**EFFIONG UDOFIA**

**V****.**

**THE STATE**IN THE SUPREME COURT OF NIGERIA

27TH NOVEMBER, 1981.

SUIT NO. SC 9/1979

**LEX (1981) - SC 9/1979**

OTHER CITATIONS

2PLR/1981/29 (SC)

(1981) 11-12 S.C.

**BEFORE THEIR LORDSHIPS:**

GEORGE SODEINDE SOWEMIMO, J.S.C.

MUHAMMED BELLO, J.S.C.

CHINWEIKE IDIGBE, J.S.C.

ANDREWS OTUTU OBASEKI, J.S.C.

AUGUSTINE NNAMANI, J.S.C.

**BETWEEN**

EFFIONG UDOFIA - Appellant

AND

THE STATE - Respondent

**ORIGINATING COURT(S)**

1. FEDERAL COURT OF APPEAL

2. HIGH COURT OF THE CROSS RIVER STATE (Umoh, J., Presiding)

**REPRESENTATION**

SOLA RHODES (with him A ADENIYI-FASHOLA) for Appellant

TOTE E. EKPE, (P.S.C. Cross River State) for Respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

CRIMINAL LAW AND PROCEDURE – MURDER:- Proof of – Defences – Insanity - Insane delusions - Onus of proof - Killing under direction by voice to do so - Absence of evidence as to defendant’s unsoundness of mind or mental illness at or immediately around time of Killing – Whether defendant not relieved of criminal responsibility

CRIMINAL LAW AND PROCEDURE:- Prosecution – Duty to establish case - whether limited to names which appear at the back of the information

CRIMINAL LAW AND PROCEDURE:- Prosecution – Duty to establish case – Whether the law imposes no obligation on the prosecution to call a host of witnesses – Whether all the prosecution need do is to call enough material witnesses in order to prove its case

CRIMINAL LAW AND PROCEDURE:- Prosecution- Presentation of criminal case - Whether the prosecution has any duty in law to produce witnesses to prove insanity of accused person

CRIMINAL LAW AND PROCEDURE – PROOF OF CRIME - DEFENCES:- Defence of insanity – Burden of proof – On whom lies - Whether prosecution has no duty to call witness thereto

CONSTITUTIONAL LAW: Exemption from criminal liability – Foundation of- Section 30(2)(a) of the 1979 Constitution of the-Federal Republic of Nigeria (and section 286 of the Criminal Code Cap 30 Laws of Eastern Nigeria)

HEALTHCARE AND LAW:- Military Servicemen and access to proper mental healthcare – Soldier treated and ‘cured’ by herbalist for mental health problem – Re-absorption of into active service – Subsequent murder of girlfriend and assault of several others due to alleged hallucinations/insane delusions – Implication for justice administration

CHILDREN AND WOMEN LAW:- *Women and Security/Murder* – Woman killed by soldier boyfriend under alleged insane delusions/hallucinations – Heroic wife of Commanding who singlehandedly disarmed a rampaging soldier with rifle and matchete set on killing her spouse – *Women and Justice Administration* – Evidence of wife and mother of person accused of murder who sets up defence of insanity/mental delusion – Where not called - Relevance and effect

**PRACTICE AND PROCEDURE ISSUES:**-

EVIDENCE:- Criminal proceedings – Defence of insanity – Burden of proof thereto – On whom lies - Whether prosecution has no duty to call witness thereto

WORDS AND PHRASES:-  “Delusion” – “Hallucination: - Meaning of – Distinction between

**MAIN JUDGMEN T**

**OBASEKI, J.S.C.** (Delivering the Judgment of the Court):

This appeal against the decision of the Federal Court of Appeal (affirming the conviction of the appellant and sentence of death on him for the murder of his girlfriend, Atim Nyaraowo entered and passed by the High Court of the Cross River State Umoh, J. on the 31st day of May, 1976) was heard by this Court on the 29th day of October, 1981. After hearing the submissions of the appellant’s counsel we decided not to call on the respondent’s counsel for his submissions, dismissed the appeal for lack of merit and fixed delivery of Reasons for the judgment for today. I shall now proceed to give my reasons.

The main question raised in the briefs filed was whether the defence of Insanity was established by the evidence before the court to entitle the appellant to an acquittal of the offence of murder although not to a discharge from detention. A subsidiary question is whether the prosecution has any duty in law to produce the wife and mother of the appellant and the herbalist who treated appellant two years previously to testify on the mental health condition of the appellant.

