

**SUPREME COURT OF NIGERIA**

23RD MAY, 2008 SC. 249/2004

**CORAM:- A. I. KATSINA-ALU, S. A. AKINTAN, M. MOHAMMED, W. S. N. ONNOGHEN, I. T. MUHAMMAD, JJSC**

SGT. DESMOND EZEJA ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Judgments - Mistakes - Notwithstanding the mistaken reference to s. 218 of Penal Code instead of s. 218 Criminal Procedure Code - There was no miscarriage of justice occasioned - Court of Appeal was therefore right to uphold conviction (H1)

CRIMINAL PROCEDURE - Conviction - Offences not charged - Under s. 218 of the Criminal Procedure Code courts have power to convict - For lesser offences not charged or pleaded to - Where greater offences charged are not proved (H2)

**FACTS**

Appellant was arraigned and tried for the offences of inter alia, causing grievous hurt punishable under section 248 of the Penal Code. At the end of the trial, the learned trial judge held that by the definition of "grievous hurt" in section 241 of the Penal Code, more was required than the evidence put up by the prosecution. Nevertheless, he held that by the definition of "simple hurt" in section 240 of the Penal Code, the prosecution had proved a case of simple hurt against the appellant. Accordingly, the court in exercise of the powers conferred on it by section 218 of the Criminal Procedure Code convicted the Appellant for the offence of simple hurt instead of that of grievous hurt charged and pleaded to by the Appellant. Moreover, in his judgment, the judge erroneously made reference to section 218 of the Penal Code instead of section 218 of the Criminal Procedure Code as the source of his jurisdiction to convict for the lesser offence.

Appellant appealed to the Court of Appeal contesting the pro-

cedure adopted by the learned trial judge, and contending also that the mistaken reference in the judgment was fatal to his conviction. The appeal was dismissed, hence he has brought this further appeal.

**ISSUES FOR DETERMINATION**

*“1. Whether the Court of Appeal properly considered the main issues raised by the 1st appellant in his appeal, particularly as they relate to Sections 122, 246 and 140 of the Penal Code?”*

*2. Whether it was correct, that the Court of Appeal having found that the 1st appellant was wrongly convicted under Section 218 of the Penal Code, would still affirm his conviction under Section 218 of the Criminal Procedure Code, on the basis that the said mistake does not amount to miscarriage of justice?”*

**HELD** (Unanimously dismissing the appeal per **MOHAMMED JSC**)  
**CRIMINAL PROCEDURE - Judgments - Mistakes**

1. The main complaint of the appellant in this appeal in fact arose from the findings of the trial court in the above quoted part of its judgment that the court below was wrong in not discharging and acquitting him of the offence under Section 246 of the Penal Code, after finding that the trial court also convicted him for the same offence under Section 218 of the Penal Code. What did the court below say on this complaint of the appellant? This is what the court below said in its judgment at pages 286 - 287 of the record:-

*“I think there is a misconception in the submission of the learned counsel for the 1st appellant which must have been caused by the mistake the learned trial Judge made in quoting or referring to Section 218 of the Penal Code instead of Section 218 of the Criminal Procedure Code xxxxxxxx*

*The learned counsel for the appellant observed, rightly in my view, that the finding of the trial court as highlighted above ‘is very funny’ as he put it. The counsel concede that it is strange for the court to convict the 1st appellant under both Section 218 ‘of the Penal Code and also under Section 246 of the Penal Code’ at the same time. For this reason he urged that this court should set aside the finding of the lower court as highlighted above.*

*A careful scrutiny of the above quoted finding of the lower*

*court, would leave no one in doubt, that the court made a mistake in referring to 'Section 218 of the Penal Code, instead of Section 218 of the Criminal Procedure Code.'*"

I entirely agree. I am not myself in any doubt that what happened at the trial court was a slip of pen which the learned counsel to the appellant had picked up to capitalize upon rather unjustifiably at the court below and in this court in the face of overwhelming unchallenged evidence in support of the conviction of the appellant under Section 246 of the Penal Code. No where in the passage of the judgment of the trial court quoted above, did that court say it found the appellant guilty of an offence under Section 218 of the Penal Code. Quite contrary, the appellant was clearly convicted of causing hurt to Cyprian Okpala which that court further described as an offence under Section 246 of the Penal Code. The fact that the trial court said it was proceeding to do so procedurally under Section 218 of the Penal Code, had no effect whatsoever of beclouding the name of the offence for which the appellant was convicted being 'causing hurt to Cyprian Okpala, or the Section of the Penal Code being Section 246, under which the appellant was actually convicted. (p. 2306 D)

