witnesses as
H alleged by learned appellants’ counsel, Mr. Sa ‘Eda submitted, as found by both courts below, that no material contradictions were disclosed in the evidence of the prosecution witnesses. Learned Director of Public Prosecution contended that the so-called contradictions in the prosecution’s case had no bearing whatever with

the charge or the role of the appellants in the commission of the offence for which they were charged. He submitted that no reason had been advanced why this court must disturb the concurrent findings of fact of both courts below. He therefore urged the court to resolve all three issues in favour of the respondent, dismiss the appeal of both appellants and confirm the conviction and sentences passed on them. B

Upon a close study of the three issues submitted on behalf of the appellants for determination in this appeal, it seems to me that issues 1 and 2 are inter-related. I propose, therefore, to consider them together in this judgment. C

Issues 1 and 2 essentially relate to the powers of a trial court to amend a charge and whether section 208 of the Criminal Procedure Code is inconsistent with Section 33 of the 1979 Constitution. It is the submission of Mr. Olatunji that the appellants were denied their constitutional right to fair hearing by virtue of the fact that the trial court did direct and/or amend the charge for which they stood trial at the conclusion of the evidence of the parties and addressed of learned counsel but before the delivery of judgment. D

Section 208 of the Criminal Procedure Code, Cap. 3, Laws of Northern Nigeria under which the amendment complained of was made, the provisions of which are in pari materia with those of Section 163 of the Criminal Procedure Act, Cap. 80, Laws of the Federation of Nigeria, 1990, provides as follows:- E

“208(1) Any court may alter or add to any charge or frame a new charge at any time before judgment is pronounced.” F

“(2) Every such alternation or addition or new charge shall be read and explained to the accused and his plea thereto shall be taken”.

Unquestionably, Section 208(1) of the Criminal Procedure Code of Northern Nigeria gives the court discretionary power to alter, add to or indeed, to frame a new charge by way of amendment at any time before judgment is delivered. Equally relevant is Section 162 of the Criminal Procedure Act which provides thus:- G

“162 Where any person is arraigned for trial on an imperfect or erroneous charge the court may permit or direct the framing of a new charge or add to or otherwise alter the original charge.” H

Now, commenting on the distinction between the provisions

of Section 162 and 163 of the Criminal Procedure Act, the West African Court of Appeal in *R. v. Sunday Ijoma and Others* (1947) 12 WACA 220 at 222 explained as follows:-

“The distinction is to be found in the fact that, whereas before the accused has pleaded thereto, the court may permit or direct the framing of an entirely new charge (i.e. under Section 162) after plea, it is only open to the court to permit or direct such alteration of or additions to the original charge as may be permissible having regard to the rules for the joinder of offences in one charge (i.e., under Section 163)” (Words in brackets supplied).

That Court went on :-

“It is therefore open to the court under section 162 to permit or direct the framing of a new information before plea, or, at any time after pleas and before judgment, to add to or alter the original information, provided that such additions or alternations are within such Sections as 156, 157 and 158 of the Ordinance.”

As already pointed out above, the provisions of Section 208 of the Criminal Procedure Code of Northern Nigeria are, without doubt, in pari materia with those of Section 163 of the Criminal Procedure Act, the scope of which was succinctly explained above. **In my view, therefore, the trial Court was perfectly right not only to have directed but also to have allowed the amendment sought by the prosecution in the present case after the addresses of learned counsel for the parties but before the delivery of judgment in the case so long as all the relevant mandatory rules concerning what a court must do after granting such an amendment of a charge were complied with. I think that the learned trial judge was entitled to amend the charge before the delivery of judgment in the charge.** See *R. v. Kano and Another* (1951) 20 NLR 32, a decision of the then Supreme Court of Nigeria which was subsequently endorsed by the West African Court of Appeal in which it was held that it was permissible to amend a charge after the final addresses of counsel but before judgment provided that Sections 164 and 165 of the Criminal Procedure Act were strictly complied with and provided that the alternation could be made at that stage without injustice to the accused. See too *Ayub-Khan v. The State* (1991) 2 NWLR (Pt. 172) 127 and *Echeazu v. C. of P.* (1974) 2 S.C. 55 at 69.

