

**SUPREME COURT OF NIGERIA**  
FRIDAY 19TH JULY, 2013. SC. 375/2011  
**CORAM:- M. MOHAMMED, M. S. MUNTAKA-  
COOMASSIE, N. S. NGWUTA, M. U. PETER-ODILI,  
O. ARIWOOLA, JJSC**

KAZEEM POPOOLA ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Insanity - Procedure to adopt - CPL ss. 223 & 224 - When the issue is raised - Court is expected to put the trial on hold - And inquire into the sanity of accused - To see if he can continue with his trial or not (H1)

CRIMINAL PROCEDURE - Insanity - Proof - Appellant failed to discharge the onus of establishing his insanity - On the balance of probability (H2)

RAPE - Denial - Proof - Medical evidence - Once there is denial - The evidence is not always mandatory - As court is encouraged to look for such evidence - Which shows injury to private part of prosecutrix (H3)

**FACTS**

Accused/appellant was arraigned before the High Court of Ogun State for the offence of rape contrary to section 357 and punishable under section 358 of the Criminal Code Law, Laws of Ogun State 1978. Prosecution/respondent's case is that appellant accosted the prosecutrix/PW1 (Bukola Adebajo) while she was urinating at the Abeokuta Grammar School farm and in the process raped her. Appellant fled from the scene after committing the crime. The matter was reported to the school authority and the police. PW1 was taken to hospital for medical examination.

Subsequently, appellant was seen at a location and following a tip-off by PW1, he was arrested. He confessed to the crime. At the trial, respondent called four witnesses and tendered two exhibits (appellant's confessional statement and Medical Report) to prove its

case. Appellant, who raised the defence of insanity, did not testify but called two witnesses who gave evidence on his behalf. At the end of trial, the court having considered evidence adduced by respondent, found appellant guilty of the offence. Appellant was thus sentenced to five years imprisonment with hard labour. Aggrieved, appellant appealed to the Court of Appeal Ibadan Division. The appeal was dismissed. Hence, appellant appealed to Supreme Court.

**ISSUES FOR DETERMINATION**

1. Whether the failure of the trial Court to comply with the provisions of Sections 223 and 224 of the Criminal Procedure Laws of Ogun State to determine the insanity of the Appellant at the trial prejudiced the trial of the Appellant.

2. Whether the extra-judicial statement of the Appellant in view of his defence of insanity is a corroboration of the sexual offence of rape.

**HELD** (Unanimously dismissing the appeal per **PETER-ODILI JSC**)

*CRIMINAL PROCEDURE - Insanity - Procedure to adopt*

**1. Sections 223 and 224 of the Criminal Procedure Laws of Ogun State enjoin the court to do the following when the issue of insanity is raised at the trial, viz:**

**a. When he observes that the accused behaves abnormally; or**

**b. When the fact of the mental instability of the accused is raised in the course of the trial; or**

**c. When the counsel to the accused request for the inquiry.**

**Since we do not operate the jury system what in effect is expected is that the trial would be placed on hold while the inquiry into the soundness of mind of the accused is fully carried out so as to see if he cannot continue with his trial or not. The first stage of such an investigation is the invitation for medical examination. (pp. 3881 D/3882 B)**

*CRIMINAL PROCEDURE - Insanity - Proof*

**2. Then comes up the matter of whether at the time the crime was committed the accused/appellant was mentally unsound for which it can be said that he was not responsible for his act. In this regard Section 28 of the Criminal Code Law of Ogun State provides thus:**

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

**The kernel of the provision in Section 28 Criminal Code Law is that the onus of establishing the insanity of the Appellant at the material time of the offence is on no other than the Appellant himself. The burden of proof however is on the balance of probability. Placing this prescription within the context of the facts before us and that brings about showing that the offence was committed on 29/1/2004 and Appellant was arrested on 24/7/2004. No evidence was adduced by the defence as to the hospitalization of the Appellant at any point relevant or anytime at all. Nothing said about any medical consultation made to any doctor and what such had thrown up. None whatsoever. All that was proffered by the defence, through the evidence of DW1 and DW2 was that about June of 2003 before the incident the Appellant had been at a prayer house due to mental illness and getting normal absconded. No more no less. (p. 3882 F)**

*RAPE - Denial - Proof - Medical evidence*

**3. That posture for the mandatoriness of medical report would only be relevant if there was denial of the offence by the accused, which the circumstances prevailing having not supported. Also, it cannot be correct that once there is denial of the offence by an accused, no other corroborative evidence would suffice. This is because each case must be considered on its own peculiar facts and circumstances as it is not the law that once there is a denial without medical report, the**

***Prosecution fails. What is required is that once denial is at play the Court is encouraged to look for a medical report showing injury to the private part of the Prosecutrix or any other part of her body.***

