IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
ON FRIDAY, THE 17TH DAY OF JUNE, 2011
BEFORE THEIR LORDSHIPS

ALOMA MARIAM MUKHTAR	JUSTICE, SUPREME COURT
WALTER SAMUEL NKANU ONNOGHEN	JUSTICE, SUPREME COURT
FRANCIS FEDODE TABAI	JUSTICE, SUPREME COURT
JOHN AFOLABI FABIYI	JUSTICE, SUPREME COURT
BODE RHODES-VIVOUR	JUSTICE, SUPREME COURT

SC. 283/2009

BETWEEN:

JOSEPH AMOSHIMA -- -- -- -- APPELLANT

AND

THE STATE -- -- -- -- - -- RESPONDENT

JUDGMENT

(*Delivered by Walter Samuel Nkanu Onnoghen, JSC*)

This is an appeal against the judgment of the Court of Appeal, Holden at Abuja Division delivered on the 8th day of June, 2008 in appeal NO. CA/A/196C/06 in which the court affirmed the judgment of the High Court of Niger State Holden at Suleja Judicial Division in charge NO. NS/RFT/4C/98 delivered on the 19th day of July, 2005 in which the court convicted the appellant of the offence of conspiracy and armed robbery

contrary to sections 5(b) and 1(2) (a) of the Robbery and Firearms (Special Provisions) Act 1984 and sentenced him accordingly.

By an amended charge dated 1st November, 2002 the appellant who was the 2nd accused at the trial was charged, along with four others as follows:-

> *"1ST COUNT*
>
> *That you Aminu Tanko, Joseph Amoshima and Ikechukwu Okoh on or about the 6th day of April, 1996 at Suleja, within the Niger State Judicial Division agreed among yourselves to rob one Alhaji Zakari Mohammed in his house with a Knife and the same act was done in pursuance of the agreement and you thereby committed an offence contrary to section 5(b) of the Robbery and Firearms (Special Provisions) Act 1984.*
>
> *2ND COUNT*
>
> *That you Aminu Tanko, Joseph Amoshima and Ikechukwu Okoh on or about the 6th day of April, 2006 at Suleja, within Niger State Judicial Division committed the offence of armed robbery to wit you robbed one Alhaji Zakari Mohammed of his video machine with a knife resulting in his death and you thereby committed an offence contrary to section 1(2) of the Robbery and Firearms (special Provisions) Act 1984."*

Following a no case submission made at the conclusion of the evidence of the prosecution, the original 2nd and 5th accused persons were discharged and acquitted while the 1st, 3rd and 4th accused persons were ordered to defend themselves. In the process the appellant, who was the original 3rd accused person became the 2nd of the three who defended themselves.

It is the case of the prosecution that on the 16th day of April 1996 at about 0300 hours while the deceased, Alhaji Zakari Mohammed was sleeping in his room at home at Kasuwan Dutse area of Suleja town with his family, PW1 and PW2, there were some bangs on the door of the house after which PW1, the wife of the deceased, heard the deceased shouting and calling her name as a result of which PW1 rushed to their sitting room where she saw some people beating up her husband, the deceased. One of those beating up the deceased was said to be one Uche who was said to have been summarily convicted during the State Chief Judge's prison decongestion exercise and was the 4th accused in the original charge of eight accused persons. The said Uche chased PW1 back to her room where she locked herself in while the beating of the deceased continued, while she shouted for help. PW1 said that after sometime, she did not hear the voice of her husband anymore and when she opened her door she found him in a pool of blood. The thieves had vanished taking along with them a video machine and some cash. PW2 a son of the deceased identified the 1st accused as one of the thieves. The deceased was later rushed to Maraba hospital where he was admitted but later died on 14/4/96. Appellant was eventually arrested and he made a confessional statement which he later retracted at the trial.