Learned counsel for the appellants relied heavily on the obiter dictum of Karibi-Whyte, JSC., in the case of Ayub-Khan (supra) where the learned Justice at Page 144 of the report stated as follows:-

“The position of a Judge adjudicating in a case in our adversary system is that of an unbiased umpire. His role is generally to determine from the facts before him whether the charge against the accused has been proved. If the onus has not been discharged, it is the constitutional and judicial duty of the Judge to so declare, not being a party, he is bound to do nothing to promote the case of either party.” B

Without doubt, the above statement of the law cannot be faulted. It must however be stressed that the learned Justice of the Supreme Court in the very next sentence after the above passage added thus:- C

“He is only bound to do everything to achieve justice in the dispute between the parties before him and on the evidence presented.” D

Accordingly, the obligation of the court primarily is to do everything possible to achieve justice in any dispute between the parties on the evidence presented and not simply to invoke rules of technicality for the purpose of defeating the justice of a case before the court. E

I think the point must be stressed that the vital consideration which governs the amendment of a charge whether suo motu by the court or on the application of the prosecution after addresses by counsel but before judgment is that such amendment may be made without injustice to the accused. In this regard, the various sections of the Criminal Procedure Act, Cap 80, Laws of the Federation of Nigeria, 1990, such as Section 164 and 165 and those of the Criminal Procedure Code, Cap. 30, Laws of Northern Nigeria, such as Section 208(2), 209, 210 and 211, all of which prescribe the necessary procedure a court shall adopt on granting the amendment of a charge must be strictly complied with. These, to a large extent, are to ensure that the accused person is neither prejudiced nor suffers any injustice by virtue of the amendment. See R. v. Kano and Another, (supra). These procedures which, inter alia, include the reading and explaining of the amended charge to the accused person, the taking of his plea thereto, finding out from the accused whether he is ready to proceed with his trial on F G H

such an amended charge immediately or whether he would thereby be prejudiced in which case the trial shall be adjourned and granting the accused and, indeed, the prosecution the opportunity to recall any witnesses who may have testified for further examination or cross-examination in the light of such amended charge must be strictly
 B complied with. See *Okonofua v. The State* (1981) 12 NSCC 233, *Okegbu v. The State* (1979) 11 S.C. 1 etc. **Accordingly, an amendment to a charge pursuant to the provision of Section 208 of the Criminal Procedure Code, Cap. 30 may be made at the instance of either the prosecution or, suo motu by the court.**
 C **However, once the charge is amended, a host of rights inure to the accused as carefully laid down in Section 208(2), 209, 210 and 211 of the Criminal Procedure Code. Those rights, it seems to me, are in-built safeguards with a view to ensuring**
 D **that an accused person by virtue of an amendment is not thereby prejudiced or misled, that no injustice is occasioned to him and that his constitutional right to fair hearing pursuant to the provisions of the Constitution is fully preserved. See too *Okosun v. The State* (1979) 3-4 S.C. 36.**

E **In the present case it is clear from the record of proceedings that the provisions of Section 208(2), 209, 210, and 211 of the Criminal Procedure Code under which the appellants were charged were meticulously complied with by the learned trial judge.** I think it is convenient at this stage to
 F reproduced hereunder the record of proceedings of the trial court in this regard. It went thus:-

“Resumed 9/7/90

Accused persons appear, speak in English.

G Mr. M. S. Daneji for the State

Mr. P. U. Oge for the Accused

Mr. Oge:- We have seen the new charge. We have no objection.

Court:- Leave is hereby granted to amend the charge under
 Section 208 of the CPC. The new charge is explained to the accused
 H persons.

(SIGNED) T. ABUBAKAR,

JUDGE - 9/7/90

1st Accused:- I understand the new charge, I am not guilty.

2nd Accused:- I understand the charge. I am not guilty.

Mr. Daneji:- We have closed our case. That is our case as per the evidence before the court.