***In the case in hand, where there is no medical report but the B confessional statement of the Appellant is direct, cogent, positive and in fact lends strong support to the evidence of the Prosecutrix. It stands to reason therefore that the corroboration desired is in place and the requirement of the law complied with. The assertion by the Counsel for the Appellant that C the confessional statement should not be such corroboration as according to him, the Appellant was insane at the time is a flying of a kite without purpose as that insanity posture has been effectively debunked and unsupported by any evidence D worth its salt.*** (p. 3886 A)

## NOTABLE POINT OF INTEREST

### **ARIWOOLA JSC**

#### ***1. Rape - Meaning of***

***E*** Rape is unlawful carnal knowledge of a girl or woman without her consent, by force, fear or fraud, and it is an essential ingredient of that offence that the intercourse must be without the woman's consent. In other words, a man will be said to have committed rape if he ***F*** has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and at the time, he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it. Even when consent is obtained by force or threat or ***G*** intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act, the offence can be committed. (p. 3891 E)

### **REPRESENTATION**

***H*** Adekunle Ojo, for Appellant  
 Abimbola I. Akeredolu (Mrs.), Attorney-General of Ogun State and  
 J. K. Omotosho DDPP, for Respondent

**CASES REFERRED TO**

Mboho v. State (1966) ALL NLR 63	
Odo v. State (1998) 1 NWLR (pt. 532) 24	
Ejinima v. State (1991) 7 SC (pt. III) 1	
Energy v. State (1973) 6 SC 215	
Peter v. State (1997) 12 NWLR (pt. 531) 45	B
Sanusi v. State (1984) 10 SC 166	
Ogbu v. Wokoma (2005) 7 SC (pt. II) 123	
Onakpoya v. Queen (1959) 4 FSC 150	
Guobadia v. State (2004) 6 NWLR (pt. 869) 380	C
Onyekwe v. State (1988) 1 NWLR (pt. 72) 565	
Kanu v. State (1980) 3-4 SC 1	
Udofia v. State (1981) 11-12 SC 45	
Okeke v. State (2003) 13 NSCQR 754	
Odo v. State (1998) 1 NWLR (pt. 532) 24	D
Sambo v. State (1993) 6 NWLR (pt. 300) 399	

**STATUTES REFERRED TO**

Criminal Code Laws of Ogun State of Nigeria 1978, ss. 28, 358	
Criminal Procedure Law, ss. 222, 223, 224	E
Evidence Act, s. 136	

**LEAD JUDGMENT BY PETER-ODILI JSC**

This is an appeal against the judgment of the Court of Appeal, Ibadan Division wherein the Appellant appealed against the conviction and sentence on a charge of Rape contrary to Section 357 and punishable under Section 358 of the Criminal Code Law, Laws of Ogun State of Nigeria 1978. F

The Appellant was arraigned before the trial Court on 15th day of December, 2005 for the offence of rape. He was alleged to have raped the Prosecutrix, Bukola Adebajo, a secondary school girl within the school farm on or about the 29th day of January 2004. The Appellant pleaded “*not guilty*” to the charge. The Prosecution called four witnesses and tendered two exhibits 1 - 1A, the Yoruba and English version of the Appellant’s statement and Exhibit 2, the Medical Report. The Appellant did not testify but called two witnesses who gave evidence on his behalf. G H

At the end of the trial the learned trial Judge, Lokulo-Sodipe,

J. (as he then was) found the Appellant guilty and sentenced him to a term of five years imprisonment with hard labour.

Dissatisfied, the Appellant proceeded to the Court of Appeal which dismissed his appeal, hence this process before the Supreme Court on appeal.

## B BACKGROUND FACTS

The facts of this case from the evidence adduced by the Prosecution revealed that, on the 29th day of January, 2004 at about noon, the Prosecutrix (Bukola Adebajo) was urinating at the school farm of the Abeokuta Grammar School, Abeokuta, Ogun State when the Appellant accosted her and threatened to report her to the school authority on the ground that students had been barred from defecating in the school farm. The Prosecutrix (PW1) pleaded with him but the Appellant demanded for money which the Prosecutrix said she did not have and in the process of further threat of reporting the Prosecutrix, the Appellant grabbed PW1 and dragged her further into the farm, overpowering her, he raped her before fleeing the scene.

The incident was later reported to the School Vice-Principal who took PW1 to the hospital and reported the matter to the police. The Appellant could not be found for arrest but on the 24th day of July, 2004 at about 9.20am at a place called Mortuary Junction in Abeokuta, PW1 saw the Appellant and she called her mother by phone who came over and got the Appellant arrested. He made a confessional statement the same day and he was charged to Court.