At the end of the trial, the appellant was convicted along with the others for the offences charged and sentenced accordingly, resulting in an appeal to the lower court, the issue for the determination of which are stated in the appellant brief at pages 251 – 252 of the record of appeal, as follows:-

" *ISSUE NO. 1*

Whether the Hon. Trial Court was right to have convicted the Appellant without any evidence of identification since he was not arrested at the scene of crime (Ground1).

ISSUE NO. 2

Whether considering the provisions of the Robbery and Firearms (Special Provisions) Act and the evidence before the court, the Hon. Trial court was right to have sentenced the Appellant to death and in ordering how the sentence of (sic) should be executed (Ground 2).

ISSUE NO. 3

Whether, the trial, conviction and sentencing of the Appellant under the Robbery and Firearms (Special Provisions) Act were not nullities, the criminal proceeding having not been initiated in accordance with the Constitution of the Federal Republic of Nigeria, 1999 (Ground 3)

ISSUE NO. 4

Whether considering that the purported confessional statement was retracted by the appellant, the Hon. Trial court was right to have relied heavily and solely on the said retracted statement to convict the Appellant in the absence of any corroboration by another witness (Ground 4 – 5)

ISSUE NO.5

Whether considering the circumstances and the evidence before the Hon. Trial court, the court was right to have held that the prosecution proved her case beyond reasonable doubt. (Ground 6, 7, 8)."

As stated earlier in this judgment all the issues were resolved against the appellant and the appeal dismissed, resulting in the instant further appeal, the issues for determination of which have been formulated by learned counsel for the appellant, CHUKWUMA – MACHUKWU UME ESQ, in the appellant's brief of argument filed on 6/11/2010 which was adopted in argument of the appeal on 24/3/2011 as follows:-

"1. Whether the mandatory death penalty as provided by Robbery and Firearms Special Provisions Act and upheld by the Hon. Court of Appeal is not unconstitutional (being a negation of sections 4 and 6 and in breach of Appellant's right of appeal under section 241 (1) (e) etc of the Constitution of the Federal Republic of Nigeria, 1999. (GROUND I).

2. Was the court below right in its decision that the Robbery and Firearms (Special Provisions) Act, Cap. 398 is a State Law? (Ground 4).

3. Whether the Hon. Court of Appeal was right to hold that the Attorney General of Niger State had the Constitutional power and competence to initiate the proceedings under the Robbery and Firearms (Special Provisions) (Amendment) Act No. 62 of 1999 has withdrawn his powers to prosecute under the said statute (GROUND 3)."

Learned Counsel for the respondent has adopted the three issues raised by the appellant in the respondent brief filed on 29/3/2010 and presented arguments thereon.

It is the views of the learned Counsel for the appellant that the death sentence in section 1(2) (a) and (b) of the Robbery and Firearms (Special Provisions) Act, Cap. 398 is meant to be a mere maximum punishment and not a mandatory one.

In the alternative, learned Counsel submitted that section 1(2) (a) and (b) of the Robbery and Firearms (Special Provisions) Act Cap. 398 is unconstitutional and should be so declared on the following grounds:

(a) that it violates and ousts the judicial powers vested in the courts under section 6 of the 1999 Constitution;

(b) it negates the principle of separation of powers enshrined in sections 4, 5 & 6 of the Constitution.

(c) it renders negatory the Constitutional powers of the Court of Appeal and Supreme Court to hear appeals on death sentence; and,

(d) it violates the appellant's Constitutional right of appeal and right of fair hearing protected under section 241(I) (e) and section 36 of the Constitution.

Elaborating on the submission, learned Counsel submitted that section 6(1) (2) and (3) of the 1999 Constitution vests not only judicial functions and powers but also inherent powers in the courts; that the clause *"notwithstanding anything to the contrary in this Constitution"* as stated in section 6 (6) (a) of the 1999 Constitution squarely placed a limitation on the legislative powers of the National Assembly to cripple

the powers of courts; that exercise of jurisdiction and discretion in sentencing is an inherent part of the Constitutional functions and powers to be exercised by the courts *"notwithstanding anything to the contrary in this Constitution;"* that none of the inherent powers and sanctions of a court can be curtailed by the legislature thereby rendering section 1(2) (a) and (b) of the Robbery and Firearms (Special Provisions) Act null and void; that the mandatory death penalty reduces the role of the judiciary to that of rubber stamping the legislature's intention thereby reallocating judicial powers from the courts to the National Assembly.