Mr. Oge:- I intend to recall the following witnesses for further cross-examination in view of the amendment of the charge.

1. Rita Eru (P.W.5)
2. Albert Eka (P.W. 5)
3. Ada Eru (P.W. 4)

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I want to recall the four eye witness for further cross-examination. That includes P.W. 6 Eke Egbu. I am also applying that the statements of the witness be brought to the Court by the Police to know what they told the Police when the matter was fresh in their minds. We ask for a date in September after the vacation.

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Mr. M. S. Daneji:- I have no objection to recall the witness but I want to inform the court that not all the witnesses are resident in Kano. As to the 2nd application the learned counsel should come by way of motion on notice. We agreed on 12/9/90.

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Court:- Case adjourned to 12/9/90 for defence. P.Ws. 2, 3, 4, 5, & 6 to be recalled. The defence may bring a motion on notice for the production of the case file for the consideration of this court any time before the return date. The accused to remain in prison custody. (Sgd) T. ABUBAKAR
JUDGE
9/7/90”

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It is clear from the above that the amendment in issue was not only granted without any objection, a fresh plea of the appellants in respect of the amended charge was duly taken after the same was read over and explained to them. It ought to be pointed out that this procedure is of great significance as failure to call on the accused to plead to the charge as amended renders the whole proceedings null and void. See Waldo Fox v. Commissioner of Police (1947) 12 WACA 215, Edmund Eronini v. R. (1953) 14 WACA 366.

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The prosecution indicated after the fresh plea was taken that they did not intend to recall any witnesses. The appellants, on the other hand, were not only granted an adjournment of two months on their application to study the amended charge, they were subsequently granted leave to recall all the prosecution witnesses they desired to examine further in the

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light of the amendment. In the result, P.W.3 and P.W.6 were on their application recalled and duly cross-examined by their learned counsel. This was obviously in compliance with the provisions of Section 211 of the Criminal Procedure Code. Beside, it is trite law that whenever there is an amendment to
 B **a charge after the commencement of a trial, it is the right of the accused to be permitted to recall witnesses who had already testified before the amendment for further cross-examination and also to call further witnesses that the court**
 C **may consider to be material in the light of the amendment.** See also *Osuolale v. The State* (1991) 8 NWLR (Pt. 212) 770.

The position in this case, as I see it, is that the appellants were arraigned for the offence of culpable homicide punishable with death contrary to Section 221 of the Penal Code. The person killed as laid
 D in the charge was one Joseph Egbe. At the conclusion of addresses of learned counsel but before the delivery of judgment in the case, the charge was amended on the direction of the trial court to reflect a joint act on the part of both appellants for causing the death of the same Joseph Egbe on the same date, time and place and in the same
 E incident. The learned trial Judge gave the direction in the exercise of his powers under Section 208 of the Criminal Procedure Code, Cap. 30, Laws of Northern Nigeria. The application for amendment which was brought by the prosecution was not opposed and was accordingly
 F to the appellants and they individually pleaded thereto, recalled some of the prosecution witnesses who had testified before the court and addressed the court further in the light of the amendment. The respondents neither recalled any witness after the amendment nor did they deliver any further address.

G ***It is clear to me that the amendment in issue was for the purpose of meeting the evidence already led in the case. The appellants were neither misled or prejudiced thereby nor was failure of justice occasioned to them by virtue of the amendment in question.***

H Commenting on this amendment, the court below stated:-

“It is my view that the learned trial judge acted rightly. Furthermore, I fail to see the relevance of Section 17(2)(e) of the 1979 Constitution of the Federal Republic of Nigeria viz-a-viz Section 208 of the Criminal Procedure Code. Learned counsel for the

appellants failed to substantiate the allegation of lack of fair hearing by the learned trial Judge. I think it is more of counsel's responsibility to bring to light, if any, provision of Section 33 of the said constitution, which is justifiable, that has been breached by the learned trial Judge."