At the hearing on the 2nd day of May, 2013, the learned Counsel for the Appellant, Adekunle Ojo adopted the brief of argument he settled and filed on 2/11/2011. In it were crafted three issues for determination which are stated thus:

1. Whether the failure of the trial Court to comply with the provisions of Sections 223 and 224 of the Criminal Procedure Laws of Ogun State to determine the insanity of the Appellant at the trial prejudiced the trial of the Appellant.

2. Whether the extra-judicial statement of the Appellant in view of his defence of insanity is a corroboration of the sexual offence of rape.

The learned Attorney-General for Ogun State, Mrs. Abimbola Akeredolu adopted the brief of argument of the Respondent settled

by B. A. Adebayo Esq. which was filed on 13th June, 2012 and deemed filed on 29th November, 2012. Learned Counsel adopted the issues as raised by the Appellant which are good enough in the determination of the appeal.

### ISSUES 1 & 2

These two issues raise the questions whether the trial Court's failure to comply with the provisions of Section 223 and 224 of the Criminal Procedure Laws of Ogun State to determine the insanity of the Appellant prejudiced the trial of the Appellant. Also, whether the Appellant discharged the burden of proof in establishing that he was insane on the date the offence was allegedly committed.

Learned Counsel for the Appellant pointed out that at the trial, DW1 and DW2 stated that Appellant had mental sickness and had escaped from where he was undergoing treatment until he was detained and arraigned. That there was no contrary evidence on his having recovered and the learned trial judge had not subjected him to any investigation on the state of his mind at the material time. He cited Sections 223 and 224 of the Criminal Procedure Law.

Mr. Ojo of Counsel went on to contend that when there is a reason to suspect that the accused is of unsound mind and consequently incapable of making his defence, the inquiry will be held and the findings made part of the trial. He referred to *Mboho v The State* (1966) ALL NLR 63; *Odo v State* (1998) 1 NWLR (Pt.532) 24.

Learned Counsel for the Appellant contended that by the provisions of Section 28 of the Criminal Code of Ogun State, a person who sets up a defence of insanity is only enjoined to prove same on the balance of probability and or preponderance of evidence. He relied on *Anthony Ejinima v. The State* (1991) 7 SC (Pt.III) 1; *Energy v The State* (1973) 6 SC 215 at 226; *Peter v State* (1997) 12 NWLR (pt.531) 45; *Sanusi v The State* (1984) 10 SC 166 at 167 - 169.

It was submitted for the Appellant that proof on the balance of probability means that the party who asserts in proof of the existence or non-existence of the fact he alleges shall adduce evidence which establishes a prima facie case of the fact and thereafter the burden shifts to the other party who disputes the claim. He cited *Ogbu v. Wokoma* (2005) 7 SC (pt. II) 123; *Onakpoya v Queen* (1959) 4 FSC 150; *Guobadia v State* (2004) 6 NWLR (Pt.869) 380.

That it follows that by virtue of Section 136 of the Evidence Act, where an evidence adduced is unchallenged the Court is bound to accept that evidence and act on it. He referred to *West African Shipping Agency (Nig.) Ltd v. Alhaji Musa Kalla* (1978) 3 SC 21; *Omoregbe v. Lawasi* (1980) 3 - 4 SC 10, *Lipede v. Sonetun* (1995) B 1 SCNJ 184.

For the Appellant, it was further stated that the onus where the balance is that of probability is that the onus of proof is not static but shifts from Complainant to Defendant and vice-versa depending on the case and the evidence offered by either party. He cited Nigerian C *Maritime Services Ltd v. Afolabi* (1978) 2 SC 79; *Onyekwe v. The State* (1988) 1 NWLR (pt.72) 565 at 579.

Responding, Mrs. Akeredolu of Counsel stated that it is clear from the provision of Section 222 of the Criminal Procedure Law, D that an accused can only be said to be of unsound mind if by reason of some physical or mental condition he cannot follow the proceedings and so cannot make a defence. That it is after the Court has observed the condition of the accused person or his attention drawn to such fact for him to know whether the accused is fit to stand his E trial. That it is after the observation that the procedure laid down in Sections 223 and 224 will be followed.

The learned Attorney-General for the Respondent said there was no reason on which the Court at trial could have seen signs of F unsoundness of mind on the Accused/Appellant for which the application of Section 222 and the follow up Sections 223 and 224 would be made. Also of note, she said that at no time during the trial did Counsel for the Appellant call the attention of the Court to any mental impairment.

G It was further submitted for the Respondent that in respect to Section 28 of the Criminal Code Law of Ogun State that the burden of proving insanity is on the defence and that is on the balance of probabilities and this was not done. She referred to *Loke v The State* (1985) 1 SC 1; *Egbe Kanu v. The State* (1980) 3-4 SC 1; *Udofia v* H *The State* (1981) 11 - 12 SC 45.