### ***Conviction - Offences not charged***

2. The powers under which the trial court proceeded to convict the appellant of the offence for which he was neither charged with nor pleaded to, are contained in Section 218 of the Criminal Procedure Code, which states:-

*"218 (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete lesser offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the lesser offence though he was not charged with it.*

*(2) When a person is charged with an offence and facts are proved which reduced it to a lesser offence, he may be convicted of the lesser offence although he was not charged with it."*

In the instant case, although the appellant was originally charged with causing grievous hurt to Cyprian Okpala, whom the appellant shot and wounded with a Chief Revolver Pistol, the evidence only disclosed a lesser offence of causing hurt without provo-

cation. The evidence on record appraised and accepted by the trial court/ clearly supported the conviction of the appellant under Section 246 of the Penal Code and the court below, in my view, was right in affirming that conviction.

B It is important to point out here that the power to convict a person for a lesser offence that was proved in place of the original greater offence charged, is available not only to the trial criminal courts but also to appellate courts, including the court below and this court. (p. 2307 F)

C

**REPRESENTATION**

David M. Mando, for the Appellant.  
 Vera Venda, (Director Public Prosecutions) Ministry of Justice Makurdi,  
 D (with her; S. T. Suleh, (Principal State Counsel 1), Benue State), for the Respondent.

**CASES REFERRED TO**

R. v. Adokwu & 20 Ors. NLR 105  
 E Adeyemi v. The State (1991) 2 S.C. 93; (1991) 6 NWLR (Pt. 195) 1 at 37.  
 Babalola & Ors. v. The State (1989) 7 S.C. (Pt. I) 94; (1989) 7 SCNJ 127  
 F Amadi v. Nwogu (1992) 5 NWLR (Pt. 241) 273,  
 Woluchem v. Gudi (1981) 5 S.C. 291; (1981) 5 S.C. (Reprint) 178  
 Odojou v. Ayoola (1984) 11 S.C. 291  
 Rufai v. The State (2001) 7 S.C. (Pt. I) 140; (2001) 10 SCM 140 at 144  
 G Adeniji v. The State (2001) 5 S.C. (Pt. II) 100; (2001) 7 SCM 1 at 6  
 Trade Bank Plc. v. Benlux (Nig.) Ltd. (2003) 5 S.C. 1; (2003) 9 NWLR (Pt. 825) 416  
 Ogolo v. Ogolo (2003) 12 S.C. (Pt. 1) 56; (2003) 18 NWLR (Pt. 852) 494

H

**STATUTES REFERRED TO**

Criminal Procedure Code, s. 218  
 Penal Code, ss. 89, 115, 122, 140, 221 & 246

***LEAD JUDGMENT BY MOHAMMED JSC***

This is an appeal against the judgment of the Court of Appeal, Jos Division delivered on 9th November, 2004, dismissing the appellant's appeal against his conviction and sentence by the High Court of Justice Benue State, Makurdi in its judgment of 7th August, 1998. B

Although from the record of appeal it is shown that there are two appellants in this matter, the contents of the notice of appeal, the appellant's Brief of Argument, the respondent's Brief of Argument, and the appellant's Reply Brief, are quite clear there is only one appellant in this appeal. Reference to him in these court processes as the "1st appellant" when there is no appeal by the 2nd appellant before this court, is therefore a misnomer. Sgt. Desmond Ezeja is the only party seeking reliefs in this appeal as the appellant. Therefore in this judgment, I shall continue to refer to him as such. C D

