

HALLMARK OF JUSTICE

COMMENTARIES ON SELECTED JUDGEMENTS OF HON. JUSTICE M.M.A. AKANBI



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Chapter 8

IN THE FEDERAL COURT OF APPEAL
IBADAN JUDICIAL DIVISION
HOLDEN AT IBADAN
On Friday, the 27th April, 1979
BEFORE THEIR LORDSHIPS

ANTHONY IJOMA ASEME — **JUSTICE, COURT OF APPEAL**
M.M.A. AKANBI — **JUSTICE, COURT OF APPEAL**
UCHE OMO — **JUSTICE, COURT OF APPEAL**

BETWEEN
OLUFEMI KOMAIYA ..... APPELLANT
And
THE STATE ..... RESPONDENT
Judgement of the Court
(Delivered by M.M.A. Akanbi, J.C.A)
Comment by R. J. Adebimpe*

INTRODUCTION

Provocation is unarguably a mitigation of punishment in homicide cases.[74] The defence stands on the law's recognition of human frailness, for the law acknowledges the reality that man is predisposed to failure of restrain while angered, accordingly cognizance ought to be taken of this in meting out sentence.[75] In spite of this reality however, principles concerning the defence appear to be easily glossed over. In the

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74 See Shande v The State (2005) 22 NSCQR (Pt.2) 756, 772, [2005] NWLR (Pt 907) 218, Ekag v The State [2001] 17 NWLR (Pt. 723), Uwaekweghinya v State [2005] NWLR (Pt 930) 227 SC, Onyia v State [2006] 7 NWLR (Pt 991) 267 CA; Jide Onwo v The State [1997] 1NWLR (Pt.480)209

75 See (n1) Note however that, provocation is not a defence in Islamic law, for in Islamic jurisprudence all offences are, prima facie strict liability offences Rabiu Ruma v Daura Native Authority (1960)5FSC93, Fagoiiv v Native Authority (1957) NRNLR 84. And that was the law applicable in the Northern part of Nigeria before the enactment of the 1960 Independent Constitution. see R v Ilorin Native Court, Ex parteJimoh Aremu (1952) 2 NLR 144 where it was held that the application of Islamic law by an Alkali Court in Ilorin was proper as the law prevailing in the area even though the applicants were Yorubas. The leading case that changed the law on the issue was Maizabo v Sokoto Native Authority [1957] NRNLR 133, where the Supreme Court held that provocation is available to an accused on a charge of culpable homicide even though the area of jurisdiction was entitled to apply Islamic law

same vein, a notion had been peddled, often with some aura of unwarranted inviolability that the prosecution is bound to call, at the trial, all the available witnesses in the case in order that the whole of the facts may be before the court. Be that as it may, this paper reviews the Court of Appeal decision in a case which covers these two subjects and examined some issues missed out by counsels or overlooked by the court if any.

PRINCIPLES OF LAW ENUNCIATED IN THE JUDGMENT

1. ***Quantity of Witnesses**: The prosecution is not bound to call every available or, any number of witnesses and, the appellate courts would not interfere with his exercise of discretion to determine which witnesses are material to proof his case, unless a failure of justice had occurred to the accused by the failure to call such witness(es).*

2. ***Plea of Provocation:** Unsustainable if the reprisal following the provocative act(s) is unreasonably disproportionate to the provocation received.*

FACTS OF THE CASE

The appellant in this case was convicted and sentenced to death for murder. He had alleged that the deceased stole a plumbing instrument (the 'tongue') of his. The deceased and the appellant bartered hot words and fought. The appellant got hold of a galvanized iron pipe of about 3 inch in diameter and about 30 inches long with which he struck the deceased on the head. There was no dispute that the appellant hit the deceased with the object resulting in the deceased death. The problem however posed on the evidence lie in the varying and conflicting accounts as to the event that led to the striking of the deadly blow.

At the trial, the appellant maintained that his action was sequel to an unprovoked attack on him by the deceased whom he claimed first gave him a blow and subsequently kicked him in his private part. There was ample evidence that it was the appellant who first called the deceased a thief-a fact which gave rise to 'hot exchange of words between them', and that the appellant resisted attempt to stop the fight. The appellant gave chase to the deceased whom he had 'promised greater punishment' and dealt the deceased who was not holding any object for the fight with a mortal blow on his head. Indeed, the deceased had, at the material moment turned his back against the appellant who struck from behind.

Based on these findings of facts, the trial court found the appellant guilty and sentenced him for murder. Rejecting the submissions on behalf of the appellant, the trial judge held that the evidence does not point to the fact that the appellant acted under extreme provocation, that from the nature of the alleged assault on the

appellant and its painful effects, the act of retaliation meted out was entirely out of proportion to the alleged provocative acts by the deceased. The trial court held further that even if any, there was enough time for the appellant's passion to cool as there was a time lapse between the alledged kicking of the appellant by the deceased and the retaliatory action of the appellant. Being dissatisfied with the decision, the appellant appealed to the Court of Appeal, which dismissed the appeal and affirmed his conviction and sentence.

ANALYSIS OF ISSUES AND DECISION OF THE COURT OF APPEAL

At the Court of Appeal, the following issues for determination were distilled from the grounds of appeal:

i. Whether the trial judge was right in law to have taken the view that although the name of a witness appeared in the proof of evidence and at the back of the information filed, failure by the prosecution to call him as witness or tender him for cross examination by the defence was of no consequence.
ii. Whether the trial court was right in law to have held that the facts can not avail the accused of the defence of provocation as to mitigate his conviction of murder to manslaughter.