That the Appellant merely raised the defence of insanity without discharging the onus placed on him by law. That the defence of insanity is not available to a person who denies committing an act that might give rise to the defence. She cited *Okeke v The State*



(2003) 13 NSCQR 754.

The questions herein raised are, firstly if the failure of the trial Court to comply with the provisions of Sections 223 and 224 of the Criminal Procedure Laws of Ogun State to determine the insanity of the Appellant at the trial prejudice the trial of the Appellant. Secondly, if the Appellant was discharged on the preponderance of evidence, the burden placed on him to establish was that he was insane on the date the offence was allegedly committed. B

To proceed I need to be reminded of the provisions of Section 222 of the Criminal Procedure Law of Ogun State which are thus: C

*“An accused person shall be deemed to be of unsound mind and consequently incapable of making his defence if by reason of some physical or mental condition he cannot follow the proceedings and so cannot make a proper defence.”*

**Sections 223 and 224 of the Criminal Procedure Laws of Ogun State enjoin the court to do the following when the issue of insanity is raised at the trial, viz: D**

**a. When he observes that the accused behaves abnormally; or**

**b. When the fact of the mental instability of the accused is raised in the course of the trial; or E**

**c. When the counsel to the accused request for the inquiry.**

This court has handled the provisions of this statutory prescription in the case of Mboho v The State (1966) ALL NLR 63, thus: F

*“In our view, this subsection envisages that if the trial is to continue there ought to be a specific finding on an investigation under Section 223 of the Criminal Procedure Act if such an investigation was in fact made. This view is reinforced by the fact that if the trial had been before a judge and jury, it would have been necessary for the jury to make a finding on the facts given in the course of such investigation before the trial continued. Sections 223 and 224 of the Criminal Procedure Act have really not made any specific and/or detailed provisions for the procedure to be adopted by a Court in the course of such investigations but Section 363 of the Criminal Procedure Act provides as follows: G*

*“The procedure and practice for the time being in force of Her Majesty’s High Court of Justice in England in criminal trials shall ap- H*

*ply to trials in the High Court in so far as this Act has not specifically made provision therefore.” In England, the issue whether an accused person is fit to plead or take his trial is an issue upon which a final decision must be given by the jury; and if a jury trying such an issue is unable to reach an agreement a fresh jury must be impaneled to*  
 B *decide the issue before trial should proceed or continue.”*

**Since we do not operate the jury system what in effect is expected is that the trial would be placed on hold while the inquiry into the soundness of mind of the accused is fully carried out so as to see if he cannot continue with his trial or not.**  
 C **The first stage of such an investigation is the invitation for medical examination.** See *Odo v. State* (1998) 1 NWLR (Pt.532) 24.

It needs be said that the ad hoc procedure which this inquiry is  
 D cannot be held in vacuo or on its own without the conditions precedent to its process being present. Those conditions are in the main that the trial judge himself has observed certain abnormal behavior of the accused which convinces him that there may be a danger of the trial not being conducted with a stable accused fit to stand his trial  
 E or learned Counsel on behalf of the accused calling the Court’s attention to the mental impairment of the accused such as to put the trial in jeopardy if carried on. However, none of these two possible conditions arose and so making it futile for learned Counsel for the Appellant to raise and attempt to impugn the integrity of the trial on  
 F the ground that ss. 223 and 224 CPL had not been complied with.

***Then comes up the matter of whether at the time the crime was committed the accused/appellant was mentally unsound for which it can be said that he was not responsible for his act. In this regard Section 28 of the Criminal Code Law of Ogun State provides thus:***  
 G

***“A person is not criminally responsible for an act or omission if at the time of doing the act or omission he is in such a state of mental disease or natural mental infirmity as to***  
 H ***deprive him of capacity to understand what he is doing or the capacity to know that he ought not to do the act or make the omission.”***

**The kernel of the provision in Section 28 Criminal Code Law is that the onus of establishing the insanity of the Appel-**

**lant at the material time of the offence is on no other than the Appellant himself. The burden of proof however is on the balance of probability. Placing this prescription within the context of the facts before us and that brings about showing that the offence was committed on 29/1/2004 and Appellant was arrested on 24/7/2004. No evidence was adduced by the defence as to the hospitalization of the Appellant at any point relevant or anytime at all. Nothing said about any medical consultation made to any doctor and what such had thrown up. None whatsoever. All that was proffered by the defence, through the evidence of DW1 and DW2 was that about June of 2003 before the incident the Appellant had been at a prayer house due to mental illness and getting normal absconded. No more no less.**

