

SUPREME COURT OF NIGERIA
20TH FEBRUARY, 2004. SC. 295/2002
CORAM:- I. L. KUTIGI, A. I. KATSINA-ALU, U. A. KALGO,
S. O. UWAIFO, D. O. EDOZIE, JJSC.

AUGUSTINE GUOBADIA	APPELLANT
V.		
STATE	RESPONDENT

APPEALS - Incompetence of issue or defence - The defence raised was incompetent having been abandoned in the court of Appeal - And could only be raised with leave to argue it as a new issue (H1)

CRIMINAL PROCEDURE - Defences - Insanity - An accused who pleads insanity as a defence - Has the burden on the balance of probability - Of proving that he was suffering from insanity or insane delusion - At the time the offence was committed (H2)

CRIMINAL PROCEDURE - Defences - Insanity - What the accused must prove to successfully rely on the defence under S.28 CC - Includes lack of the capacity to understand what he was doing (H3)

CRIMINAL PROCEDURE - Defences - Insanity - Duty of trial court - In determining the defence of insanity - Trial judge is enjoined to take into consideration any admissible medical evidence - And the whole of the facts and the surrounding circumstances of the case (H4)

CRIMINAL PROCEDURE - Defences - Insanity - Evidence of a psychiatrist, PW5 - Is admissible and credible - And apart from it - There was ample evidence to suggest - That appellant was sane at the time the offence was committed (H5)

INSANITY - Motive - Mere absence of any evidence of motive for a crime - In not sufficient ground to infer mania (H6)

INSANITY - Defence of - Tendered by the accused himself - Is suspect and not usually taken seriously (H7)

INSANITY - Mental disorder - Mere evidence of mental disorder in an accused - Without showing that it deprived the accused of capacity to understand what he was doing - And to know that he ought not to have done the act - Is no satisfactory evidence of insanity (H8)

INSANITY - Abnormal behaviour - Is not evidence of insanity (H9)

CRIMINAL PROCEDURE - Juveniles - Age of appellant - As there was a discrepancy as to the true age of appellant - Trial judge ought to have conducted an inquiry - To ascertain actual age of the appellant (H10)

FACTS

In the morning of 5/2/1987, Sunday Guobadia (PW3) the father of the appellant ordered him and one Victor to go to the farm. The appellant and the said victor proceeded to the farm on a bicycle. Half way on their journey to the farm, the appellant changed his mind and decided to return home. While trekking home, PW3 his father met him and tried to persuade him to go to the farm but to no avail. When the appellant finally got home, he met Rosaline Guobadia (PW2) his stepmother. PW2 asked him if he wanted a bath to which he replied affirmatively. The appellant fetched water by himself and had his bath. Shortly thereafter PW2 heard a shout from the deceased who was sleeping inside the house. On getting into the house she found the deceased in a pool of blood and the appellant hiding behind the door with a machete in his hand. On seeing PW2, the appellant jumped through the window and escaped to a neighbouring village from where he was subsequently arrested after narrating to the villagers what he had done. Meanwhile the deceased who was being rushed to the hospital died on the way. In his statement to the police made on 5/2/87, the appellant gave a coherent and rational account of the incident confessing that he killed the deceased. In his testimony in court, he stated that on the

date of the incident, he was having headache and pains on his ear and that he did not know what he was doing when he injured the deceased as he felt he was in a dream with someone pursuing him.

The learned trial judge considered exhaustively whether the defence of insanity or insane delusion availed the appellant. He rejected the defence convicted the appellant of murder and passed a death sentence on him. The appellant appealed to the court of appeal on the main ground that the judge ought to have conducted an inquiry to ascertain the actual age of the appellant at the time the offence was committed since if he was found to be under 17 years of age, an appropriate sentence would have been for his imprisonment at the pleasure of the governor. The court of appeal dismissed the appeal and the appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1 Whether the defence of insanity did not avail the appellant.