The appellant was a Police Officer attached to the Rural Police-Station at Daudu in Goma Local Government Area of Benue State. On 11th January, 1997, the appellant together with other Police Officers were deployed by the Rural Divisional Police Officer on a 'stop and search duty' along Daudu Ikpiani Road. The appellant was, at the time of this deployment, armed with a chief revolver pistol and six rounds of 33mm ammunition. While on duty, the appellant stopped a pick-up vehicle driven by one Emmanuel Yaga. Other passengers in same vehicle were Cyprian Okpala and Chia Dio. The appellant and his colleagues demanded N30.00 from the driver of the pick-up who offered N20,00. This was rejected by the appellant. When the driver of the pick-up vehicle attempted to forcefully drive away from the check point, the appellant fired his pistol at the vehicle and hit one of the passengers, Cyprian Okpala on his buttock above the right thigh resulting in an injury. Angered by the action of the appellant, the driver wrestled the pistol from the appellant and drove to Daudu Police Station and reported the incident. Not satisfied with the way the Police at the Station were responding to the complaint, especially when no attempt was made to take the injured Okpala to the hospital, the driver left the Police Station and headed to Makurdi E F G H

to report at the Police Headquarters. Meanwhile, the Police at the Daudu Police station sent a radio message to the Police Headquarters Makurdi to the effect that the driver of the pick-up vehicle and his passengers were armed robbers who were in possession of a Police service pistol seized from the Police. On the strength of this information, some Police Officers were detailed to mount road block along Daudu Makurdi road to secure the arrest of the supposed armed robbers and recover the pistol.

When the driver of the pick-up vehicle with his passengers one of whom was injured from the bullet wound caused by the appellant came to the road block, they were arrested by the Police Officers on duty and taken to a spot along Naka Road Makurdi, where the passengers Cyprian Okpala and Chia Dio were shot dead while their driver Emmanuel Yaga, managed to escape.

Following a complaint from the family of late Cyprian Okpala to the Inspector General of Police on the conduct of the Police in causing the death of Cyprian Okpala resulted in investigation into the incident, the appellant and other Police Officers involved were charged before the Benue State High Court Makurdi for various offences. The appellant in particular was jointly charged in count 1 with other accused persons with the offence of abetment of culpable homicide under Sections 89, 221 and 140 of the Penal Code. In addition, the appellant was also charged separately in counts 5 and 6, with the offences of receiving N20.00 as gratification other than legal remuneration, punishable under Section 115 of the Penal Code and voluntarily causing grievous hurt to the late Cyprian Okpala by means of gun shot, punishable under Section 248 of the Penal Code. At the end of the trial, in the judgment of the trial court of 7th August, 1998, the appellant was acquitted and discharged of the offence of abetment of culpable homicide under Sections 89 and 221 of the Penal Code but was found guilty and convicted of the offence under Section 140 of the Penal Code in count 1 of the charge and sentenced to three months imprisonment and fine of N40.00. In exercise of the powers of the trial court under Section 218 of the Criminal Procedure Code, Cap. 30, Laws of Northern Nigeria, 1963, applicable in Benue State, the trial court also found the appellant guilty of the offence under Section 122 of the Penal Code and sentenced

him to three years imprisonment in place of the offence under Section 115 of the Penal Code originally charged in count 5. In exercise of the same power under Section 218 of the Criminal Procedure Code, the appellant was found guilty and convicted of the offence of causing hurt under Section 246 of the Penal Code and sentenced him to three months imprisonment and a fine of N40. 00 in place of the offence of causing grievous hurt under Section 248 of the Penal Code originally charged in count 6. B

Aggrieved with his conviction and sentences by the trial court, the appellant appealed to the Court of Appeal Jos Division which after hearing the appeal, dismissed the same and affirmed the decision of the trial court in its judgment delivered on 9th September, 2004. The appellant is now on a further and final appeal to this court on two grounds of appeal from which the following two issues were distilled by his learned counsel in the appellant's Brief of Argument:- D

*"1. Whether the Court of Appeal properly considered the main issues raised by the 1st appellant in his appeal, particularly as they relate to Sections 122, 246 and 140 of the Penal Code?"*

*2. Whether it was correct, that the Court of Appeal having found that the 1st appellant was wrongly convicted under Section 218 of the Penal Code, would still affirmed his conviction under Section 218 of the Criminal Procedure Code, on the basis that the said mistake does not amount to miscarriage of justice?"* E

In the respondent's Brief of Argument filed by the learned Director Public Prosecutions Benue State, two issues were also identified for determination. They are:- F

