SUNDAY MODUPE V. THE STATE
CITATION: (1988) LPELR-SC.109/1987

In The Supreme Court of Nigeria
On Friday, the 16th day of September, 1988
Suit No: SC.109/1987

Before Their Lordships

KAYODE ESO	..... Justice of the Supreme Court
ADOLPHUS GODWIN KARIBI-WHYTE	..... Justice of the Supreme Court
CHUKWUDIFU AKUNNE OPUTA	..... Justice of the Supreme Court
ABDUL GANIYU OLATUNJI AGBAJE	..... Justice of the Supreme Court
EBENEZER BABASANYA CRAIG	..... Justice of the Supreme Court

Between

SUNDAY MODUPE — **Appellants**

And

THE STATE — **Respondents**

RATIO DECIDENDI

1 **APPEAL - ISSUES FOR DETERMINATION:** From where does issues for determination arise?

"Issues for Determination in any appeal must be issues arising from the grounds of appeal filed". Per Oputa, JSC. (P.11, Para. G) - read in context

2 **COURT - DUTY OF COURT:** duty of trial court when faced with conflicting versions of an essential fact

"Normally a trial Court that had the opportunity of seeing the witnesses, hearing them and watching their demeanour enjoys the special privilege of believing or disbelieving their evidence. But belief or disbelief becomes an issue when and

only when there are two conflicting versions of an essential fact. When there is only one version of an essential fact and that version is not patently and obviously improbable, a trial Court is not left with any option than to believe that which has not been controverted or contradicted in any way". Per Oputa, JSC. (Pp. 8-9, Paras. F-A) - read in context

3 **CRIMINAL LAW AND PROCEDURE - CONVICTION:** Importance of determining the age of the accused before conviction

"...where the age of the accused person is material for the purpose of conviction or relevant in the determination of the nature of the sentence, and evidence of such age is not conclusive the trial Court is obliged to make due inquiry as to the age of that person by taking evidence of such age. It does not lie in the trial Judge to ignore uncontradicted evidence of age of the accused before him by relying on his own perception without supporting evidence before him. Whereas the trial Judge is required to determine the age of the appellant where this is relevant, the court is required to come to its determination on the evidence before it". Per Karibi-Whyte, JSC. (P. 19, Paras. A-D) - read in context

4 **CRIMINAL LAW AND PROCEDURE - AGE OF THE ACCUSED:** Whether the trial Judge can call a medical witness to testify to the age of the accused where he feels the accused put his age rather low

"If the trial Judge felt that the Appellant put his age rather low, he was at liberty to adjourn the case and call a medical witness to testify to the age of the Appellant as was done in Oladimeji (E.A.) v. R (1964) 1 All N.L.R. 131. Then he will be comparing the evidence of the Appellant as to his age with the evidence of the doctor. He will be perfectly within his right to do this." Per Oputa, JSC. (P. 10, paras. A-D) - read in context

5 **CRIMINAL LAW AND PROCEDURE - AGE OF THE ACCUSED:** Whether court can make an inquiry as to age where a person is before the court and it appears to the court that such person is an infant, or a child, or a young person, or an adult

"Where a person is before any court and it appears to the court that such person is an infant, or a child, or a young person, or an adult, the court may make due inquiry as to the age of that person and for that purpose may take such evidence as may be forthcoming at the time, or at the time to which the inquiry may be adjourned but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of that person shall for the purposes of this Act be deemed to be the true age of that person. The presumption or declaration of age made under this section applies only for the purposes of this Act, that is in relation to orders made under section 204 or 206, to sentences passed under section 385 and to the finding that the jurisdiction of the court is or is not excluded under section 413. Since the inquiry is made by the court, there is no true burden of proof on either party." Per Karibi-Whyte, JSC (P. 18, paras. B-G) - read in context

C. A. OPUTA, J.S.C.(Delivering the Leading Judgment): This appeal came up for hearing on the 16th day of June, 1988. Both counsel for the Appellant and the Respondent relied on their respective Briefs and addressed the Court briefly in elaboration of the main issues canvassed in those Briefs.