2 Whether the Court of Appeal was right in not holding that there was sufficient material at the trial court to have justified an inquiry by the Judge into the actual age of the Appellant at the time of the commission of the offence."

HELD (Unanimously allowing the appeal per lead judgment of **EDOZIE JSC**)

APPEALS - Incompetence of issue or defence

1. It needs to be emphasised that the defence of insanity being canvassed for the Appellant in this court is incompetent, since the defence was not raised in the court below. It is not competent for an Appellant who raised an issue at the trial court, abandoned that issue at the Court of Appeal and only to take it up again in this court. Constitutionally, this court is enjoined to hear appeals from decisions of the Court of Appeal. It has no jurisdiction to entertain appeals directly from decisions of High Courts and in this regard it is apposite to refer to section 213(1) of the 1979 Constitution, now section 233(1) of the 1999 Constitution, *Ogoyi v Umagba* (1995) 2 N.W.L.R. (Pt. 24) 581, *Harrima v Harrima* (1987) 3 N.W.L.R. (Pt. 60) 244. For the Appellant to canvass before this court

the defence of insanity which was raised at the trial court but abandoned in the Court of Appeal is tantamount to an appeal on an issue directly from the decision of the High Court to the Supreme Court which on the authorities referred to above is objectionable unless upon leave to argue it B as a new issue. (p. 552 A)

Insanity - An accused who pleads insanity as a defence

2. In considering whether the defence of insanity avails the Appellant, it C is well to bear in mind that there is a general presumption that every person is sane until the contrary is proved. In this connection, section 27 of the Criminal Code Law of Bendel State applicable in Edo State provides that everyone is presumed to be of sound mind and to have been of sound mind at the time he committed the offence charged: see Onakpoya D v The Queen (1959) N.S.C.C. 130, (1959) S.C.N.L.R. 384. Therefore, an accused person who pleads insanity as a defence to an offence with which he is charged has the burden of proving that he was suffering from insanity or insane delusion at the time the offence with which he E was charged was committed. The burden of proof on the accused is on the balance of probability or preponderance of evidence and not on the basis of proof beyond reasonable doubt: see Daniel Madjemu v State³ (2001)9 N.W.L.R. (Pt. 718) 349. (p. 552 F)

F ***Insanity - What the accused must prove***

3. For an accused person to successfully rely on the first limb of section 28 of the Criminal Code supra, he must prove that at the time the offence was committed, he lacked:

- G (a) the capacity to understand what he was doing
 (b) capacity to control his action
 (c) capacity to know that he should not do the act or make the omission.
 See Adegbesan v The State (1986) 1 N.S.C.C.

H For the second limb of section 28 of the Criminal Code to avail an accused person as a defence, he must show that there is a set of facts which does not actually exist but which he imagines to exist, that as a result of his belief that the set of facts actually exists as he imagined

them, he commits an act of omission or commission which has resulted in the charge on which he stands trial and that if those facts had existed as so imagined by him they would have amounted to a complete defence to his act which is called in question even though the factual situation was not real: see *Anthony Ejnima v State* (1991) 6 N.W.L.R. (Pt. 200) B 627 at 657. (p. 553 F)

Insanity - Duty of trial court

4. Learned Counsel to the Appellant had contended that P.W.5 did not examine the Appellant immediately before or after the commission of the offence to ascertain his medical condition at the relevant time. But the report of P.W. 5 quoted above reveals that the observation on the Appellant started when he was admitted into the psychiatric hospital's wing of the prison about the time he was charged to court. In determining the defence of insanity, the trial judge is enjoined to take into consideration any admissible medical evidence and the whole of the facts and the surrounding circumstances of the case which will include the nature of the killing, the conduct of the accused before, at the time as well as after the killing and any history of mental abnormality: see *Ishola Karimu v State* (1989) 1 S.C. 121 at 139. (p. 556 A) D