Going through the situation in the United States of America as expressed in the case of Pallicy and Corfield (1979 123 CLR 52 at 58; Lockett vs Ohio 438 U.S. 586 (1978); Deaton vs A-G (1963) 1. R 170, 183; the State vs O Brien (1973) 1. R 50 as well as the decision of the Constitutional Court of Uganda in Kigula vs A-G (Constitutional Appeal NO. 6 of 2003) (2005 UGCC, learned Counsel submitted that mandatory death sentence which leaves the courts without discretion on what sentence to impose upon conviction is unconstitutional and a violation of the principle of separation of powers; that *"the unlimited powers of the courts to hear appeal on death sentence and rights of convicts to appeal against same death sentence are recognised by our Constitution, see sections 233(2) (d); 241 (I) (e) read with section 240 of the Constitution"*. However, that the

rights so conferred on the courts were taken away by the Robbery and Firearms (Special Provisions) Act. Starangely enough all the above arguments are being canvassed by learned Counsel for the appellant on an appeal before this Court arising from a trial, conviction and sentence of the appellant under the provisions of section 1(2) (a) and (b) of the Robbery and Firearms (Special Provisions) Act. If the Robbery and Firearms (Special Provisions) Act has denied the appellant a right of appeal etc, then where is the locus of the appellant before this Court as it is settled law that appellate jurisdiction is not inherent in the court but statutory or Constitutionally conferred. In any event, learnt Counsel urged the court to resolve the issue in favour of the appellant.

On his part, learned Counsel for the respondent ROTIMI OJO ESQ submitted that there is a difference between maximum sentence (punishment) and mandatory sentence (punishment); that the sentence on section 2(1) of the Robbery and Firearms (Special Provisions) Act is mandatory not maximum and as such the courts have no discretion in the matter, relying on Balogun vs A-G, Ogun State (2002) 6 NWLR (pt. 763) 512; Udoye vs The State (1967) NMLR 197; Otti vs State (1991) 8NWLR (pt. 207) 103 at 121; that section 1 (2) (a) and (b) of the Robbery and Firearms (Special Provisions) Act is Constitutional as it does not offend section 1(3) of the Constitution neither is it in conflict

with any other provision of the Constitution; that the foreign cases cited and relied upon by learned Counsel for the appellant do not apply as they are irrelevant to the facts of this case; that the Constitutional right of the appellant to appeal against the sentence has not been taken away by the legislation; it is not the responsibility of the court to abolish death sentence but that of the legislature and urged the court to resolve the issue against the appellant.

I have to point out that this issue is purely academic or hypothetical.

Apart from the above, I hold the considered view that the issue as argued is misconceived. The law recognises the existence of maximum and mandatory sentences in criminal law proceedings both of which mean different things and are irreconcilable. The misconception of learned Counsel for the appellant in relation to death sentence arises from the global trend which shows hostility to the imposition of the sentence on any convict which learned Counsel apparently feels ought to apply with equal force to this country's adjudication notwithstanding the Constitutional and statutory provisions relevant thereto. Whereas in very many jurisdictions the death sentence is frowned upon or even abolished, in Nigeria, it is firmly entrenched in our statutes and it is trite law that whereas it is the duty of the legislature to enact laws, that of the

judiciary is to interprete the laws so made. It follows therefore that where there is a dissatisfaction with the state of the law as it exists, and a desire for a change thereof is expressed by the people, it is the duty of the legislature which made the law in the first place to effect the needed reforms by amendment thereto. The duty both to make and amend laws so made belongs exclusively, by Constitutional arrangement, to the legislature as provided under section 4 of the Constitution of the Federal Republic of Nigeria, 1999 (hereinafter referred to as the 1999 Constitution). The death penalty may be said to be degrading of human beings etc, but the same cannot be said where the law recognises its existence and desires its enforcement by the law courts.