*"1. Whether the court below considered (or duly considered) the main issues raised before it by the 1st appellant?"*

*2. Whether the court, below was correct in holding that the trial court could and rightly relied on Section 218 of the Criminal Procedure Code, in convicting the 1st appellant of lesser offences not withstanding the reference to Section 218 of the Penal Code?"* G

These issues were introduced by a clear statement from the learned Director of Public Prosecutions in the respondent's Brief of Argument at page 1 where she said:- H

*"Having regard to the grounds of appeal filed by the 1st appellant on 10th December, 2004, the following issues arise for deter-*

*mination in this appeal.”*

This statement coming right from the beginning of the Brief of Argument in the second paragraph thereof, affirming that the two issues identified therein arose from the two grounds of appeal filed by the appellant on 10th December, 2004, means that the respondent has no quarrel whatsoever with the grounds of appeal from which the issues were framed. Furthermore, the issues in the respondent’s Brief being virtually the same as those formulated in the appellant’s Brief of Argument, also seem to suggest that the respondent is quite at home with the issues in the appellant’s Brief of Argument. Therefore it is difficult to find any reason for the conduct of the respondent’s counsel in coming up with a Preliminary Objection to the competence of the grounds of appeal filed by the appellant and the issues arising from them in the appellant’s Brief. The Notice of Preliminary Objection raised and argued from pages two to six of the respondent’s Brief, is in my view, not properly raised. It ought to have been raised and argued before proceeding, to raise issues from the grounds of appeal being attacked. In any case looking at the two grounds of appeal filed by the appellant and the issues formulated from them by both parties, the grounds of appeal and the issues identified from them, are quite competent.

The two issues raised in the appellant’s Brief of Argument were argued together. The main contention of the appellant is that the trial court having acquitted the appellant of the offence in count 1 of the charge, could not again on the same evidence find the appellant guilty under Section 140 of the Penal Code; that for this reason, the appellant’s appeal should have been allowed by the Court of Appeal. The appellant also complained that the Court of Appeal did not properly treat the complaint of the appellant before it that he was wrongly convicted under Section 218 of the Penal Code which deals with cannibalism and at the same time under Section 246 of the Penal Code; that the Court of Appeal was therefore in error in its judgment affirming the conviction of the appellant because the court having found that the trial court was in error in convicting the appellant under Section 218 of the Penal Code, ought to have set aside the conviction and discharge and acquit the appellant. Relying on the cases of *Rufai v. The State* (2001) 7 S.C. (Pt. I) 140; (2001) 10

SCM 140 at 144 and *Adeniji v. The State* (2001) 5 S.C. (Pt. II) 100; (2001) 7 SCM 1 at 6, learned appellant's counsel had argued that the conviction of the appellant under Section 140 of the Penal Code requires a formal charge and a fresh plea of the appellant taken, before his conviction could be sustained. Counsel therefore urged this court to allow the appeal, particularly when trial court below failed to pronounce on all issues placed before it by the appellant which that court was bound to do if cases such *Trade Bank Plc. V. Benlux (Nig.) Ltd.* (2003) 5 S.C. 1; (2003) 9 NWLR (Pt. 825) 416 and *Ogolo v. Ogolo* (2003) 12 S.C. (Pt. 1) 56; (2003) 18 NWLR (Pt. 852) 494, are taken into consideration, B C

The learned Director of Public Prosecutions for the respondent however maintained that the court below infact had considered all the four issues raised before it in the appellant's appeal before dismissing it having regard to the unchallenged evidence led by the prosecution in proof of all the offences the appellant was convicted by the trial court. The case of *Babalola & Ors. v. The State* (1989) 7 S.C. (Pt. I) 94; (1989) 7 SCNJ 127, was cited and relied upon. This appeal being on concurrent findings of fact by the trial court and the Court of Appeal, learned counsel urged this court to be guided by its decisions in *Amadi v. Nwogu* (1992) 5 NWLR (Pt. 241) 273, *Woluchem v. Gudi* (1981) 5 S.C. 291; (1981) 5 S.C. (Reprint) 178 and *Odojou v. Ayoola* (1984) 11 S.C. 291, and dismiss this appeal. This is because according to the learned counsel, the court below was quite correct in holding that the trial court correctly exercised its powers under Section 218 of the Criminal Procedure Code, in convicting the appellant for the offences disclosed from the evidence even though he was not originally charged with the offences since the claim of the appellant that he was convicted under Section 218 of the Penal Code, was a mere mistake by the trial court which did not occasion any miscarriage of justice. The case of *Okwuwa v. The Queen* (1965) NMLR 53, was relied upon in support of this submission of counsel who urged this court to dismiss the appeal. D E F G