The Appellant did not testify for himself. Those circumstances placed alongside the extra-judicial statement of the Appellant, Exhibit "14" which was comprehensive, clear, coherent and confessional which I shall quote verbatim hereunder, viz:

*"I am married with children and also I am a taxi driver. On the 25/1/2004 at about 11.30hrs or thereabout, was at one Celestial Church behind Abeokuta Grammar School where something told me to enter the nearby bush. When I went to the bush, there I met a student of Abeokuta Grammar School, who came there to defecate (sic: defecate). I held the girl and dragged her away from nearby people into the bush. I forced her, pulled her pant, she dragged with me, she pour me sand on my face, I beat her or assaulted her by given (sic: giving) fist blow which made (sic: made) her weak. I unlawfully had a carnal knowledge of her. I did not tear her pant, I don't know what pushed me to the bush. I Kazeem Popoola of Itoku Abeokuta on the 29/1/2004 at the bush beside Abeokuta Grammar (sic: school) Idi-Aba Abeokuta unlawfully had a carnal knowledge of one female student of the school. The name of the student is yet unknown. Today 24/7/2004 at about 092 hours. I was on my way to my boss house at Mortuary Junction where three boys on bike chased me and arrested me to their garage. While we were there the lady came and high jacked my shirt and started saying I am the one who raped her at Idi-Aba. They later took me down to Ibara Police Station. I am the one raped the girl."*

Taken together, it is easy to see that the attempt to show insanity of the Appellant at the time material even went to the advantage of the Prosecution in that by the time the Appellant left the prayer house he was of sound mind. His confessional statement gave details of his life and details of what transpired between him and the Prosecutrix and nowhere within the statement can it be said to have emanated from a person of unsound mind. So in effect how the Appellant is supposed to prove by the balance of probability or preponderance of evidence on his unstable mind at the time of the alleged offence, this Court cannot just see it and I dare say such evidence is not existing. Therefore, the trial Court and the Court of Appeal which agreed with it were right not to have taken that very weak clutching of straw in an attempt to raise insanity at the time of the offence as inadequate to raise a dust not to talk of being considered on the balance of probability. I place reliance on the cases: *Egbe Kanu v. The State* (1980) 3- 4 SC 1; *Udofia v The State* (1981) 11 - 12 SC 45, *Okeke v The State* (2003) 13 NSCQR 754. Clearly the two issues herein raised are resolved in favour of the Respondent.

### ISSUE 3

This issue asks the question whether the extra-judicial statement of the Appellant in view of his defence of insanity is a corroboration of the sexual offence of rape.

In answer to the poser, learned Counsel for the Appellant said that in line with the position of the Supreme Court in *Sambo v. The State* (1993) 6 NWLR (pt.300) 399 and *Edet Okon Iko v The State* (2001) 7 SC (pt.II) 115 corroboration is required to support conviction for the offence of rape.

For the Appellant it was contended that whether the accused denies the offence of rape or not the offence must be corroborated by medical evidence. That the extra-judicial statement was not corroborative of the Appellant's commission of the offence. That the offence of rape can only be ascertained by a medical evidence showing injury to the private part of the complainant or an injury to other parts of the woman's body which may be occasioned in a struggle or eye witness or account.

Mr. Ojo of Counsel for the Appellant said in all practicality, it is only medical evidence that can prove an act of sexual intercourse and the offence of rape. That it therefore translates to the fact that it

is compulsory that medical evidence of the examination of the victim confirming the allegation of forcible intercourse and the existence of recent semen in the vagina of the victim traced medically to accused must be conducted at the instance of the Prosecution. He said failure of the Prosecution to call the Medical Doctor who examined the Prosecutrix or Medical Doctor who can testify on a medical report is fatal to the case of the Prosecution as it fails to provide any corroboration to the evidence of the victim on penetration. B

For the Appellant, it was further canvassed that the Appellant who allegedly made the confessional statement, Exhibit A1, was not a competent witness by reason of the insanity and so both the statement and plea were void in law. He relied on *Makosa v The State* (1969) 1 ALL NLR 363 at 366. That the evidence of the victim cannot be corroborated by the untested, unverified extra-judicial statement not made on oath. C

Learned Counsel for the Respondent stated that the duty on the Prosecution is to establish the guilt of the accused beyond reasonable doubt. She cited *Ogidi v State* (2005) 1 SC 98. She submitted that in a case of rape, the evidence of the Prosecutrix must be corroborated but the nature of the corroboration depends on the peculiar facts of each case. That where the offence is denied by the accused, the Court is therefore enjoined to look for the corroboration from the medical report showing injury to the private part of the victim or other parts of her body. She referred to *Iko v The State* (2001) SCNJ 39. D E F

The learned Attorney-General went on to say that in the case in hand, the Appellant did not deny committing the offence rather he claimed to be of unsound mind at the time material. That in the circumstance the non-calling of the Medical Doctor is not fatal and the confessional statement thereby offered the needed corroboration. That a plea of not guilty is not the same as retraction of an extra-judicial statement. G

The grouse of the Appellant herein is that though conceded that a confessional statement of an accused can be corroboration of the evidence of a Prosecutrix in an allegation of rape, such a statement must have come from a sound mind not as Appellant contends here that the Appellant was mentally sick at the time material and at the time of making the statement. Also Learned Counsel for the Ap- H

pellant insists that medical evidence of the rape is a necessity for the proof as required by law.