Insanity - Evidence of a psychiatrist, PW5

5. In my view, the evidence of P.W. 5 is admissible and credible and the learned trial judge was justified in placing reliance on it. Besides, there was ample evidence other than the evidence of P.W. 5 to justify the inference that the Appellant was sane at the time the offence was committed. The evidence of P.W. 2 who described the conduct of the Appellant in hiding himself and escaping through the window after killing the deceased and his coherent account of the incident which the Appellant narrated to the villagers and in his statement (Exhibit B) all these belie the assertion that he was insane. (p. 556 D) F G H

INSANITY - Motive

6. It is conceded that there was no motive established for the murder but

it is trite law that mere absence of any evidence of motive for a crime is not a sufficient ground to infer mania: see *Egbe Nkonu v The State* (1980) 3-4 S.C. 1. (p. 556 F)

B *INSANITY - Defence of - Tendered by the accused himself*

7. But the law is that evidence of insanity tendered by the accused himself is suspect and is not usually taken seriously: see *Onyekwe v The State* (1988) 1 N.W.L.R. (Pt.72) 565. (p. 556 H)

C *INSANITY - Mental disorder*

8. Mere evidence that an accused person has mental disorder without showing that the disorder deprived the accused of the capacity to understand what he was doing and to know that he ought not to have done the

D act which is called in question is no satisfactory evidence of defence of insanity under the law. (p. 557 A)

INSANITY - Abnormal behaviour

E 9. The evidence by the Investigating Police Officer (P.W.6) that the behaviour of the Appellant was abnormal is of no moment because abnormal behaviour is not evidence of insanity: see *Lamidi Salami v The State* (1984) 6 S.C. 357. (p. 557 B)

F *Juveniles - Age of appellant*

10. There was therefore a discrepancy as to the true age of the Appellant. This in my view ought to have prompted the learned trial judge to conduct and enquiry to ascertain the actual age of the Appellant at the material time as envisaged by section 208 of the Criminal Procedure Law.

G Learned counsel for the Respondent has conceded, quite rightly, that since it was doubtful that the Appellant had attained the age of 17 years when he committed the offence, that doubt ought to be resolved in his
H favour. On this score alone, this appeal succeeds with respect to death sentence pronounced on the Appellant.

The appeal is allowed. The death sentence passed on the Appellant is set aside and in its place, the Appellant is ordered to be detained at the

pleasure of the Governor of Edo State. (p. 559 B)

REPRESENTATION

Etigwe Uwa for appellant.

O. A. Omonuwa with him N. T. Okwejie (Miss) for Respondent B

CASES REFERRED TO

Ogoyi v Umagba (1995) 2 N.W.L.R. (Pt. 24) 581, (1995) 10 KLR 1982
Daniel Madjemu v State (2001) 9 N.W.L.R. (Pt. 718) 349, (2001) 5 KLR C
(pt 121) 1411

Ejinima v. State (1991) 6 N.W.L.R. (Pt. 200) 627

Dim v. R (1952), 4 W.A.C.A. 154

R. V Omoni (1949) 12 W.A.C.A. 511

Kure v. The State (1988) 1 N.W.L.R. (Pt. 71) 404 D

Sanusi v The State (984) 10 S.C. 105.

Adegbesan v The State (1986) 1 N.S.C.C

Loke v The State (1985) 1 S.C., (1985) 1 N.W.L.R. (Pt. 1) 1 S.C

Egbe Nkonu v The State (1980) 3 – 4. S.C. 1 E

Udofia v The State (1981) 11 – 12 SC 49.