The relevant part of the judgment of the trial court containing the findings and conviction of the appellant of the offence of causing hurt under Section 246 of the Penal Code, is at page 150 of the record of this appeal where the learned trial Judge said:- H

“I have found that the 1st accused fired his gun at P.W.8’s vehicle and that a bullet hit Cyprian in his buttock. By the definition of “grievous hurt” in Section 241 of the Penal Code, more is required than the evidence before me has disclosed, P.W.7 described the injury that Cyprian sustained as only a brush by the bullet. Although some said he was bleeding and lying down. I have no evidence that he suffered any of the things enumerated in paragraphs (a) - (g). The evidence before me shows that he only suffered bodily pain. That, by the definition in Section 240, only constitutes simple hurt. Since simple hurt is subsumed in grievous hurt, and since I have held that simple hurt has been established, I again proceed under Section 218 of the Penal Code and convict the 1st accused of causing hurt to Cyprian Okpala. I have no evidence before me that Cyprian offered any provocation to the 1st accused. I do not consider the act of P.W.8 in deciding to leave without the 1st accused’s permission as provocation to warrant the use of a firearm. Since he caused hurt to Cyprian without any provocation I convict him of the offence under Section 246 of the Penal Code.”

**The main complaint of the appellant in this appeal in fact arose from the findings of the trial court in the above quoted part of its judgment that the court below was wrong in not discharging and acquitting him of the offence under Section 246 of the Penal Code, after finding that the trial court also convicted him for the same offence under Section 218 of the Penal Code. What did the court below say on this complaint of the appellant? This is what the court below said in its judgment at pages 286 - 287 of the record:-**

**“I think there is a misconception in the submission of the learned counsel for the 1st appellant which must have been caused by the mistake the learned trial Judge made in quoting or referring to Section 218 of the Penal Code instead of Section 218 of the Criminal Procedure Code xxxxxxxx**

**The learned counsel for the appellant observed, rightly in my view, that the finding of the trial court as highlighted above ‘is very funny’ as he put it. The counsel concede that it is strange for the court to convict the 1st appellant under both Section 218 of the Penal Code and also under Section 246 of**

*the Penal Code' at the same time. For this reason he urged that this court should set aside the finding of the lower court as highlighted above.*

*A careful scrutiny of the above quoted finding of the lower court, would leave no one in doubt, that the court made a mistake in referring to 'Section 218 of the Penal Code, instead of Section 218 of the Criminal Procedure Code.'*<sup>B</sup>

*I entirely agree. I am not myself in any doubt that what happened at the trial court was a slip of pen which the learned counsel to the appellant had picked up to capitalize upon rather unjustifiably at the court below and in this court in the face of overwhelming unchallenged evidence in support of the conviction of the appellant under Section 246 of the Penal Code. No where in the passage of the judgment of the trial court quoted above, did that court say it found the appellant guilty of an offence under Section 218 of the Penal Code. Quite contrary, the appellant was clearly convicted of causing hurt to Cyprian Okpala which that court further described as an offence under Section 246 of the Penal Code. The fact that the trial court said it was proceeding to do so procedurally under Section 218 of the Penal Code, had no effect whatsoever of beclouding the name of the offence for which the appellant was convicted being 'causing hurt to Cyprian Okpala, or the Section of the Penal Code being Section 246, under which the appellant was actually convicted. The powers under which the trial court proceeded to convict the appellant of the offence for which he was neither charged with nor pleaded to, are contained in Section 218 of the Criminal Procedure Code, which states:-*<sup>C</sup>  
<sup>D</sup>  
<sup>E</sup>  
<sup>F</sup>  
<sup>G</sup>

*"218 (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete lesser offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the lesser offence though he was not charged with it.*<sup>H</sup>