What then does the Robbery and Firearms (Special Provisions) Act provide on the sentence to be imposed by the courts upon a convict for the offence charged?

Section 1 of Cap 398 provides thus:-

"*1. (1) Any person who commits the offence of robbery shall upon trial and conviction under this Act, be sentenced to imprisonment for not less that twenty-one years.*

(2) if

(a) any offender mentioned in subsection (I) of this section is armed with firearms or any offensive weapon or is in company with any person so armed; or

(b) at or immediately before or immediately after the time of the robbery the said offender wounds or uses any personal violence to any person;
The offender shall be liable upon conviction under this Act to be sentenced to death.

(3) The sentence of death imposed under this section may be executed by hanging the offender by the neck till he be dead or by causing such offender to suffer death by firing squad as the Governor may direct."

From the above provisions, it is very clear that it is not every accused person convicted of robbery that must be sentenced to death. An accused person convicted of an offence of robbery simplicita is liable to a term of imprisonment for not less than twenty one years as provided under section I(1) of the said Robbery and Firearms (Special Provisions) Act. The above provision provides for the minimum term of imprisonment not the maximum as it confers the discretion on the court to impose a term of imprison of twenty one years and above or more. The court in the circumstance may impose 21, 22, 23 – 100 years terms of imprisonment.

However, the same cannot be said of section 1(2) (a) and (b) thereof, where if the offender/convict was armed either at the commission of the robbery or immediately before or thereafter wounds or uses any personal violence on any person. In the instant provision, the

convict *"shall be liable upon conviction under this Act to be sentenced to death"*.

The question is whether the above provision confers any discretion on the court to impose a sentence less than death on the convict and if the answer is in the negative whether the death sentence so provided is unconstitutional for the reasons canvassed in the appellant's brief.

The law is settled that the use of the word *"shall"* in an enactment, such as the instant one, is usually interpreted to mean a mandatory provision which must be obeyed as it is. The word is usually employed to denote or express a command or exhortation or what is legally regarded as mandatory – see Diokpa Onochie vs Odogwu (2006) All FWLR (pt. 317) 544; Mokelu vs Fed. Min. For Works & Housing (1976) 3 S.C 35; Aroyewun vs Adebanji (1976) 11 S.C 33; Amokeodo vs I.G of Police (1999) 5 SCN 571 at 81 – 82.

It is settled law also that where a statute prescribes a mandatory sentence in clear terms as in the instant case, the courts are without jurisdiction to impose anything less than the mandatory sentence as no discretion exists to be exercised in the matter. It is a duty imposed by law.

The above situation is different from the one in which the statute provides for either the minimum sentence as in section 1(1) of the Robbery and Firearms (Special Provisions) Act or the maximum sentence to be imposed. In either case the court is clothed with the discretion to either impose more than the minimum or less than the maximum sentence prescribed. It is therefore my view that the lower courts were right in holding that the sentence of death imposed on the appellant upon conviction for the offence of armed robbery is proper.

Secondly I wish to point out that this issue had earlier been decided by this Court in the Case of TANKO VS THE STATE (2009) 1- 2 S.C (pt. 1) 198. Mr/Mallam Tanko was the original 1st accused person in the charge giving rise to this appeal and was represented before this Court by the same learned Counsel for the present appellant who formulated the same issues that call for determination in the instant appeal among the similar issues in that case are as follows:-

"(1) *Whether the Honourable Court of Appeal was right to have held that the offence of robbery created under the Robbery and Firearms (Special Provisions) Act, Cap. 398, not being in the Exclusive and Concurrent Legislative List is a State offence for and can be prosecuted by the Attorney-General of Niger State?*

(2) *Whether the Honourable Court of Appeal was right to have held that death sentence is mandatory on conviction under the Robbery and Firearms (Special Provisions) Act?*

In respect of issue 2 in that appeal, this Court had this to say per ADEREMI, JSC at pages 219-221 of the report:-

"The punishment for robbery as clearly stated in Section 1(2) of the Robbery and Firearms (Special Provisions) Act, under which the appellant was charged is as follows:

"the offender shall be liable upon conviction under this Act to be sentenced to death."