The first issue above relates to the exercise of prosecution's discretion to determine which witness is material to proof his case. It was contended on behalf of the appellant that the omission on the part of the prosecution to call a witness whose name appeared in the prove of evidence as well as at the back of the information filed as witness, and not tendered for cross examination by the defence was a serious omission that must adversely affect the prosecution's case, urging the court to quash the conviction of the appellant.

In reply, the learned counsel for the prosecution submitted that although there is a duty on the prosecution to ensure that material witnesses are presented at the trial, that duty does not entail the calling of a host of witnesses whose evidence it does not consider indispensable. The counsel hinged his argument on the fact that throughout the trial no application was made by the defence for the production of the witness for the purpose of cross-examination or for any other purpose whatsoever as indeed it was open to them to do if they had wanted.

On the second issue, counsel for the appellant contended that evidence clearly point to the fact that the appellant acted under extreme provocation. It was argued further that from the nature of the assault on the appellant and its painful effects, the trial

court ought to have found the retaliation meted out, as proportionate to the provocative acts of the deceased. He argued further that it was wrong to hold that there was enough time for the appellant's passion to cool as there was hardly any time lapse between the alleged kicking of the appellant by the deceased and the retaliatory action of the appellant. In reply, the prosecution contended that even if it could be said that the appellant was in the circumstances provoked, the act of retaliation was entirely out of proportion to the alleged provocative act by the deceased.

After evaluating the facts of the case, the testimonies of the witnesses, the arguments for the parties and the legal principles enunciated by counsels, the Court of Appeal per Akanbi JCA (as he then was) delivering the leading judgment of the court resolved both issues against the appellant, and dismissed the grounds of appeal which covered them.

The issues afforded the Court of Appeal, per Akanbi an opportunity to dispell the long standing notion that the prosecution is bound to call at the trial, all witnesses whose names appear on the back of an indictment or information or, at least be out into the witnesses box so that the defence may cross-examine them; and restate the correct legal position on the point.

Reviewing plethora of judicial authorities[76] Justice Akanbi JCA, settled for the time-honoured right of the prosecution to exercise discretion in determining who the material witnesses are. The erroneous notion has therefore been blown-up by the decision in the instant case as the learned appellate judge held that the court would not interfere with the discretionary right of the prosecution case since the most the prosecution is expected to do is to place within the reach of the defence any witness which for good reasons they are unable to call as witness, unless of course where injustice has been done to the accused's case by the failure to call such witness. The views expressed by his lordship on this issue have been followed and adopted not only by the Court of Appeal differently constituted but by the Supreme Court in a number of subsequent cases.

In deciding the second issue, his Lordship relied on the principle, established much earlier in *Nomad v Bornu Native Authority*[77] to the effect that a retaliation following provocation must be proportionate to the alleged provocative acts. His lordship then inferred from the circumstances of the case that the appellant was not in any serious pain or rage during the fight, not even after the alleged kick on him since he was still

76 Such as R v Chip Chiqeri 3 WACA 201; R v Kuree (1941) 7WACA 175; Yeboah v The Queen 14 WACA 484; R v Dora Harris (1927)2 KBD 58 Per Herwart LCJ at 587; R v Adebanjo (1935) 2WACA 315; R v Yumashi Ankrah 14 WACA 673. El Dabbah v Attorney General of Palestine (1944) AC 156 etc cited by the parties.
77 (1954) 21 NLR 31

able to pursue the deceased to give vent to his feelings. The learned judge therefore did not consider that a minor provocative incidence as in that case should amount to provocation in law sufficient to mitigate murder to manslaughter.

Moreover, the galvanized iron pipe used, made the manner of reprisal disproportionate to the alleged provocation offered to the appellant. His lordship seems to be convinced that in whatever delusion the appellant may be, proportionality should be implicit in the test of a reasonable man. Thus his retaliatory action is far in excess of the provocation received, and this stands to be denounced as unreasonable, and the learned judge denied, and rightly too, the appellant of the benefit of provocation.[78] His lordship also considered the question as to whether there was time for passion to cool in the case as of no significance since he has held earlier in the judgment that the alleged provocation to the appellant was not so as to justify the appellant's action. Justice Akanbi's decision in this case is discernible also in many cases, of which only a handful can be mentioned.[79]

CONCLUDING REMARKS

The concern of this paper has been an analysis of the principles and relevance of the positions articulated in the judgment of his lordship in the case, particularly to the contemporary position of the law. It suffices to state that the reality that his Lordship's position on the main issues in the case have been followed and are discernible in subsequent judgments of the Court of Appeal differently constituted and by the Apex Court of the land, even after close to half a century articulates all-of the calibre of the jurist which his Lordship, Hon. Justice M.M.A. Akanbi is made of; and not only of the correctness of his Lordship's reasoning but of the relevance of his verdicts.

Comment by Kafayat Hassan

INTRODUCTION

The doctrine of "passion to cool off" in the determination of the defence of provocation would not even arise where the alleged act of provocation is not so strong to justify the criminal act of the accused. It is after the defense of provocation has been proved beyond reasonable doubt that the court would begin to consider whether the accused had enough time for his anger/passion to cool off before committing the offence for which he is charged.

78 Note the seeming conflicting decisions on this element of the defence as shown in State v Mohammmed (1969) 1 WNLR 296, where the court took into account the fact that the dagger used by the accused who is a Kanuri man. was worn by his tribe as ornament. see also the case of R v Phillip (1969) AC 130. where the court sustained the defence of provocation to mitigate the sentence of an accused who used a deadly weapon on the deceased to retaliate abusive words on her mother

79 See Nwede v State (1985) 12 SC 32;Onyia v State[2006] 11 NWLR (Pt. 999) 271; Twumasi v The State[1992] 3 NWLR (Pt. 227) 54; Oladiran v The State [1986]1 NWLR (Pt 4)75 Biruwa v The State [1992] 1NWLR (Pt 220)633