***That posture for the mandatoriness of medical report would only be relevant if there was denial of the offence by the accused, which the circumstances prevailing having not supported. Also, it cannot be correct that once there is denial of the offence by an accused, no other corroborative evidence would suffice. This is because each case must be considered on its own peculiar facts and circumstances as it is not the law that once there is a denial without medical report, the Prosecution fails. What is required is that once denial is at play the Court is encouraged to look for a medical report showing injury to the private part of the Prosecutrix or any other part of her body. See Iko v The State (2001) SCNJ 39.***

***In the case in hand, where there is no medical report but the confessional statement of the Appellant is direct, cogent, positive and in fact lends strong support to the evidence of the Prosecutrix. It stands to reason therefore that the corroboration desired is in place and the requirement of the law complied with. The assertion by the Counsel for the Appellant that the confessional statement should not be such corroboration as according to him, the Appellant was insane at the time is a flying of a kite without purpose as that insanity posture has been effectively debunked and unsupported by any evidence worth its salt.***

I shall recant the finding of the learned trial Judge at this point to at least lay to rest the shadow of insanity which Appellant is tout-ing. That Court per Lokulo-Sodipe held thus:

***"I have given serious consideration to the evidence before the Court and I am of the settled view that it will be perverse for me to hold that the accused person was as at 29/1/2004 suffering from any mental disease or infirmity given the fact that the accused person as at 21/12/2003 had sufficiently recovered from whatever it was that he was being (sic) for by DW2... I do not only not find the accused person on the evidence of DW1 and DW2 to have established the defence of insanity he has set up at the trial of his case on balance of probability... But I also do not find him to have been suffering from any mental infirmity as at 24/7/2004 when he made his statement...***

*which statement was admitted without objection at the trial of this case.”*

The Court of Appeal reviewing those findings found them unassailable within the records as I have no option doing herein. It is therefore my conclusion that this issue is also resolved in favour of the Respondent. I cannot fail to express my disappointment however on the lenient terms of imprisonment of five years dished by the trial High Court which not having been appealed against has to remain, sadly in a heinous crime such as this.

That said, this appeal lacks merit and is hereby dismissed. I affirm the judgment of the Court of Appeal, Ibadan Division which affirmed the decision, conviction and sentence of the trial High Court.

### MOHAMMED JSC

The judgment of my learned brother Peter-Odili, JSC which has just been delivered was read by me before today. I entirely agree that the appeal is lacking in merit and deserves to be dismissed.

The main complaint of the Appellant in this appeal is the alleged failure of the trial Court to uphold the Appellant’s defence of insanity within the scope of the provisions of Sections 222, 223 and 224 of the Criminal Procedure Law of Ogun State. Section 222 of the Criminal Procedure Law of Ogun State which forms the foundation of the complaint of the Appellant states -

*“222. An accused person shall be deemed to be of unsound mind and consequently incapable of making his defence if by reason of some physical or mental conditions he cannot make a proper defence.”*

The above provision of the law requires the trial Judge in the course of the conduct of the prosecution of an accused person for a criminal offence, to observe the mental and physical conditions of the accused in the determination of whether or not the accused person is incapable of making his defence to justify the count in concluding that the accused is of unsound mind. In the case at hand even the learned Counsel to the Appellant himself did not deem it fit to raise the defence of insanity on behalf of his client because throughout the trial, the Appellant did not exhibit any evidence of physical or mental conditions capable of raising any inference that the Appellant was

incapable of making his defence. Consequently, on the evidence on record before the learned trial Judge, there is no basis whatsoever of accusing him of failure to avail the Appellant of the benefit of the provision of Sections 222, 223 and 224 of the Criminal Procedure Law of Ogun State to find that the Appellant was incapable of making his defence. The Court below was therefore right in affirming the finding of the trial Court that the Appellant was not suffering from any mental disease or infirmity to justify finding him incapable of making his defence at the trial Court.