STATUTES & RULES REFERRED TO

Criminal Code, Cap 48 Vol. II, Laws of Bendel State of Nigeria, 1976 ss. F
319(1), 28, 208 and 368(3)

Constitution of Nigeria 1999 s. 233(1)

LEAD JUDGMENT BY EDOZIE JSC

The appellant Augustine Guobadia was charged before the Benin G
High Court for the murder on 5th February 1987 of his tow year old half
brother, Osazuwamen, an offence punishable under section 319(1) of the
Criminal Code, Cap 48 Vol. II, Laws of Bendel State of Nigeria, 1976. At
the trial in which six witnesses testified for the prosecution, the fact that H
the act of the Appellant caused the death of the deceased was not
contested. Indeed, both in his statement to the police Exhibit B and his
evidence in court the Appellant confessed to killing the deceased. What

was canvassed on his behalf was the defence of insanity. But the learned trial judge, Obi J, in his judgment of 29th July, 1988 exhaustively considered that defence and in rejecting it, he convicted the Appellant of murder and passed a death sentence on him.

B On appeal by the Appellant to the Benin Division of the Court of Appeal, the main plank of the appeal was that the learned trial judge ought to have conducted an inquiry to ascertain the actual age of the Appellant at the time the offence was committed since if he was found to be under 17 years of age, an appropriate sentence would have been for his imprisonment at the pleasure of the Governor.

C The Court of Appeal in dismissing the appeal held that no issue about the Appellant's age arose during the trial of the Appellant in the High Court to warrant an inquiry before that Court as to the actual age of the Appellant at the time of the commission of the offence.

In his further appeal to this court, the Appellant by his counsel identified two issues for determination in his brief of argument. These are:-

"1 Whether the defence of insanity did not avail the appellant.

E *2 Whether the Court of Appeal was right in not holding that there was sufficient material at the trial court to have justified an inquiry by the Judge into the actual age of the Appellant at the time of the commission of the offence."*

F In the Respondent's brief of argument, similar issues were raised, to wit:-

"1. Whether the defence of insanity avail (six) the Appellant having regard to the state of the overwhelming evidence before the court.

G *2. Whether it was right of the Appeal Court to hold that an inquiry into the age of the Appellant was not necessary not being an issue before the court."*

Dealing with the first issue for determination, learned counsel for the Appellant in his brief of argument referred to the evidence of P.W. 2 the step mother of the Appellant and mother of the deceased who testified that she had no quarrel with the Appellant before the incident; he also referred to the evidence of P.W. 3 the father of the Appellant who in cross-examination stated that the Appellant had mental problems in respect of which he was treated by a native doctor without any improve-

ment when he P.W. 3 resorted to treating him at home. Attention was also drawn to the evidence of the investigating police office (P.W.6) who testified that at the time he was recording the statement of the Appellant, he, the Appellant was behaving abnormally. Reference was also made to the evidence of the Appellant to the effect that in the morning of the incident, he was having headache and pains in his ears. It was then submitted that these pieces of evidence from P.W.2, P.W.3, P.W.6 and the Appellant himself establish that the Appellant was insane at the material time. It was further submitted that where there exists some evidence pointing towards insanity or abnormal behaviour, then the lack of motive for the offence which ordinarily is of no moment becomes a relevant consideration in deciding whether the Appellant was insane at the material time of the offence. For this proposition, counsel referred to the following cases:- Onyekwe v The State (1988) 1 N.W.L.R. (Pt. 72) 565, R. v Inyang 12 W.A.C.A. 5; R. v Ashigifuwo 12 W.A.C.A. 389. It was pointed out that the learned trial judge relied heavily on the report (Exhibit A) of the consultant psychiatrist Dr. Malomo (P.W.5) in coming to the conclusion that the Appellant was not insane. Learned counsel argued that the evidence of P.W. 5 to the effect that the Appellant did not suffer from insanity or insane delusion ought not to have been treated as conclusive on the issue since he, P.W.5 did not examine the Appellant immediately before or after the incident. It was further stressed that the examination of the Appellant by P.W.5 was conducted in April 1988 that is, one year and two months after the offence was committed and therefore not relevant in determining the mental condition of the Appellant at the material time.