I think the Court of Appeal cannot be faulted when it upheld the validity of the amendment by the learned trial judge and consequently arrived at the conclusion that the appellants were not denied their right to fair hearing by the trial court. Nor am I persuaded in any way to accept that the provisions of Section 208 of the Criminal Procedure Code is an infraction on the appellants' right to fair hearing under Section 33 of the 1979 constitution as contended by their learned counsel. Accordingly issues 1 and 2 must be resolved in favour of the respondent.

Issue 3 poses the question whether certain alleged contradictions in the evidence of the prosecution witnesses did not create enough doubt on the guilt of the appellants and whether the prosecution had proved its case against the appellants beyond reasonable doubt. The main contention of learned counsel for the appellants on this issue is that there were contradictions in the evidence of the prosecution witnesses as to which of the appellants was attacked and hacked to death. More specially, appellants in their brief of argument set out other facts in respect of which they alleged that prosecution witnesses gave contradictory evidence. These consisted of:-

"(a) Whether or not apart from the initial first free for all fight, the Appellants came back to fight at the scene of the crime.

(b) Whether or not the Appellants were the ones who brought to the scene of the crime Exhs. 4(a), 4(b) and 4(c), the alleged weapons claimed to have caused the death of the deceased and whether the accused persons used same.

(c) Whether or not the Appellants used Exhs. 4(a), 4(b) and 4(c) on the deceased

(d) Whether or not it was the act of the appellants that caused the death of the deceased which was intended by them."

On the issue of which of the appellants held what weapon, the learned trial Judge observed:-

"It is to be noted that both Exhibits 4a and 4b are almost of the same length though the thickness and the weight are different. It

is easy to mistake one for the other. It is my view that the contradiction as to who was holding what is not material inasmuch as the accused persons went back to the fight armed with the instruments. Although the four eye witnesses (P.W.3, 4, 5 and 6) are related to the accused. I watched their demeanour in the witness box and found
 B *them to be witnesses of truth and that they saw the accused armed attacking the deceased. I do not believe the evidence of D.W.3 in the witness box who said the accused did not go back to the house because it is contrary to his statement”.*

C The court below, for its own part, in upholding the above view of the learned trial Judge commented as follows:-

“From the records made available to this Court, it is clear that the learned trial Judge, in my view, did his best in resolving such issues raised by the learned counsel for the appellants as conflicting.
 D *For instance, the learned trial judge, in his judgment on pages 54-56 of the record) resolved the conflict of who among the appellants was holding what out of the lethal weapons in attacking the deceased”.*

It went on:-

E *“The learned trial Judge equally resolved the issue of whether it was not the P.W.3 who used her high heel shoe in beating the deceased which resulting to his death. He stated as follows:-*

“If the injury was caused by P.W.3 with high heel shoe, the deceased would have been unconscious after the fight was separated before the accused came back. The oral evidence of the Doctor, P.W.8,
 F *in conclusion, is that the injury was caused with Exh. 4(a) and, when used at close range, even with Exh. 4(b).*

These, in my view, leave no lingering doubt that Exhibits 4a and 4b were the objects used by appellants in killing the deceased. As
 G *to the manner of how these exhibits were recovered and by who, I think that may not be prejudicial to the respondent’s case. It has long been settled that even where an exhibit has illegally been obtained, once tendered, it could be admitted in evidence. Throughout the length and breadth of the record of this appeal. I am unable to find*
 H *where the appellants objected to the admissibility of the lethal weapons used by the appellants...*

Thus, the inconsistency of whether it was P.W.7 who carried the said exhibits to the Police Station or not cannot, in my view, be material enough to prejudice the prosecution’s evidence”.

The learned trial judge next turned to the question of whether apart from what learned appellants' counsel described as the initial "first free for all fight", the appellants returned to the residence of P.W.5 for the second deadly encounter. In this respect, the court was completely satisfied that there was nothing like "a free for all fight" but the both appellants were the aggressors in the first fight between them and the deceased with P.W.3. Said the trial court:-

".....I am convinced by their (i.e. prosecution's) evidence that the deceased was attacked by the accused. I believe that when the first fight was separated, the accused left the house. The deceased and P.W.3 were about to go when the accused came back and attacked him as a result of which he fell unconscious....The evidence before me which I believe is that the unarmed deceased did not fight back. He fell unconscious after the attack....In the instance case, the accused are the aggressors. They left the scene only to get armed and return to fight....the accused went and took the weapons for the purpose of the fight against an unarmed person. In my view, these constitute premeditation..."