The Court allowed the appeal on sentence and adjourned its reasons for judgment to today the 16th day of September 1988. Hereunder are my Reasons for Judgment.

The facts are not in dispute. The Appellant along with eight others were arraigned before the Ondo High Court on a charge of murder. They were alleged to have unlawfully killed one Dapo Awoboyokun contrary to Section 254(2) and punishable under Section 257(1) of the Criminal Code Law Cap 28 Laws of Western Nigeria 1959. After due trial, the Court of first instance on the 26th day of July 1985 convicted the Appellant and two others and sentenced them to death.

The Appellant appealed to the Court of Appeal, Benin Division, against his conviction and sentence. The Court of Appeal on the 16th April 1987 dismissed the appeal of the Appellant, affirmed the judgment of the trial Court and confirmed the sentence of death passed by that Court.

The Appellant then appealed to this Court against his conviction and sentence. He filed only one ground of appeal- the omnibus ground. He however indicated that "additional grounds of appeal will be forwarded on receipt of the record of proceedings." None was however filed. The only ground of appeal would therefore seem to be:-

"That the decision is altogether unwarranted, unreasonable and cannot be supported having regard to the evidence."

This ground undoubtedly deals with facts. The issue now would seem to be:-

Whether or not this ground of appeal is wide enough to sustain and support the Issues for Determination as formulated in the Appellant's Brief?

The 1st Issue reads as follows:-

"Whether the learned trial Judge was right in estimating the age of the appellant instead of setting up an enquiry to find out the age of the appellant in accordance with the provisions of Section 208 of the Criminal Procedure Act."

This issue deals with the question of whether there was any evidence that the Appellant was of such an age that would warrant his being sentenced to death, as was done by the trial Court, and confirmed by the Court of Appeal.

Here it is relevant to note the provision of Section 368(3) of the Criminal Procedure Act to wit:-

"S.368-

When an offender who in the opinion of the Court has not attained the age of seventeen years is found guilty of a capital offence, sentence of death shall not be pronounced or recorded but in lieu thereof the Court shall order such offender to be detained at the pleasure of the Governor of the State,"

If the evidence on record shows that at the time the offence was committed (which is the crucial date) the Appellant had not attained the age of seventeen years then the mandatory provision of

Section 368(3) of the Criminal Procedure Act will apply and then again it will be wrong of any Court not only to sentence him to death but also to even pronounce or record such a sentence.

Now what was the evidence before the trial Court? The Appellant gave evidence on oath in his own defence, His positive testimony with regard to his age was:-

"I was born on November 3rd 1967. I am now 18 years old..." This evidence was given on the 22nd day of May, 1985. The murder charge was alleged to have been committed "on or about the 20th day of December 1983." On this material date (20th December 1983) the Appellant was only 16 years, one month and 17 days. He had by then not attained the age of 17 years required by Section 368(3) of the Criminal Procedure Act before any sentence of death can even be pronounced or be recorded against him.

Throughout the entire proceedings there was no direct oral evidence to contradict the positive assertion of the Appellant that he was born on the 3rd of November 1967.

How did the Court of first instance deal with the crucial question of the age of the Appellant? Learned Counsel for the Appellant submitted to the Court that "if the 1st accused is under 17 years of age then he cannot be sentenced to death."

In his submission, Mr. Adebusoye, learned State Counsel at p. 131 of the record stated:-

"As regards the ages of the accused persons counsel submitted that Section 368(3) of the C.P.A. will only apply if the accused persons are found guilty by the Court and if the Court believes their evidence as to age." After considering the submissions on both sides as to the age of the Appellant, the learned trial Judge at p. 137 of the record found as follows:-

"As regards the ages of the 1st (the Appellant) 2nd and the 7th accused persons, I do not believe their evidence. From my own estimation, each of them, 1st, 2nd and 7th accused is older than 21 years of age. No doubt, evidence on their ages is very material, but I am satisfied that each of them is older than twenty years."

This judgment was delivered on 26/7/85.