In response, learned counsel for the Respondent referred to the statement (Exhibit B) made by the Appellant on 5th of February 1987 the day the offence in question was committed and submitted that the Appellant was fully in charge of himself. He argued that the Appellant knew that what he was doing was wrong and that was why he ran away to a nearby village after killing the deceased. The defence of insanity under section 28 of the Criminal Code of Bendel State does not avail the appellant, learned counsel submitted relying on the following authorities:- Ejinima

552 Guobadia v. State (2004) 2 KLR Edozie JSC
v. State (1991) 6 N.W.L.R.(Pt. 200) 627, Dim v. R (1952), 4 W.A.C.A.
154, R. V Omoni (1949) 12 W.A.C.A. 511; Kure v. The State (1988) 1
N.W.L.R. (Pt. 71) 404, and Sanusi v The State (984) 10 S.C. 105.

**It needs to be emphasised that the defence of insanity being
B canvassed for the Appellant in this court is incompetent, since the
defence was not raised in the court below. It is not competent for an
Appellant who raised an issue at the trial court, abandoned that
issue at the Court of Appeal and only to take it up again in this
court. Constitutionally, this court is enjoined to hear appeals from
C decisions of the Court of Appeal. It has no jurisdiction to entertain
appeals directly from decisions of High Courts and in this regard it
is apposite to refer to section 213(1) of the 1979 Constitution, now
section 233(1) of the 1999 Constitution, Ogoyi v Umagba (1995) 2
D N.W.L.R. (Pt. 24) 581, Harrima v Harrima (1987) 3 N.W.L.R. (Pt.
60) 244. For the Appellant to canvass before this court the defence
of insanity which was raised at the trial court but abandoned in the
Court of Appeal is tantamount to an appeal on an issue directly
E from the decision of the High Court to the Supreme Court which
on the authorities referred to above is objectionable unless upon
leave to argue it as a new issue. However, since no objection thereto
was raised by any of the parties in this appeal, and having regard to the
F nature of the appeal involving life and death, I am prepared, for what it is
worth, to hazard on opinion on the Appellant's defence under considera-
tion.**

**In considering whether the defence of insanity avails the
Appellant, it is well to bear in mind that there is a general pre-
G sumption that every person is sane until the contrary is proved. In
this connection, section 27 of the Criminal Code Law of Bendel
State applicable in Edo State provides that everyone is presumed to
be of sound mind and to have been of sound mind at the time he
H committed the offence charged: see Onakpoya v The Queen (1959)
N.S.C.C. 130, (1959) S.C.N.L.R. 384. Therefore, an accused person
who pleads insanity as a defence to an offence with which he is
charged has the burden of proving that he was suffering from in-**

sanity or insane delusion at the time the offence with which he was charged was committed. The burden of proof on the accused is on the balance of probability or preponderance of evidence and not on the basis of proof beyond reasonable doubt: see Daniel Madjemu v State³ (2001) 9 N.W.L.R. (Pt. 718) 349. It must also be borne in mind that it is not every form of mental disorder that can relieve an accused person from criminal responsibility. The law requires that such mental disorder that can avail an accused person as a defence must fall within the ambit of section 28 of the Criminal Code Law supra which provides:-

“28 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 was doing or of capacity to control his actions or of capacity to know that he ought not to 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 delusion 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 has been such as was induced by the delusions to believe to exist.”

For an accused person to successfully rely on the first limb of section 28 of the Criminal Code supra, he must prove that at the time the offence was committed, he lacked:

- (a) the capacity to understand what he was doing
- (b) capacity to control his action
- (c) capacity to know that he should not do the act or make the omission.

See Adegbesan v The State (1986) 1 N.S.C.C., Loke v The State (1985) 1 S.C., (1985) 1 N.W.L.R. (Pt. 1) 1 S.C. Egbe Nkonu v The State (1980) 3 – 4. S.C.1, Udofia v The State (1981) 11 – 12 SC 49.

For the second limb of section 28 of the Criminal Code to avail an accused person as a defence, he must show that there is a set of facts which does not actually exist but which he imagines to

exist, that as a result of his belief that the set of facts actually exists as he imagined them, he commits an act of omission or commission which has resulted in the charge on which he stands trial and that if those facts had existed as so imagined by him they would have amounted to a complete defence to his act which is called in question even though the factual situation was not real: see Anthony Ejinima v State (1991) 6 N.W.L.R. (Pt. 200) 627 at 657.