The facts established before the High Court found and accepted by the judge are positive, straight-forward and were not in dispute. Briefly, they are:

The appellant, a soldier attached to the 13th infantry Brigade, stationed at Calabar, slept with his girl friend Atim Nyaraowo in his quarters at the Army barracks on the night of 29th November to the morning of 30th November, 1974. He was a married-man with children but had sent his wife and children away to his home-town before calling in his girl friend. His recent medical history had not been so good. He has had one mental breakdown. This was in November, 1972. There is no evidence of any violence by the appellant resulting from that mental illness. He was taken to a native doctor, Monday Udo Inyang for treatment. He was treated for 5 months and cured. He thereafter returned to Calabar and resumed his military duties. In his own words as recorded in his statement to the police Exhibit 3A, the story continues:

“As I became well, I returned to Calabar and resumed duty gradually. I fell in love with one lady, I used to call her sister. It was on Friday 29/11/74 in the evening this lady came to my house in the Army Barracks. As we slept on bed, someone came and told me to kill that my girl friend. I did not see the person with my eyes, I only heard a voice. I brought out my matchet and matcheted that lady to death.”

His evidence in court was not different. It reads:

“A voice from the air told me that I was going to be killed and I ran to hide. I hid myself behind my door. I ran out to Captain Johnson (P.W.1). The voice told me that I should go to P.W.1’s house. To protect myself I went round cutting people. The deceased was with me that night. I heard the voice. The voice told me to kill the deceased and I killed her. (Italics mine).

After killing his girl friend and inflicting matchet cuts on 7 people, he decided and went to the quarters of his commanding officer, Captain Johnson Adebusoye (P.W.1) to kill his wife and children. P.W.1 and his men did not succeed in locating him but P.W.2 (wife of P.W.1) did. She saw him outside their quarters armed with a matchet and rifle and shouting “come out, all of you are dying today” in English she tried to scare him off by firing her husband’s double barrelled gun into the air. He was not scared. He took cover and was seen later crawling out of a flower bed armed with his rifle and matchet. He shouted “so you have gun, come out, you say you are a captain”. To disarm him, P.W.2 shot him in the legs; as he fell down, she rushed out to him, took the rifle and matchet from him and called on the soldiers to come and take him to hospital. That was the end of the drama.

Counsel’s submission was that the Federal Court of Appeal should have held that the failure to call the wife of the appellant, his mother and the native doctor or herbalist, in the light of the evidence of P.W.5 and Exhibit 7, occasioned miscarriage of justice in that the appellant’s acts cannot be said not to have been the direct result of the mental illness suffered by the appellant in 1972.

This submission contravenes all known presumptions and principles of law as regards liability and proof of insanity.

The defence of insanity to criminal liability under our law is a creation of statute - The Criminal Code section 28 Cap 42 of the Laws of the Federation, the Criminal Code of the various southern states and the Penal Code Law of the North section 51 Cap 89 Laws of Northern Nigeria 1963 which governs the Northern States. It is worthy of note that the learned trial judge, Umoh, J. considered In detail, the defence of insanity although the record of proceedings contains little or no evidence of the accused’s mental ill-health at the time the offence was committed and either immediately before, or immediately after the commission of the crime. After examining a number of decided authorities on insanity including: Rex v. Inyang (1946/1949) 12 WACA 6 R. v. Echam 1952/55 14 WACA 158; Upetire v. Attorney-General, Western Nigeria (1964) 1 All NLR. 204; Regina v.Yayiye of Kadi (1957) 4 NRNLR 207; Rex v. Ashigifuwo (1946/1949) 12 WACA 389; Iwuanyanwu v. The State (1964) 1 All NLR 431; Thamu of Guyuk v. The Queen (1952/55) 14 WACA 372

The learned trial judge dismissed the defence in the following words:

“Now section 28, second paragraph, provides that a person affected with in-sane delusions on some specific matter or matters ‘is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist.’ A defence under this paragraph can be set up when the accused is partially insane as in my opinion the accused in this case was at the time.

The law is that ‘if the facts which he supposes in his delusions to exist would justify the act or omission if they had really existed, the accused is to be excused; If they would not, then he is responsible in law’ (Halsbury Laws of England, 3rd Edition Vol. 10 p. 288).