Normally a trial Court that had the opportunity of seeing the witnesses, hearing them and watching their demeanour enjoys the special privilege of believing or disbelieving their evidence. But belief or disbelief becomes an issue when and only when there are two conflicting versions of an essential fact. When there is only one version of an essential fact and that version is not patently and obviously improbable, a trial Court is not left with any option than to believe that which has not been controverted or contradicted in any way. To reject the positive assertion by the Appellant that he was born on the 3rd of November 1967 without any contrary evidence at all-either in cross-examination or in rebuttal seems to be much mere than a trial Court is allowed to do. To base such a rejection on the subjective estimation of the trial Judge looks quite arbitrary, nay dangerous. It looks as though the trial Judge converted himself into a witness, gave evidence of the age of the Appellant, and then preferred his own evidence of age to that of the Appellant. Put as bluntly as this, one can then appreciate the danger involved in a trial Judge preferring his own estimation, which is not evidence, and which was not based on any evidence, to a positive assertion which has not in the least been contradicted or controverted. The learned Director of Public Prosecutions at a stage conceded "that there was no evidence contradicting the Appellant's evidence on oath." In his judgment, the learned trial Judge rightly observed that "no doubt evidence of their ages is very material." That is correct. But evidence of the age of the Appellant is a very different thing from speculation as to his age. If the learned trial Judge was in any doubt as to age, when as in this case evidence of the proper age is material, he was obliged and obligated

by the provisions of Section 208 of the Criminal Procedure Act not to estimate in vacuo the age of the Appellant but to "make due inquiry as to the age of that person and for that purpose may take such evidence as may be forthcoming at the time or at the time to which the inquiry may be adjourned....". If the trial Judge felt that the Appellant put his age rather low, he was at liberty to adjourn the case and call a medical witness to testify to the age of the Appellant as was done in *Oladimeji (E.A.) v. R (1964) 1 All N.L.R. 131.* Then he will be comparing the evidence of the Appellant as to his age with the evidence of the doctor. He will be perfectly within his right to do this. But he is not permitted to reject positive evidence without any superior and/or contradicting and more probable evidence. If there was evidence from a doctor or any other person in a position to give such evidence, like the parents of the Appellant, then the learned trial Judge could pick and choose but not otherwise. The Statement of the Appellant to the Police was tendered as Exhibit B. In Exhibit B at p. 152, the age of the Appellant was given as 20 years. Exhibit B was made on 21/12/83 a day after the alleged murder. But Exh. B is not a proof of the age of the Appellant. It suffers from a radical defect as the portion giving the age of the Appellant as 20 years was written probably by the recording Police Officer before the words of caution. That entry of the Appellant's age as 20 years is not therefore part of the Statement of the Appellant. And it would have been wrong of the learned trial Judge to have used it to contradict the Appellant's direct, positive and uncontradicted oral evidence as to his age. In any event, the trial Court did not and rightly in my view, rely on the age shown on Ex. B. The learned trial Judge merely relied on his "own estimation" of the age of the Appellant. To estimate is merely to form an opinion and opinion evidence can only be considered if it amounts to expert opinion. Otherwise the mere opinion of the learned trial Judge cannot over-ride the positive evidence of the Appellant as one is direct evidence of fact while the other is merely a conjecture. The trial Court was therefore wrong to have pronounced and recorded a sentence of death against the Appellant. The Court of Appeal on its part, with respect, was also wrong in upholding, affirming and confirming that sentence.

The next Issue for Determination reads:-

"(2) Whether the second limb of Section 208 of the C.P.A. is not unconstitutional in so far as it is out of tune with Section 33(8) of the 1979 Constitution as amended when it made the age determined by the Judge final and conclusive; and any sentence imposed therefrom final and conclusive even though a subsequent proof of the age of the person concerned would show that the age was incorrectly stated by the Judge and the correct age of the person was lower and would have entitled him to a lower punishment of detention at Governor's pleasure instead of a higher punishment of the death penalty" (Italics ours).