To appreciate the issues canvassed in this appeal, it is necessary to review the facts of the case. The evidence led at the trial revealed that in the morning of 5/2/87, Sunday Guobadia (P.W.3) the father of the Appellant ordered him and one Victor to go to the farm. The Appellant and the said Victor proceeded to the farm on a bicycle with Victor conveying the Appellant on the bicycle. Half way on their journey to the farm, the Appellant changed his mind and decided to return home. While trekking home, P.W. 3 his father met him and tried to persuade him to go to the farm but this was to no avail. When the Appellant finally got home, he met Roseline Guobadia (P.W.2) his stepmother who inquired why the Appellant had returned so early. P. W. 2 asked him if he wanted a bath to which he replied affirmatively. While P.W.2 requested her daughter to fetch water for the Appellant, the latter fetched water by himself and had his bath. Shortly thereafter, P.W. 2 heard a shout from the deceased who was sleeping inside the house. On getting into the house she found the deceased in a pool of blood and the Appellant hiding behind the door with a machete (Exhibit C) in his hand. On seeing the P.W. 2, the Appellant jumped through the window and escaped to a neighbouring village from where he was subsequently arrested after narrating to the villagers what he had done. Meanwhile, the deceased who was being rushed to the hospital died on the way. In his statement to the police, (Exhibit B) made on 5/2/87, the very day of the incident, the appellant gave a coherent and rational account of the incident confessing that he killed the deceased. He said:-

“This morning my father Sunday guobadia say make me and my brother Victor follow him go farm. Victor carry me for bicycle and we left. On the way I decided not to go to farm again and I got back. I

leave Victor for road and I go home with my cutlass. When I came home, I bathe and after bathing, I rub pomade. I began dey vex I carry cutlass go cut my junior brother Osazuwa or Daddy for neck. I cut am 2 times. The boy was coming out from my father's room that time. He fall down and died. My papa wife Roseline Sunday dey house that time. Roseline B was outside that time. When the boy don die, I run away with the cutlass. I ran to Ogbohameya village and from there to Imosobar village. At Imosobar village, I beg somebody to give me water when they give me water; they ask me what happened. I tell them say I kill my junior and they hole me. I go show them where I keep the cutlass. They send police C to come and catch me for the village and they take me to Ologbo Police Station....."

In his testimony in court given on 8th July 1982, he stated that on the date of the incident, he was having headache and pains on his ears D and that as he was going to the farm with Victor, his condition worsened hence he decided to return home. He continued –

"When I got home, I reported to P.W. 2 and others that I had to return because I was not well. After sometimes I did not know what I was E doing. I was in this condition when I took up my cutlass and injured the deceased. I then escaped to Imosobar village and surrendered myself. I told the people I met there that I did not know when I injured my brother..... I did not know what I was doing when I F stabbed my brother. I felt as I was in a dream with someone pursuing me and am running that (six) something on my way."

The learned trial judge considered exhaustively whether the defence of insanity or insane delusion availed the Appellant. At p. 33 of the record he stated that the evidence of Dr. Malomo (P.W. 5), which he G accepted, established beyond doubt that the Appellant suffered from no mental disease. In his medical report on the Appellant (Exhibit A) P.W. 5, a consultant psychiatrist had stated inter alia:-

"On examination the only complaint since he came into prison H over a year ago has been occasional dizziness. His orientation as to time, place and person is intact. His flow of speech is normal and rational. Emotional reaction to his present predicament is as expected as it is char-

acterised by regret and poorly co-ordinated lies. There is nothing to suggest presence of insane delusion or any other type of abnormal experience. He is fully aware of the nature and gravity of the alleged offence."