The other aspect of the complaint of the Appellant on the question of the defence of insanity in this appeal concerns the issue of whether or not the Appellant had in the course of his trial, discharged the burden of proof placed upon him by law in proving that he was truly deprived of the capacity of knowing what he was doing or appreciate his conduct at the time the offence of rape was committed. This requirement of the law is stated in the case of *Peter v. The State* (1997) 12 N.W.L.R. (pt.531) 1 at 22, one of the cases cited and relied upon in the Appellant's brief of argument. The root of this requirement of the law is contained in the provisions of Section 28 of the Criminal Code Law of Ogun State which states -

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

The evidence required for an accused person to benefit from the above provision of the law, is the evidence that relates to the time the offence was committed, which in the present case is 29th January, 2004, the date the alleged act of rape was committed by the Appellant. The Appellant not having testified on oath at the trial, the evidence of the two witnesses called by him was not relevant at all in proving the requirements of Section 28 of the Criminal Code Law of Ogun State.

In the result, the Appellant having failed to even attempt to establish the defence of insanity in this case to justify the trial Court in taking the required steps to allow him to enjoy the benefit of that defence, the trial Court and consequently the Court below were quite right in their decisions that the defence of insanity was not available



to the Appellant. I am therefore at one with my learned brother Peter-Odili JSC, in the judgment that this appeal lacks merit. Accordingly, I also dismiss the appeal and affirm the conviction and sentence passed on the Appellant by the trial Court and affirmed by the Court below.

B

### **MUNTAKA-COOMASSIE JSC**

I have had the opportunity of reading in draft the lead judgment of my learned brother Mary Peter-Odili, JSC, I entirely agree with the reasons and conclusion therein adumbrated. I in fact, adopt same as mine. I entirely agree that the appeal lacks merit. Same is hereby dismissed.

The offence appeared to be heinous and heartless acts. The sentence meted out by the trial Court amounts to abdicating its role as a judicial officer. I condemn such type of sentence. The sentence is unnecessarily lenient and loose. Since the Appellant did not appeal against the sentence there is nothing the Court of Appeal can say on appeal.

The judgment of the lower Court which affirmed the conviction and sentence of the trial Court is further affirmed by me.

### **NGWUTA JSC**

I had the privilege of reading in draft the lead judgment just delivered by My Lord, Peter-Odili, JSC, CFR and I entirely agree with the reasoning and the conclusion reached.

I desire to make a few observations on the defence of insanity raised by the Appellant.

The law is settled that every person is presumed to be of sound mind and to have been of sound mind at any time in question until the contrary is proved. See *Oladele v. State* (1993) 1 SCNJ 60. The word “*presume*” implies the possibility that the thing being presumed may be rebutted. See *Karimu v. State* (2005) 4 ACLR 438 at 443.

It follows that the presumption that an accused was of sound mind at the time of the alleged offence can be rebutted. It is an issue of fact to be settled on evidence. Arising from the presumption of soundness of mind is the burden placed on the accused who sets up

a defence of insanity to lead evidence to prove same.

It is not the duty of the Court to scout for evidence to found a defence of insanity sought to be relied on by the accused. See *Sanusi v. State* (1984) 10 SC 166 at 176.

However, the burden of proof on the accused who relies on a defence of insanity is less than the burden cast on the Prosecution to prove his guilt beyond reasonable doubt. The burden of proof is satisfied on a balance of probability or preponderance of evidence.

What is the evidence of insanity upon which the Appellant relies? Appellant made a confessional statement. No plea of insanity was made by him or on his behalf. He did not testify at the trial. The evidence of insanity came from PW1, his father, and a Pastor, PW2; none of whom is a Psychiatrist or in any way or manner qualified to testify as to the soundness of anyone's mind at any time relative to the commission of an offence or trial for same.

The learned trial Judge made a finding of fact that based on the evidence of DW1 and DW2, the defence of insanity was not established on the balance of probabilities. The lower Court endorsed the learned trial Judge's finding of fact. The concurrent finding of fact has not been shown to be perverse and this Court has no duty to, and will not, interfere with such concurrent finding. See *Ibodo v. Enuofia* (1980) 5-7 SC 42; *Kponuglo v. Kodadja* (1933) 2 WACA 24.

In a trial for rape, evidence of corroboration could come from the accused himself. See *Ezeigbo v. The State* (2012) NCC 7 436 at 447 para. H. In this case, the confessional statement of the Appellant corroborates the evidence of the PW1 that the Appellant raped her.

My Lords, the facts of this case constitute a sad commentary on the sanitary facilities provided for students at Abeokuta Grammar School, Ogun State and may be, some other institutions in the country. Had there been toilet facilities in the school, the young girl, Bukola Adebajo, would not have gone to the school farm to answer the call of nature and the Appellant could not have had the opportunity to violate her as he did. This should be a lesson to the management of all schools in the country, particularly, schools in the hinterlands.