Applying the above principle to the circumstances in which the accused came to kill the deceased, is it possible to say that he has an excuse? The criminal liability or otherwise of the accused depends upon whether the circumstances in which he found himself would provide a defence in a non-insane situation. A mere direction to rise and kill does not afford a defence to a charge of murder, and a person would be fool hardy if he killed in these circumstances. Nor is it sufficient to say that because he was going to be killed he must kill. Three things must be proved if killing in those circumstances is to be justified.

First, one must identify one’s would-be killers. Second, they must actually set about to kill the person. Third, no other means of escape from being killed must be available. lwanyanwu v. The State (1964) 1 All N.L.R 431. None of these facts was forthcoming in the evidence of the accused or of the prosecution ... There is no evidence that the accused supposed himself to be fighting in battle. So this aspect of the delusion does not assist him.”

The learned trial judge concluded his impression of the appellant in these words:

’The accused gave logical answers to every question that was put to him. Al-though he tried to deny knowledge of his statement (Exhibit 3) he gave evidence under cross-examination which substantially corroborated his statement to the police. There is no evidence as to abnormal behaviour in prison. He impressed me as a man in full possession of his faculties.”

The Federal Court of Appeal also considered this issue of insanity when it was raised before it In Ground 3 of the grounds of appeal and argued at length before it. After considering several judicial authorities Including: Yekini Okunnu v. The State (1977) 3 SC 151 at 158; Upetire v. Attorney-General, Western Nigeria (1964) 1 All NLR. 204; R. v. Ashigifuwo (1946/49) 12 WACA 380; lwuarryanwu v. The State (1964) 1 All NLR 413; Thamu of Guyuk v. The Queen(1952155) 14 WACA 372

The Federal Court of Appeal held in conclusion:

‘We are of the view that even if the appellant heard a voice which impelled him to kill, he appeared to be rational enough to realise that what he did was wrong ... Having regard to the evidence before the trial court, we are therefore satisfied that the learned trial judge is justified in arriving at the conclusion that:

‘To my mind, the accused was conscious of his moral guilt and was concerned for his safety. The flight and the hiding are evidence that the accused knew that he ought not to have done what he did’.” (italics mine)

Before us in this Court, counsel for the appellant made the submission already referred to both in his paragraph 9 of his brief of argument and before us. It is set out in his brief as follows:-

“My Lords, it is my submission that the evidence of the wife, the mother of the appellant and the herbalist was most vital to the case, but was not before the court -Keziah Okoro v. The Commissioner of Police (1972) 2 ECSLR Vol.2 Part 1 page 230 at 233 - The evidence of the above-mentioned people in the absence of a psychiatrist report would have enabled the trial court to gauge the mental state of the accused person and would have made a judicious finding. I submit, my Lords, that if the witnesses at least one of them had been called on the authority of R. v. George Kuree (1941) 7 WACA 7 and R. v. Ashigifuwo 12 WACA 389 at 390 the trial judge might have reached a different decision.”

Before dealing with the issue of proof of insanity and the party on whom the burden lies, I would like to observe that contrary to the tenor of this submission, the learned trial judge held that the appellant was afflicted with insane delusion when he said:

A defence under this paragraph can be set up when the accused is partially in-sane as in my opinion the accused in this case was at the time.”

It was in the light of this finding that he dealt with the circumstances in which insane delusions can relieve an accused of criminal responsibility and found that in the instant case, the appellant was not relieved of criminal responsibility for the murder of his girlfriend. It appears to me clearly therefore that neither the wife nor the mother of the appellant nor indeed the herbalist could have by their evidence of the mental ill- health of two years previously and the successful treatment of it improved the quality of the defence of insanity considered by the learned trial judge in favour of the appellant.

The elements of a proper defence of insane delusion have been considered recently by this Court in the cases of: Ngene Arum v. The State (1979) 11 SC. 91 Egbe Nkanu v. The State (1980) 3-4 SC. 1 and I propose to refer to the observations of two of my learned brothers namely the Honourable Chief Justice of Nigeria and the Honourable Justice Idigbe, J.S.C. In the first case.

In the case of Ngene Arum v. The State (supra) Fatal- Williams, C.J.N. dealing with the criminal responsibility of an accused person afflicted with delusion, said at page 94:

‘This is because an accused person notwithstanding the delusions to which he is subject, is still criminally responsible for his act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist. In other words, before the defence of insanity based on a delusion can be of any avail to an accused person, the response of the accused to the state of things as believed by him must be such that it could be regarded as legitimate and natural reaction to such a state of things.”