*(2) When a person is charged with an offence and facts are proved which reduced it to a lesser offence, he may be*

***convicted of the lesser offence although he was not charged with it.***”

***In the instant case, although the appellant was originally charged with causing grievous hurt to Cyprian Okpala, whom the appellant shot and wounded with a Chief Revolver Pistol, the evidence only disclosed a lesser offence of causing hurt without provocation. The evidence on record appraised and accepted by the trial court/ clearly supported the conviction of the appellant under Section 246 of the Penal Code and the court below, in my view, was right in affirming that conviction.***

See R. v. Adokwu & 20 Ors. NLR 105 and Adeyemi v. The State (1991) 2 S.C. 93; (1991) 6 NWLR (Pt. 195) 1 at 37. ***It is important to point out here that the power to convict a person for a lesser offence that was proved in place of the original greater offence charged, is available not only to the trial criminal courts but also to appellate courts, including the court below and this court.***

In the recent case of Tunde Adava & Anor. v. The State (2006) 2 S.C. (Pt. II) 136; (2006) 9 NWLR (Pt. 984) 152 at 169, where the appellants were charged with and convicted of culpable homicide punishable with death under Sections 221 and 79 of the Penal Code, by the High Court of Justice of Kogi State and affirmed by the Court of Appeal, the appellants’ further appeal to this court was allowed by a majority decision, setting aside their conviction and sentence and they were discharged and acquitted. However, in the leading judgment, Kutigi, JSC., (as he then was), now CJN, saw the need of exercising this power under Section 218 of the Criminal Procedure Code, to convict the appellants of the offence under Section 246 of the Penal Code, disclosed from the evidence against the appellants on the record thus, this is what he said:-

***“Consequently, the appeals succeed and they are hereby allowed. The convictions and sentences of death passed on each of the appellants by the trial High Court and affirmed by the Court of Appeal are set aside. Each of the appellants is discharged and acquitted of the charge under Section 221 read with Section 79 of the Penal Code.***

*However, in exercise of the powers under Section 218 of the Criminal Procedure Code, Cap. 30, the Laws of Northern Nigeria,*

*1963, Vol. 1, (applicable in Kogi State), each of the appellants is found guilty of a lesser offence of voluntarily causing hurt without provocation under Section 246 of Penal Code. Each of them is accordingly convicted and sentenced to imprisonment for a term of one (1) year only, with effect from 29th July, 1991, when they were convicted by the Okene High Court, Kogi State.”* B

In the instant case, from the overwhelming and unchallenged evidence on record, the trial court correctly exercised its powers under Section 218 of the Criminal Procedure Code, to find and convict the appellant of the offences under Sections 140, 133 and 346 of the Penal Code. The court below was therefore right in affirming the convictions and sentences passed on the appellant. C

In any case, in the absence of any denial by the appellant of the prosecution's evidence of his receiving the sum of N20.00 from Emmanuel Yaga as gratification; of shooting Cyprian Okpala with a chief revolver pistol and of later sending a false information to the Police Headquarters Makurdi painting Emmanuel Yaga and his pick-up vehicle passengers as armed robbers, the appellant's appeal certainly has no slightest chance of success. D

In the result, this appeal fails and the same is hereby dismissed. E  
The convictions and sentences against which the appellant had appealed are hereby affirmed.

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### **KATSINA-ALU JSC**

I have read before now in draft the judgment delivered by my learned brother, Mahmud Mohammed, JSC. I entirely agree with it and, for the reasons which he has given, I also find no merit in the appeal. Accordingly, I dismiss the appeal and affirm the conviction G and sentences on the appellant.

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### **AKINTAN JSC**

The two appellants were tried and convicted at Makurdi High Court. But although the names of the two appellants appear on top of this judgment, all the papers filed relate to only the 1st appellant. H

The appellant was jointly charged with other accused persons

with the offence of abetment of culpable homicide under Sections 89, 221 and 140 of the Penal Code. The appellant was also separately charged in two other counts with receiving gratification other than legal remuneration punishable under Section 115 of the Penal Code and voluntarily causing grievous hurt by means of gun shot punishable under Section 248 of the Penal Code.