Learned Counsel to the Appellant had contended that P.W.5
 B **did not examine the Appellant immediately before or after the commission of the offence to ascertain his medical condition at the relevant time. But the report of P.W. 5 quoted above reveals that the observation on the Appellant started when he was admitted into**
 C **the psychiatric hospital's wing of the prison about the time he was charged to court. In determining the defence of insanity, the trial judge is enjoined to take into consideration any admissible medical evidence and the whole of the facts and the surrounding circumstances of the case which will include the nature of the killing, the**
 D **conduct of the accused before, at the time as well as after the killing and any history of mental abnormality: see Ishola Karimu v State (1989) 1 S.C. 121 at 139.**

In my view, the evidence of P.W. 5 is admissible and credible
 E **and the learned trial judge was justified in placing reliance on it. Besides, there was ample evidence other than the evidence of P.W. 5 to justify the inference that the Appellant was sane at the time the offence was committed. The evidence of P.W. 2 who described**
 F **the conduct of the Appellant in hiding himself and escaping through the window after killing the deceased and his coherent account of the incident which the Appellant narrated to the villages and in his statement (Exhibit B) all these belie the assertion that he was insane. It is conceded that there was no motive established for the**
 G **murder but it is trite law that mere absence of any evidence of motive for a crime is not a sufficient ground to infer mania: see Egbe Nkonu v The State (1980) 3-4 S.C. 1. The appellant in his testimony in court alleged that he did not know what he was doing at the time**
 H **he slaughtered his brother. But the law is that evidence of insanity tendered by the accused himself is suspect and is not usually taken seriously: see Onyekwe v The State (1988) 1 N.W.L.R. (Pt.72) 565. In his evidence under cross-examination, P.W.3 the father of the**

Appellant testified that a native doctor treated the Appellant for mental disorder and that when there was no improvement he withdrew him and started treating him at home. **Mere evidence that an accused person has mental disorder without showing that the disorder deprived the accused of the capacity to understand what he was doing and to know that he ought not to have done the act which is called in question is no satisfactory evidence of defence of insanity under the law. The evidence by the Investigating Police Officer (P.W.6) that the behaviour of the Appellant was abnormal is of no moment because abnormal behaviour is not evidence of insanity: see Lamidi Salami v The State (1984) 6 S.C. 357.**

The learned trial Judge also dealt with the defence of insane delusion under the second limb of section 28 of the criminal Code supra. At p. 35 of the record, he observed:-

“The story which the accused person had put forward is that he was in a dreamland, where someone was pursuing him and as he ran to hit something only to realise when his eyes became clear that he has stabbed the deceased. Specifically, his evidence on that point was:-

‘I did not know what I was doing when I stabbed my brother. I felt as I was in a dream with someone pursing me and in running I hit someone on the way’

Assuming for the sake of argument that the story he has told is true, it is my view that merely that someone was pursuing him when he did not show that his life was in danger could not justify his brutal attack on the deceased.

I am convinced that his reaction to the purported delusions is quite unjustified in the circumstances and therefore the defence under the second limb of section 28 of the Criminal Code is not available. But more importantly, it is my finding of fact that he found himself in a dream situation is but tissues of lies and I do not believe him. When matters were very fresh in his mind when arrested by the police he said nothing about dream.....”

I have no reason to disagree with that finding. The defence of insanity or insane delusion does not avail the Appellant. There was no

shred of evidence on record to establish that defence.

With respect to the second issue for determination regarding the age of the Appellant at the time of the commission of the offence, the contention of the Appellant's counsel is that there were sufficient materials before the trial court which ought to have prompted it to conduct an enquiry into the actual age of the Appellant at the relevant time. The issue raised is predicated on the provisions of section 208 and 368(3) of the Criminal Procedure Law which enact as follows:-

"208 When a person is before any court and it appears to the court that such person is an infant, or a child or a young person or an adult, the court may make due enquiry as to the age of that person and for that purpose may take such evidence as may be forthcoming at the time, or at the time to which the enquiry may be adjourned but an order or judgment of the court shall not be invalidated by an subsequent proof that the age of that person has not been correctly stated to the court and the age presumed or declared by the court to be the age of that person shall for the purposes of this law be deemed to be the true age of that person"