Idigbe, J.S.C. also dealing with the defence of insanity and delusions under section 28 of the Criminal Code in the same case of Ngene Arum observed at page 105 after setting out the provisions of section 28 of the Criminal Code:

‘The first limb of section 28 deals with the defence of insanity; and the second limb dearly relates to delusions (sometimes loosely - though not necessarily the same - referred to as ‘Insane delusions’); insanity is not a sine qua non to the experience of delusion or hallucination. It is indeed not easy to distinguish delusion and insanity when these terms are used in their ordinary meaning; but as far as section 28 of the Criminal Code is concerned there is a clear distinction for the purposes of establishing a defence under either limb of the section.” (Italics mine).

Medical science ascribes delusions to various causes. Some arise from disease of the mind while others arise from intoxication. “Delusion” is defined in the Oxford Universal Dictionary illustrated 1969 as:

“Anything that deceives the mind with false impression; a deception; a fixed false opinion with regard to objective things especially as a form of mental derangement.”

In Webster’s New Twentieth Century Dictionary Unabridged 2nd Edition 1975 the word “delusion” is defined as

“4. In psychiatry, a false persistent belief not substantiated by sensory evidence.”

Also in the Hamlyn. Pocket Medical Dictionary by Dr. k S. Playfair, 1980 Edition, the word “delusion” Is defined as

“A firm and unreasonable belief which is not based on reality and which can-not be removed by any demonstration of its inaccuracy’.

Professor John Glaister in his book Medical Jurisprudence and Toxicology Eighth Edition (revised reprint) 1947 dealing with legal aspect of criminal responsibility said at page 436:

“Generally, the existence of delusions bearing upon the particular crime which has been committed, would be strong evidence, because their existence betokens dissociated cerebral action. A delusion may cause abnormality either of the whole mental outlook or of certain mental actions. A man may be subject of a delusion which although it effects his action does not offer any causal connection with the crime he has committed.

It must not be forgotten, however, that the intellect may have been so abnormal at the time when the crime was committed, that in the ordinary process of reasoning on the part of the examiner the connection between the delusion and the crime cannot be traced. If delusions are found to exist in a person who has committed a criminal act, it would be the duty of the examiner to discover if possible how far the processes of ideation and volition are affected thereby and to demonstrate the path by which he has arrived at the conclusion that the person is sane or insane.

An insane delusion is a persistent and incorrigible belief that things are real which exists only in the imagination of the patient and which no rational person can conceive that, the patient, when sane, could have believed. It is usually associated with the personality of the individual, and consists of belief in some beneficial or prejudicial influence. When the delusion is believed to be prejudicial to the affected individual, acts of violence either towards himself or others frequently result.

A delusion differs from an hallucination in that the latter is expressive of a disordered sense, and is a perception by one or other of the senses without external causation, for example, a person labouring under an hallucination may state that he hears voices speaking to him when in point of fact no one is speaking.”

The case of the appellant appears to me to be a case of hallucination rather than one of delusion but properly considered, under section 28 of the Criminal Code. A mind afflicted with delusions and hallucination does not enjoy the same health as one free of delusions and hallucinations. There is therefore good reasons for giving it the limited protection from criminal responsibility as section 28 of the Criminal Code Cap 30 Laws of Eastern Nigeria 1963 applicable in Cross River State has done. The section reads:

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

A person whose mind at the time of his doing or omitting to do an act is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist.” (Italics mine)

It appears to me from the expressed provision of section 28 and I am firmly of the opinion that an accused person affected by delusions can only be relieved of criminal responsibility:

(1) if at the time of doing the act or making the omission he is in such a state of mental disease or natural infirmity as to deprive him of capacity to understand what he is doing, of capacity to control his actions or of capacity to know that he ought not to do the act or make the omission; or

(2) where he has a valid absolute defence at law, i.e. under the statute and or under the Constitution.

This is illustrated by the classic example given by Fatal-Williams, C.J.N. in Ngene Arum v. The State 1979) 11 S.C. 91 at. 94 when he said:

‘Thus, H an accused person under the influence of his delusion supposes that another man was going to kill him and he then kills the man believing that he did so in self defence he would be exempted from punishment for the killing.”