The above Issue raises a substantial point of constitutional importance. But Issues for Determination in any appeal must be issues arising from the grounds of appeal filed. I do not see how the above constitutional issue can be argued under the omnibus ground dealing with facts. Also there is no evidence of any "subsequent proof of the age of the person concerned" (here the Appellant) after his evidence which put his age at the time of the commission of the offence charged at 16 years, one month and 17 days - obviously below 17 years of age. In other words, the factual situation that would have necessitated the consideration of the second limb of Section 208 of the Criminal Procedure Act simply does not and did not exist in this case. I will therefore decline from considering the 2nd Issue for Determination.

In the final result, this appeal ought to be allowed. The sentence of death pronounced and recorded by the learned trial Judge against the Appellant is hereby set aside and in its place it is hereby ordered that:-

The appellant Sunday Modupe shall be detained in prison at the pleasure of the Governor of Ondo State.

It was for the above reasons that I, on the 16th day of September 1988, allowed this appeal.

KAYODE ESO, J.S.C. (Presiding): This appeal must be allowed on sentence and it is hereby allowed. There is evidence by the Appellant as to his age. There is no admissible evidence wheresoever to contradict this evidence. The statements as regards age made in Exhibit B and D are not legally admissible as they were made before the cautions were administered in both cases.

The Judges presumption of the appellant's age has no support in law. Section 208 of the Criminal Procedure Law has to be read in the light of section 33(8) of the 1979 Constitution in which case the age for the determination of the sentence must be the date of the accused person at the commission of the offence. In this case upon the admissible evidence the appellant was certainly under 17. Sentence of death could not and must not be pronounced upon him see s. 33(8) of the 1979 Constitution.

The appeal is allowed on sentence only. The sentence of death is set aside. In its place the following order is made.

The Appellant Sunday Modupe shall be henceforth detained in prison at the pleasure of the Governor of Ondo State.

And this shall be the order of this Court.

A.G. KARIBI-WHYTE, J.S.C.: On the 16th June, 1988 I allowed the appeal of the appellant against the dismissal of his appeal by the Court of Appeal Division, sitting at Benin City, by allowing the appeal against the sentence

of death, and substituting one of imprisonment at the pleasure of the Head of State. I indicated then that I will give my reasons for so doing today.

I here below give the reasons.

Appellant who was born on the 3rd November, 1967, was tried for murder contrary to s.254(2) and punishable under s.257(1) of the Criminal Code, cap. 28, Volume I, Laws of Western Nigeria 1959.The offence was alleged to have been committed on or about the 20th December, 1983 in Okeluse in Ondo State. Appellant was tried at the Ondo State High Court, at Owo along with seven others. He was convicted with two others on the 26th July, 1985.-They were all sentenced to death. Appellant's appeal to the Court of Appeal against conviction and sentence was dismissed by that Court on 16th April, 1987. Appellant has further appealed to this Court against the judgment of the Court of Appeal. Mr. Nwazojie, learned Counsel to the appellant submitted before us that he was not appealing against the conviction of the appellant. His complaint was against the sentence. He however felt that on the evidence before the learned trial Judge, and though the point was not taken on appeal before the Court of Appeal, there was sufficient material before the Court to hold that the appellant should not be sentenced to death. Counsel therefore urged us to reduce the sentence of death to one of imprisonment.

I do not consider much of the facts of this case particularly pertinent to the determination of the issue in this appeal. It is only relevant to state that the appellant in his oral evidence at his trial stated he was born on the 3rd November, 1967. He made two extra-judicial statements in which it was variously indicated that he was 17 years and 20 years old. There was no evidence at the trial contradicting his oral evidence at his trial. In convicting the appellant, the learned trial Judge held:

"As regards the ages of the 1st, 2nd and the 7th accused persons, I do not believe their evidence. From my own estimation, each of the 1st, 2nd and 7th accused is older than twenty years of age.

No doubt, evidence on their ages is very material; but I am satisfied that each of them is older than twenty years."

It is on this reasoning, having considered the age of the 1st, 2nd and 7th accused persons, that the learned trial Judge found them guilty of the offence of murder as charged. Appellant was the 1st accused. It is this reasoning that is the subject matter of complaint in this appeal.