The above findings are abundantly supported by evidence on record and were affirmed by the Court of Appeal. I have, myself, studied the entire evidence before the court on the issue and it is clear to me that the evidence of the entire prosecution witnesses were ad idem on the point.

There is next the question whether it was the appellants that brought to the scene of crime the weapons. Exhibits 4(a), 4(b) and 4(c) with which the deceased was killed. Again, on this point, P.W.3, P.W.4 and P.W.6 were in unanimity that the appellants ran to the scene of crime armed with the iron rod and iron pipe, Exhibits 4(a) and 4(b) which they used to hit the deceased on the head. The learned trial Judge accepted their testimony on the point. It cannot be disputed that he was perfectly entitled so to do. In my judgment the court below was right to have affirmed this finding of the trial court.

There is finally the question of whether it was the act of the appellants that caused the death of the deceased. The learned trial judge accepted the evidence of P.W.8, the medical Doctor who performed post mortem examination on the body of the deceased, to the effect that Exhibits 4(a) and 4(b) were the likely weapons with which the head injuries that caused the death of the deceased were

inflicted. Again the court below had no difficulty in affirming this finding of the trial court. ***I have, myself, closely considered the entire evidence led on behalf of the prosecution in this case and can find no contradictions which are substantial or capable of disturbing the verdict of the trial court as affirmed by the Court of Appeal in this case. The law is firmly settled that for any conflict or contradiction in the evidence of the prosecution witnesses to be fatal to its case, such conflict or contradiction must be material, substantial and fundamental to the main issues in controversy between the parties before the court thus creating some doubt that the accused is entitled to benefit from.*** See *Nasamu v. The State* (1979) 6-9 S.C. 153, *Onubogu v. The State* (1974) 1 All NLR (Pt. 2) 5, *Ibe v. The State* (1992) 5 NWLR (Part 244) 642 at 649, *Azu v. The State* (1993) 6 NWLR (Pt. 299) 303 at 316, *Wankey v. The State* (1993) 5 NWLR (Pt. 295) 542 at 552 etc. ***Where conflict or contradictions in the evidence of the prosecution witnesses raise no doubts as to the guilt of the accused, the only duty of the trial judge is to observe and comment on them as such and no more. Such contradictions are not fatal to the prosecution's case.*** See *Inyere Akpuenya v. The State* (1976) 11 S.C. 269 at 276, *Sunday Emiator v. The State* (1975) 9-11 S.C. 107 at 111, *Azu v. The State* (1995) 6 NWLR (Pt. 299) 303 at 316 etc.

The learned trial judge most carefully considered the so called items of contradictions alluded to by the appellants and described them as immaterial and unsubstantial. This view of the trial court was upheld by the Court of Appeal and I can find no reason to disturb them. In my opinion the entire findings of fact of the trial court as affirmed by the Court of Appeal are copiously supported by evidence before the court and cannot be faulted.

It is settled law that this court will not normally interfere with the concurrent findings of fact of the two courts below unless there is some miscarriage of justice or a violation of some principles of law or procedure. See *Ogwumba v. The State* (1993) 5 NWLR (Pt. 291) 660 at 671, *Sanyaolu v. The State* (1976) 6 S.C. 37, *Wankey v. The State* (1993) 5 NWLR (Pt. 295) 542 at 552 etc.

No such miscarriage of justice or violation of any principle of law or procedure has been established in this case.