"368(3) Where an offender who in the opinion of the court had not attained the age of seventeen years at the time the offence was committed is found guilty of a capital offence, sentence of death shall not be pronounced or recorded but in lieu thereof, the court shall order such person to be detained during the pleasure of the Governor and if so ordered he shall be detained in accordance with the provisions of Part 44 notwithstanding anything to the contrary in any written law"

In the case of Modupe v The State (1988) 4 N.W.L.R. (Pt.87) 130 at p. 142, this court held that where the age of the accused person is material for the purpose of conviction or relevant in the determination of the nature of the sentence and evidence of such age is not conclusive, the trial Judge is obliged to make due inquiry as to the age of that person by taking evidence of such age. It was also held in the case of George v The State (1991)1 N.W.L.R. (Pt.214) 199 that where there is evidence before the trial Judge that the Appellant was 17 years old at the time of commission of the offence, the need to resolve the issue of Appellant's

age no longer arises. In the instant case, the Appellant's age as reflected in his statement to the police (Exhibit B) is 20 years. But in Exhibit A, the report of the consultant psychiatrist (P.W.5) the age of the Appellant as at 28th April 1988 when the report was written is 18 years. The offence was committed on 5th February, 1987. Learned counsel to the Appellant B has reasoned that if the Appellant was 18 years old in April 1988, he would have been under 17 years old in February 1987 when the offence was committed.

There was therefore a discrepancy as to the true age of the Appellant. This in my view ought to have prompted the learned trial judge to conduct an enquiry to ascertain the actual age of the Appellant at the material time as envisaged by section 208 of the Criminal Procedure Law. Learned counsel for the Respondent has conceded, quite rightly, that since it was doubtful that the Appellant had attained the age of 17 years when he committed the offence, that doubt ought to be resolved in his favour. On this score alone, this appeal succeeds with respect to death sentence pronounced on the Appellant. D

The appeal is allowed. The death sentence passed on the Appellant is set aside and in its place, the Appellant is ordered to be detained at the pleasure of the Governor of Edo State. E

F

KUTIGIJSC

I read before now the judgment just delivered by my learned brother Edozie, J.S.C. I agree with him that there were discrepancies in the age of the appellant as reflected in Exhibits A and B both tendered by the prosecution which make it doubtful whether or not the appellant was 17 years old when the offence was committed. I will also give the benefit of doubt to the appellant and allow the appeal on sentence only. I therefore set aside the death sentence passed on the appellant and order him to be H detained at the pleasure of the Governor of Edo State.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother EDOZIE JSC. I am in complete agreement with his reasoning and conclusion. For the reasons which he gives I too would set
B aside the death sentence passed on the Appellant and in its place I order that he be detained at the pleasure of the Governor of Edo State.

KALGO JSC

C I have had a preview of the judgment just delivered by my learned brother Edozie JSC in this appeal. I agree entirely with his reasoning and conclusions which I adopt as mine.

D I therefore find that the defence of insanity does not avail the appellant in the circumstances of this case. But in view of the conflicting evidence on his age at the time of the commission of the offence, he is entitled to the benefit of the doubt on that. For this and the more detailed reasons given by my learned brother Edozie JSC, I hereby set aside the
E sentence of death passed on the appellant by the trial court and confirmed by the Court of Appeal and in its stead I order that the appellant be kept at the pleasure of the Governor of Edo State.

F **UWAIFO JSC**

I agree with the judgment of my learned brother Edozie JSC for the reasons he gives that the appeal be allowed on the question of the death sentence based on the age of the appellant at the time the offence was
G committed. In the event, I also make the order for the detention of the appellant at the pleasure of the governor of Edo State.

H _____
3 (2001) 5 KLR (pt 121) 1411