Mr. Nwazojie, counsel to the Appellant has formulated three issues for determination. Mr. Akenroye, for the respondent agrees with the formulation of the issues which are as follows:-

"ISSUES FOR DETERMINATION

"(1) Whether the learned trial Judge was right in estimating the age of the appellant instead of setting up an inquiry to find out the age of the appellant in accordance with the provisions of section 208 of the Criminal Procedure Act.

(2) Whether the second limb of section 208 of the C.P.A. is not unconstitutional in so far as it is out of tune with section 33(8) of the 1979 Constitution as amended when it made the age determined by the Judge final and conclusive; and any sentence imposed therefrom final and conclusive even though a subsequent proof of the age of the person concerned would show that the age was incorrectly stated by the Judge and the correct age of the person was lower and would have entitled him to a lower punishment of detention at Governor's pleasure instead of a higher punishment of the death penalty.

(3) If first and second propositions above are correct, whether the sentence of death in this case can be sustained from the evidence."

The submission of Mr. Nwazojie in his brief of argument is that on the evidence before the learned trial Judge, there was considerable doubt whether appellant had attained the age of 17 years at the time of the commission of the alleged murder. He therefore submitted that if the doubt was resolved in favour of the appellant, the appropriate sentence should not be death but an order that appellant should be detained during the Governor's pleasure in accordance with section 368(3) of the Criminal Procedure Law of Western Nigeria, applicable in Ondo State.

Mr. Nwazojie pointed out that on the evidence which remained uncontradicted appellant was born on 3rd November 1967, and the offence was alleged to have been committed on 20th December, 1983. Hence appellant was at the time only 16 years, one month and seventeen days old. He admitted that on 22nd May, 1985 when appellant gave evidence, he was 17 years 6 months and 19 days old and not 18 years. Appellant under cross-examination denied he told the Police he was 20 years old at the time he made the statement, Exhibit B, where he (appellant) was indicated as being 20 years old. Counsel relied on the provisions of section 368(3) and 208 of the Criminal Procedure Law and submitted that on reading of the two sections the expression "in the opinion of the Court has not attained the age of 17 years" it is an objective and not a subjective test that is required. Section 368(3) of the Criminal Procedure Act, provides as follows-

"Where an offender who in the opinion of the court has not attained the age of seventeen years is found guilty of a capital offence sentence of death shall not be pronounced or recorded but in lieu thereof the court shall order such offender to be detained during the pleasure of the President and if so ordered he shall be detained in accordance with the provisions of Part 44 notwithstanding anything to the contrary in any written law."

In his submission the Court is bound to set up an enquiry to find out the true age of the accused. Counsel cited and relied on Oladimeji v. The Queen (1964) 1 All NLR. 131 at 133 R v Baganza

(1960)5 FSC. 1. Mr. Nwazojie referred to and relied on the provisions of section 33(8) of the Constitution 1979 and Godwin Ikpasa v. Bendel State (1981)9 SC.7 at p. 15.

Mr. Akenroye in his submission contended that the trial Judge was right to hold that appellant had attained the age of 17years at the time he committed the offence. He further submitted that on the express words of s.208 the trial Judge setting up an enquiry for the determination of age was not mandatory; and that it lies in the discretion of the trial Judge.

I have already set out the issues for determination. I think this appeal could be decided on the first issue.

Section 208 of the Criminal Procedure Act, provides as follows:"

Where a person is before any court and it appears to the court that such person is an infant, or a child, or a young person, or an adult, the court may make due inquiry as to the age of that person and for that purpose may take such evidence as may be forthcoming at the time, or at the time to which the inquiry may be adjourned but an order or judgment of the court shall not be invalidated

by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of that person shall for the purposes of this Act be deemed to be the true age of that person.