The appellant was acquitted of the offence of abetment of culpable homicide at the conclusion of the trial but was found guilty and convicted of lesser offence and appropriate sentences were imposed.

The appellant's appeal to the court below was dismissed, hence the present appeal. The main attack launched against the judgment in this court is in respect of the conviction for a lesser offence by the trial court, I had the privilege of reading the draft of the leading judgment written by my learned brother, Mahmud, Mohammed, JSC.

The facts of the case as well as the issues raised in the appeal are well set out and fully discussed therein. I therefore do not intend to go over them. I entirely agree with the reasoning and conclusions reached in the leading judgment which I hereby adopt. I also hold that there is totally no merit in the appeal and I accordingly dismiss it.

### **ONNOGHEN JSC**

I have had the privilege of reading in draft the leading judgment of my learned brother, Mohammed, JSC., just delivered. I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed.

The facts of this case are not disputed by the appellant so they are taken as established. What are the undisputed facts.

On the 11th day January, 1997, the appellant together with other Policemen were deployed on a "Stop and search" duty along Daudu Ikpiam Road, in Goma Local Government Area of Benue State.

The appellant was armed with his official chief revolver pistol with six rounds of 33mm ammunition for the duty tour. While on that duty, the appellant stopped a pick-up van driven by one Emmanuel Yaga in which one Cyprian Okpala and Chia Dio were passengers. The appellant and his colleagues demanded N30.00 (thirty

naira) gratification from the driver of the said pickup van who offered N20.00 (twenty naira) which was rejected by the appellant. The driver then attempted to drive away from the check point in the process of which the appellant fired his revolver pistol at the vehicle and hit Cyprian Okpala on the buttock and injured him. The driver became angry and consequently wrestled the pistol from the appellant and drove his vehicle together with the passengers to Daudu Police Station where he reported the incident. The Police at that station did not respond to the complaint to the satisfaction of the driver making it necessary for the driver to drive off the station with the intention of reporting the incident at the Police Headquarters, Makurdi. As soon as the driver left the station, the Police at Daudu sent a radio message to the Police Headquarter. Makurdi alleging that the driver of the pick-up van and his passengers were armed robbers who were in possession of a Police service pistol which they seized from the Police, as a result of which some Policemen were detailed to mount a road block along Daudu-Makurdi Road to effect the arrest of the alleged armed robbers and recover the pistol.

When the driver and his passengers got to the road block so mounted, they were arrested by the Policemen and taken to a spot along Naka Road, Makurdi, where Cyprian Okpala and Chia Dio were shot dead while Emmanuel Yaga, their driver escaped.

The matter was later reported to the Inspector-General of Police resulting in an investigation which ended with the arrest and charging of the Policemen involved including the appellant. These are the facts which the appellant does not deny.

However, in the course of the writing of the judgment, the learned trial Judge made an honest mistake of referring to Section 218 of the penal code instead of Section 218 of the Criminal Procedure Code, in convicting and sentencing the appellant. The error resulted in an appeal to the Court of Appeal which appeal was dismissed after the lower court corrected the error. The appellant is not satisfied with the judgment of the lower court, hence the instant appeal.

It is settled law that, the courts including this court have the power under Section 218 of the Criminal Procedure Code, to convict an accused/appellant of a lesser or an offence for which he was

neither charged nor pleaded to. The appellant in this case was originally charged with causing grievous hurt to Cyprian Okpala by shooting and wounding him with his service pistol but the evidence at the trial disclosed a lesser offence of causing hurt without provocation hence the conviction of the appellant by the trial court under Section 246  
B of the Penal Code. I hold the view that the lower court was right in affirming the said conviction and in correcting the error made by the trial Judge referring to Section 218 of the Penal Code, instead of Section 218 of the Criminal Procedure Code, as his authority for  
C substituting a conviction for a lesser offences for the offence charged- See Adava v. The State (2006) 6 S.C. (Pt.II) 136; (2006) 9 NWLR (Pt. 984} 152 at 169.

In conclusion, I too dismiss the appeal for lack of merit.

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**MUHAMMAD JSC**

I have had the advantage of reading in draft, the judgment just delivered by my learned brother, Mohammed, JSC. I find no merit in this appeal as well. I dismiss it. I abide by all orders made in the  
E leading judgment.

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