For the above and the fuller reasons in the lead judgment, I also dismiss the appeal as devoid of merit. I endorse the judgment of the lower Court. I join my learned brother in expressing disappoint-

ment that the Appellant was given a lenient term of five years in prison. I think that the severity of punishment for rape, with particular reference to statutory variety, should rank next to capital punishment. Appeal dismissed.

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### **ARIWOOLA JSC**

I had the opportunity of reading in draft the lead judgment of my learned brother, Peter-Odili. JSC just delivered. The appeal is against the decision of the Court of Appeal, Ibadan Division, herein-  
after referred to as the Court below. C

The Appellant had been tried, convicted and sentenced to a term of imprisonment for the offence of rape said to have been committed on a School girl on the School farm on or about the 29th January, 2004. Upon appeal against the conviction and sentence to the Court below, the conviction and sentence had been affirmed, leading to the instant appeal. D

It is noteworthy that the Appellant had raised the defence of insanity but was overruled by the trial Court, which decision was affirmed by the Court below. E

Rape is unlawful carnal knowledge of a girl or woman without her consent, by force, fear or fraud, and it is an essential ingredient of that offence that the intercourse must be without the woman's consent. In other words, a man will be said to have committed rape if he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and at the time, he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it. Even when consent is obtained by force or threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act, the offence can be committed. See *Sunday Jegede vs. State* (2001) 14 NWLR (pt 733) 264, (2001) 7 SC (pt 1) 122. F G

However, by the Criminal Code Law of Ogun State, where the incident took place, "*a person is not criminally responsible for an act or omission if at the time of doing the act or omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing or the capacity to know that he ought not to do the act or make the omission*" See Section 28 H

of the Criminal Code Law.

This is a defence available to a person alleged to have committed a criminal offence by his act or omission requiring soundness of mind.

In the consideration of the evidence available to or adduced by an accused person in his defence of insanity, the following radical and fundamental points have been held to be important to be borne in mind and kept in view.

(1) The law presumes every person, including any person accused of crime, sane until the contrary is proved... (see Section 27 of the Criminal Code).

(2) The Prosecution does not set out to prove what the law presumes in its favour.

(3) An accused person who raises insanity as his defence has the onus of proving such insanity cast on him. The standard of such proof is not as high as that cast on the prosecution.

It is not proof beyond reasonable doubt but it is proof of reasonable probability, proof sufficient to create a reasonable doubt in the mind of a fair minded jury as to the sanity of the accused

(4) Insanity is a blanket term embracing a considerable variety of mental abnormalities, mental infirmities, neurosis and psychosis.

(5) To constitute a defence, the mental condition relied on should be such that could and did deprive the accused of capacity:

(a) To understand what he was doing; or

(b) To control his action; or

(c) To know that he ought not to do the act or make the omission complained of as constituting the actus reus of the offence charged.

See *M. A. Sanusi Vs. The State* (1984) LPELR - SC 49/1983, per Oputa JSC, *Ogbu Vs. The State* (1992) 10 SCNJ 88, (1992) NWLR (pt 259) 255; *Ngene Arum Vs. The State* (1979) 11 SC 91 at 119.

In the instant appeal, the Appellant in his extra-judicial statement which was admitted as exhibit 1A, the appellant gave the narration clearly and coherently of the event of the day in question when he was alleged to have committed the offence.

To constitute a defence on the ground of insanity, it has been held that the defect of reason must be shown to be of a particular kind; it must be such as to bring the case within one of the following:

(a) Did the accused know the nature and quality of the act? If

not, insanity is a defence.

(b) In the alternative, if the accused did know the nature and quality of his act, did he know it was wrong? If not, insanity is a defence. See: Dillon Vs. Q (1939) 27 Cr. A.R. 152.

(c) If he knew the nature and quality of his act and knew it was wrong, was he under a delusion in some other respect? If so he is in the same situation as to responsibility as if the facts had been as he imagined - partial delusion. See Peter Johnny Loke Vs. The State (1985) 1 NWLR (pt 1) 1 at 8, William Echem Vs. Q (1952) XI WACA 158.

There is no doubt that the Appellant failed to prove that he was indeed of unsound mind when he committed the offence. With the drama that preceded the act and the event that followed with his running away from the scene until he was apprehended several months thereafter, the Appellant cannot be said to be of unsound mind with lack of capacity to know what he was doing or that it was wrong. I am of the firm view that the Appellant knew the nature of what he did and that it was wrong. The defence of insanity was therefore unavailable and properly rejected by the two Courts below.

For the above reason and the fuller and well articulated reasoning of my learned brother, Mary Peter-Odili, JSC and the conclusion arrived thereat in the lead judgment which I adopt as mine, I too consider the appeal unmeritorious. It is dismissed.

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