The presumption or declaration of age made under this section applies only for the purposes of this Act, that is in relation to orders made under section 204 or 206, to sentences passed under section 385 and to the finding that the jurisdiction of the court is or is not excluded under section 413. Since the inquiry is made by the court, there is no true burden of proof on either party: *R. v. Oladimeji (1964)1 All N.L.R. 131; 1964 N.M.L.R. 31. CF. Ss.563 and 753.* It seems from the above provision that the use of the precatory word "may" did not suggest the exercise of a discretion whether to set up an enquiry as to the age of the accused, where such was relevant to the sentence to be imposed. In my opinion where the age of the accused person is material for the purpose of conviction or relevant in the determination of the nature of the sentence, and evidence of such age is not conclusive the trial Court is obliged to make due inquiry as to the age of that person by taking evidence of such age. It does not lie in the trial Judge to ignore uncontradicted evidence of age of the accused before him by relying on his own perception without supporting evidence before him. Whereas the trial Judge is required to determine the age of the appellant where this is relevant, the court is required to come to its determination on the evidence before it. In the instant case, the trial Judge appreciated that the evidence of the age of the appellant was very material, but went on to hold that the appellant was more than 20 years old. It is not certain whether this was reckoned from the date when appellant gave evidence, or the date of the judgment, or of the commission of the offence. The opinion of the trial Judge was based on his own estimate of the age of the appellant unsupported by any evidence before him. This is not what section 208 of the Criminal Procedure Act enjoins the trial Judge to do. As was pointed out by Brett F. J. in Oladimeji v. The Queen (1964)1 All NLR at p. 135,

"In the exercise of its judicial discretion the Court has to apply its mind, not to any hypothetical set of facts, but to the material before it, and if either party wishes to invoke the discretionary power of the court in his favour, it is for him to lay a basis for its exercise."

There was clearly, no basis for the trial Judge coming to the conclusion that appellant was more than twenty years old, at the time of the commission of the offence, which is the time relevant for the imposition of the punishment.

Section 33(8) of the Constitution 1979 provides as follows:-

"No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence; and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed."

The italicised expression is clearly inconsistent with the imposition of a sentence of death on the appellant who at the time of the commission of the offence for which he was convicted, had not attained the age of seventeen years. In Ikpasa v. Bendel State (1981) 9 S.C.7 at p. 15. Sir Udo Udoma JSC, pointed out in his characteristic lucidity that the provisions of section 33(8) of the Constitution were intended, "to prevent the imposition of a heavier punishment for an offence which at the time of its commission could only attract a light punishment..."

Thus in this case on the evidence that appellant was less than seventeen years old at the time of the commission of the offence, the sentence of death imposed will definitely be a heavier punishment for the offence at the time of its commission, and accordingly an infringement of the provision of section 33(8) of the Constitution 1979.

I hold therefore that the trial Judge was wrong to have held that appellant was more than 17 years old at the time of the commission of the offence of murder and therefore liable to a sentence of death on conviction. The Court of Appeal was accordingly wrong to affirm the conviction. The above are my reasons for allowing the appeal against sentence.

A. G. O. AGBAJE, J.S.C.: On 16th June, 1988 I allowed the appellant's appeal on the issue of sentence. I indicated then that I would give fuller reasons for my judgment on 16th September, 1988.

I now proceed to give them.

The appellant and 6 others were charged in an Owo High Court, Ondo State, with the murder of one Dapo Awobayokun on 20/12/83. He and 2 others were convicted of the offence on 2617/85 and sentenced to death.

They appealed against their convictions and sentences to the Court of Appeal, Benin Division. The appeal of the other appellants succeeded but that of the appellant failed. So his conviction and sentence were confirmed in that court. This is a further appeal by the appellant against his conviction and sentence.

In this court counsel for the appellant did not contest the conviction of the appellant. It is the sentence of death which was passed on the appellant that was attacked by counsel. It is his submission that the sentence was wrong and for the following reasons. In the foreground of counsel's arguments is the submission based on Section 33(8) of the Constitution of the Federal Republic of Nigeria 1979 and the decision of this court in Godwin Ikpasa v. Bendel State (1981)9 S.C.7 at is interpreting the section that no penalty can lawfully be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed. This submission in my judgment is well founded. Counsel then referred to the time the offence was committed which was on 20th December 1983. Counsel then went on to submit that at that time the appellant had not attained the age of 17 years.