I think I ought to mention finally that the learned trial Judge considered the possible defence of provocation and had no difficulty in dismissing the same. Said he:-

“The fact that the deceased and his brother, P.W.3, spoke to Rita’s sister in their native language and not in Englishdoes in my view amount to provocation let alone being grave and sudden provocation required by the law..... The circumstances of this case do not justify the attack of the deceased with Exhibits 4(a) and 4(b) to reduce the offence from Section 221 to Section 224 of the Penal Code. The accused are therefore not entitled to the defence of provocation under Section 222 (1) of the Penal Code in this case.”

He then concluded:-

“From the totality of the evidence before me, the prosecution has proved its case beyond reasonable doubt and I am unable to find any defence open to the accused. I therefore find them guilty of the offence of culpable homicide punishable with death contrary to Section 221(b) read with Section 79 of the Penal Code as charged”.

The above observations and findings were affirmed by the court below, and I am unable to fault them in any manner. In my view, the case against the appellants was proved beyond reasonable doubt and issue 3 must be resolved in favour of the respondent.

In the final result and for all the reasons I have given above, these appeals fail and are hereby dismissed. The conviction and sentence passed on each of the appellants by the trial court as affirmed by the court below are hereby further confirmed.

BELGORE JSC

There were two concurrent findings of facts by the lower courts and I find no reason in this appeal to disturb those findings. My learned brother has meticulously analysed the facts relied upon by trial court in its findings as confirmed by the Court of Appeal that I need not add anything more. I find no merit in these appeals and for all reasons in the judgment of Iguh, JSC, I also dismiss them.

KALGO JSC

I have had the opportunity of reading in draft the judgment just delivered by my learned brother, Iguh, JSC., in these appeals and I entirely agree with him that there is no merit in the appeals. The appeals are against the concurrent findings of facts by the trial court and the Court of Appeal and I find no special circumstances to justify interfering with their findings. I am also of the view that my learned brother, Iguh, JSC., has fully and painstakingly dealt with all the issues raised by the appellants in their briefs of argument and I adopt as mine his reasoning and conclusions reached therein.

However, I have no doubt in my mind, having regard to the evidence in this case, that the learned trial Judge had properly exercised his power under Section 208 of the Criminal Procedure Code (CPC) at the time the charge was amended and he has fully complied with all the procedural requirements following such amendments. The obvious result therefore is that the appellants could not be misled to prejudiced by that amendment and no failure of justice has been occasioned thereby. I therefore agree with the Court of Appeal that the learned counsel for the appellants have failed to show how the learned trial judge by invoking the provisions of S. 208 of the C.P.C contravened the provisions of S. 33 of the 1979 Constitution in respect of their clients (the appellants).

There was unchallenged and credible evidence at the trial that the appellants were the aggressors and they attacked the deceased who was unarmed by beating him with lethal weapon on his head. It was indeed a premeditated murder and the lower courts so found. I agree with them.

For the above and more detailed reasons given in the leading judgment of my learned brother, Iguh, JSC., I find no merit in these appeals. I accordingly dismiss them and affirm the conviction and sentences passed on the appellants by the trial court and confirmed by the Court of Appeal.

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UWAIFO JSC

I find the judgment of my learned brother, Iguh, JSC., well and fully considered on all the issues raised in the appeal and that the right conclusions have been reached.

The evidence leaves one in no doubt that the attack on the deceased by appellants which led to his death was premeditated. It was contrived in the fashion of the act in which the appellants, as some social deviants, relished in. First, the appellants committed unprovoked assault on the deceased incident. The appellants left the scene only to come back after with dangerous instruments to fatally wound the deceased. B

The two courts below carefully evaluated the evidence, made findings of fact which led them to come to the conclusion that the deceased died in the hands of the appellants in circumstances which, without any case, amounted to murder. I have no reason to disturb those concurrent findings, I too find no merit in the appeals and accordingly I dismiss each of them. I affirm the conviction and sentence of death passed on each of the appellants. C

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EJIWUNMI JSC

Having been privileged to have read in advance the judgment just delivered by my learned brother, Iguh, JSC., I also hereby dismiss this appeal for the reasons given in the said judgment. The conviction and sentences passed by the trial Court and affirmed by the Court below, are hereby confirmed also. E

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