This exemption from criminal liability is given by section 30(2)(a) of the 1979 Constitution of the-Federal Republic of Nigeria and section 286 of the Criminal Code Cap 30 Laws of Eastern Nigeria. The facts in the instant appeal do no bring the appellant under the protection offered by the Constitution and the Criminal Code and the Federal Court of Appeal was justified in dismissing the appellant’s appeal to it.

Turning to the burden of proof, it is settled law that the burden of proof of ‘insanity’ and or ‘delusion’ with section 28 rests squarely on the defence. In 1946, in the case of Rex v. Omoni 1946/1949) 12 WACA 511, Verity, C.J. (Nigeria) delivering the judgment of the court said at page 12:

‘The Nigerian law being what it is, it may be well to state quite dearly what in our opinion the defence must prove under that law to establish insanity and to overcome the presumption that every man Is sane and accountable for his action …“

Section 27 of the Criminal Code Cap 42 L/FN states:

“Every person is presumed to be of sound mind and to have been of sound mind at any time which comes into question until the contrary is proved.”

See also section 27 of the Criminal Code Cap 30 Laws of Eastern Nigeria 1963. Who is to prove the contrary? The prosecution has no responsibility either expressedly or impliedly to prove that an accused person is of unsound mind and/or suffers from delusion. It is the duty of the accused. See section 140 of the Evidence Act Cap 62 L/FN 1958. See also section 140 Evidence Law Cap 49 Laws of Eastern Nigeria 1963 applicable in Cross River State. This section is fatal to the submission of counsel and it reads:

“(1) where a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from or qualification to, the operation of the law creating the offence with which he is charged, is upon such person.

(2) The burden of proof placed by this Part upon an accused charged with a criminal offence shall be deemed to be discharged If the court is satisfied by the evidence given by the prosecution, whether on cross-examination or other-wise, that such circumstances in fact exist.

(3) Nothing in Section 137, 141 or sub-section (1) and (2) of this section shall-

(a) ................................................................................................,’..

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (2) do not exist; or

(c) affect the burden placed on an accused person to prove a defence of intoxication or insanity;” (Italics mine)

There is therefore no duty on the respondent to produce the wife and mother of the appellant and the herbalist who cured him to prove that the appellant was Insane at the time he committed the act of killing his girl friend. Generally, the law requires the prosecution to call material witnesses. It does not require it to call every available person as a witness.

In the case of Okonolua v. The State (1981) 6-7 SCA, recently decided by this Court, this Court examined the law on the duty of the prosecution to call witnesses, whether or not their names appear on the back of the information and Bello, J.S.C. said at page 18:

‘The correct state of the law relating to the duty of the prosecution to call wit-nesses, whether their names appear at the back of the information or not has been recently stated by this Court in these terms:

‘The law imposes no obligation on the prosecution to call a host of witnesses. All the prosecution need do is to call enough material witnesses in order to prove its case; and in so doing, it has a discretion in the matter, per Irikefe, J.S.C. delivering the judgment of this Court in Samuel Adaje v. The State (1979) 6-9 S.C. 18 at 28;’

think it is a serious misconception on the part of counsel to hold that the wife and mother of the appellant and his native doctor (herbalist) who treated him two years previously who were not, on the evidence living with the appellant at the material time could have given any material evidence as to the unsound state of mind or mental health of the appellant at the time he committed the murder and I find no merit whatever in the submission. It was for the above reasons that I dismissed the appeal and affirmed the decision of the Federal Court of Appeal on the 29th of October, 1981 aforesaid.

**SOWEMIMO, J.S.C**.

I agree with the reasons set out by my Learned brother Obaseki J.S.C. in his judgment, a preview of which I had had the privilege of reading.

**BELLO, J.S.C**.

I have had the advantage of reading in advance the reasons for judgment just delivered by Obaseki J.S.C. I concur.

**IDIGBE, J.S.C.**

It was for the reasons just given by my learned brother, Obaseki J.S.C. that I shared in the common agreement of this Court on the 29th day of October, 1981 that this appeal should be dismissed.

**NNAMANI, J.S.C.**

I had a preview of the judgment just delivered by my learned brother Obaseki, J.S.C. and I agree with it. It was for the reasons stated in the said judgment that I also agreed that the appellant’s appeal should be dismissed.

Appeal dismissed.