So, counsel continued, because of the provisions of section 368(3) of the Criminal Procedure Law of Western Nigeria 1959 applicable in Ondo State and which say:-

"Where an offender who in the opinion of the Court has not attained the age of seventeen years is

found guilty of a capital offence, sentence of death shall not be pronounced or recorded but in lieu thereof the court shall order such offender to be detained during the pleasure of the President and if so ordered he shall be detained in accordance with the provisions of Part 44 notwithstanding anything to the contrary in any written law."

It was wrong to pronounce a sentence of death on the appellant. Counsel was cognizant of the following finding of the trial Judge:

"As regards the ages of the 1st, 2nd and the 7th accused persons, I do not believe their evidence. From my own estimation, each of the 1st, 2nd and 7th accused is older than twenty years of age. No. doubt, evidence on their ages is very material; but I am satisfied that each of them is older than twenty years."

The appellant was the first accused at the trial Court. He gave his evidence in the witness box on 22/5/1985. So the above finding of the trial Judge, if it can be sustained, would make the appellant more than 17 years old at the time of the commission of the offence in question on 20/12/83 and thereby knock the bottom out of the submission of counsel that the death sentence was wrongly passed on the appellant.

Counsel however submitted that the learned trial Judge's finding cannot be sustained.

He made a two pronged attack on the finding. Firstly, he submitted the learned trial Judge before assessing the age of the appellant at more than 20 years did not make due enquiry as to the age of the appellant as enjoined by section 208 of the Criminal Procedure Law in the circumstances like those facing us in this case. It is abundantly clear that the trial Judge made no enquiry as to the age of the appellant. Although he himself recognized it that the evidence as to the age of the appellant was material, yet he based his assessment of the appellant's age on his (trial Judge's) estimation and not evidence. Since the condition precedent to the determination of the age of a person by the Court under section 208 of the Criminal Procedure Law, namely, the making by the court of due enquiry as to the age of that person, has not been carried out by the trial Court, it cannot be said or argued successfully that the finding of the trial Judge amounts to a determination of the age of the appellant under the provisions of section 208 of the Criminal Procedure Law. It follows too that that finding cannot be deemed, relying on the section, as the true age of the appellant. This is not the end of the matter as regards the submission of counsel on section 208 of the Criminal Procedure Law. For this Court in Oladimeji v. The Queen (1964)1 All N.L.R. 131 at 133 interpreting the section held:-

"It (determination of age) can only arise however if on the facts the Judge ought to have been of the opinion that the appellant had not attained the age of seventeen years at time of committing the offence." (words in brackets mine.)

This now takes me to the other ground upon which the attack on the finding of the learned trial Judge as to the age of the appellant was based.

Counsel submitted that on the facts as disclosed by the evidence before the trial court the trial Judge not only ought to have been of the opinion that the appellant had not attained the age of 17 years at the time of committing the offence but also, ought to have been satisfied that the appellant had not attained that age at the time.

The relevant evidence as to the age of the appellant was as follows:

First: Exh. B statement of the appellant to the police of 21/12/83 taken by 4th p. w. Sergeant Eko Abani where he put the age of appellant in 1983 at 20 years;

Second: Exh. E the second statement of the appellant to the police taken by Sergeant Daniel Audu on 25/12/83 where he stated the age of the appellant as 17 years;

Third: The evidence of the appellant in the witness box which was as follows:

"1st accused: Sunday Modupe, sworn on bible and states in English language, I live at 5, Agbado Street, Okeluse, Via Owo. I am a student at Okeluse Anglican Grammar School, Okeluse. I am in Form 5 at the School. I was born on November 3rd, 1967. I am now 18 years old."..........

"Cross-examined by Mr. Adebusoye: I am the first child of my mother. There are five of us who are the children of my mother. My mother is still a young woman. My immediate younger brother was thirteen years of age in 1983. I am not telling lies when I said that I am 18 years old. I did not tell the Police that I was 20 years old at the time I made the Statement, exhibit 'B'.

Court: the 1st accused looks older than 20 years of age" ....

Exh. E which was part of the case for the prosecution showed that the appellant was 17 years on 25/12/83 and this indicates that on 20/12/83 when the offence was committed the appellant had not attained the age of 17 years. On this evidence alone I am of the firm view that the trial Judge ought to have been of the opinion that the appellant had not attained the age of 17 years at the time he committed the offence for the provision of section 208 of the Criminal Procedure Law to apply in the determination of the appellant's age.

If this were all to be considered in this appeal I would have done what this court did in Oladimeji v. The Queen (supra) and referred the question of the enquiry and report as to the appellant's age to a special commissioner under section 33(d) of the Supreme Court Act 1960. But it is not. There was the uncontradicted evidence for the appellant albeit by himself which shows that the appellant had not attained the age of 17 years at the time he committed the offence. It was wrong of the learned trial Judge to discredit this evidence not by reference to any fact revealed by the evidence before him but by reference to his estimation of the age of the appellant, an estimation the basis of which cannot be supported in law. I am, therefore, satisfied that the trial Judge on the evidence before him ought to have been satisfied that the appellant had not attained the age of 17 years at the time he committed the offence with which he was charged.

It is for the above fuller reasons that I allowed the appellant's appeal on the issue of sentence. I quashed the death sentence passed on him by the trial Court and confirmed by the lower Court, the Court of Appeal. I further ordered that he be detained in prison at the pleasure of the Governor of Ondo State, his appeal against his conviction having been dismissed by me.

E. B. CRAIG, J.S.C.: When this case came up for hearing on the 16th of June, 1988, the Court, after hearing arguments, allowed the appeal on sentence and adjourned till today, 16th September 1988 to give reasons for its judgment. I now give my reasons for agreeing that the appeal be allowed.

In this connection, I have read the judgment of my learned brother Oputa J.S.C., and I agree with his reasoning and conclusions.

The appeal concerned the sentence of death passed on the appellant who was convicted of murder. It would appear that, at the time of the commission of the offence, the appellant was under 17 years, and by the provision of section 368(3) of the Criminal Procedure Act, he should not have been sentenced to death but "in lieu thereof, the Court shall order such offender to be

detained at the pleasure of the Governor of the State."

In the course of the trial, the appellant gave evidence of his age, - he said that he was born on 3rd November 1967, which would make him 16 years and one month as at the date when the offence was committed. Although the appellant was rigorously cross-examined on this point, the Prosecution did not produce any contrary evidence that the appellant was older than the age which he had given.

In his judgment, the learned trial Judge disbelieved the appellant. He (the Judge) then went on to determine the true age of the appellant from his own personal assessment of the appellant. He eventually found that:

"From my own estimation, each of the 1st, 2nd and 7th accused is older than 21 years of age. No doubt evidence on their ages is very material, but I am satisfied that each of them is older than twenty years." (Italics mine)

Now, in the first place, the trial Judge found that it is material to have evidence on record to determine the true age of the appellant. The only evidence about age was given by the appellant himself. It was on oath and there was no other evidence to rebut that.

The question then is, when the trial Judge said that "I am satisfied that each of them is older than twenty years."

one would like to ask from what materials or evidence, did the Judge become satisfied? Obviously he became satisfied, not from the evidence given before him, but from his own estimation of the appellant. In my view, this is a wrong approach to the whole issue. If the Judge felt that the appellant had told lies about his age, he was quite entitled to reject that evidence, but he had no right to substitute his own personal assessment for evidence which should have been given. In those circumstances, if the question of the appellant's age became such an important issue (and in the instant case the Court found as a fact that it was a material issue), the proper step was to make an enquiry to determine the appellant's age under section 208 of the Criminal Procedure Law.

The learned trial Judge failed to do this and in my view he erred in Law to have substituted his own opinion for the appellant's age. For this reason the sentence of death passed on the appellant and confirmed by the Court of Appeal was equally wrong in Law.

For the fuller reasons set out in the lead judgment, which I adopt as mine, I would allow the appeal, affirm the conviction of murder, but quash the sentence of death passed on the appellant and instead order that he be detained in prison at the pleasure of the Governor of Ondo State.

Appeal Allowed.

Appearances

E B. Nwazojie	**For the Appelants**
A.E. Ake Nroye, D.P.P. Ondo State, (with him Adesola Okuyelu, Miss)	**For the Respondents**