There is a clear difference between the wordings stipulating punishment in the case of Ekpo and the instant case and in particular between the facts and circumstances of the two cases. Where the sentence prescribed upon conviction in a criminal charge is a term of years of imprisonment, then some extenuating factors such the age of the convict, whether he is a first offender etc, can be taken into consideration by the Trial Judge in passing the sentence on the convict. Indeed, the trial Judge, in my humble view, has the discretion to employ these factors to reduce the years of sentenced. But, in a charge, like the one at hand, where the sentence prescribed is "Death" only it is not within the competence of a trial Judge to exercise any Judicial discretion to reduce the "Death Sentence" to "Term of Years." Let me say it loud that a Judge must always possess judicial discretion which he is to exercise only when the interest of justice so demands. A judicial discretion ought to be founded upon the facts and circumstances presented before the Court, from which it must draw a conclusion which must be governed by the law. I go further to say that a judicial discretion must be exercised honestly and in the spirit of the law or statue otherwise the exercise of such judicial discretion cannot be said to fall within the ambits of the law or statute. In making any pronouncement in the course of or after adjudication the judex or a Judge is displaying no other thing that the power which every legal authority must of necessity have to decide controversies between subjects or between the Government and the subject.

The punishment of "Death" prescribed in Section 1 (2) of the Robbery Act, supra does not confer any judicial discretion on the trial judge or even the appellate court to reduced it and neither is there any judicial power that can be exercised by a judex to reduce that sentence. It has been decided that where a statute provides for a particular method of performing a duty regulated by the statute, that method, and no other, must have to be adopted. See C.C.B. (Nige.) Plc. V. A-G. Anambra State (1992) 8 NWLR (Pt.261) 528."

It is therefore very clear that the issue under consideration is not novel haven been duly determined by this Court. I expected learned Counsel to have been duly guided by the above decision particularly as the same was rendered before the filing of the present appeal and appellant's brief in the instant appeal. It is for the above reason that I stated earlier in this judgment that the issue is very much hypothetical or of academic interest. In any event, learned Counsel for the appellant has not attacked the findings of fact resulting in the conviction and sentence of the appellant. The appellant is therefore, by law, deemed to have accepted the decisions of the lower courts in relation thereto.

On the sub issue as to the Constitutionality of the death sentence in Nigeria jurisprudence, it is clear that learned Counsel for the appellant has not pointed the court to any provision of the 1999 Constitution which the death sentence is said to be in breach of in practice. It has not been demonstrated to the satisfaction of this Court that death

sentence is not recognised by the 1999 Constitution so as to make the imposition of same unconstitutional. It does not matter what obtains in other jurisdictions and the current global trend as regards the issue of death sentence. The duty of the court is to declare and apply the law as it is not to make or amend the law. If there is the need to amend the existing law, the duty to do so falls on the legislature which has so far not acted to the contrary.

Nigeria is a Sovereign State subject to the provisions of its Constitution and statutes duly enacted by the National Assembly and international treaties domesticated or adopted for use by the National Assembly. It is to the extent of the above position of the law that I hold the considered view that the cases cited and relied upon by learned Counsel to the appellant from the United States of America and Uganda are not only irrelevant but of no pesuasive authority in our jurisprudence. It must be noted that the right to life as provided under our Constitution is qualified – not absolute. Though section 33(1) of the 1999 Constitution guarantees the right to life of everyone, it equally legally permits the deprivation of life in execution of the sentence of a court of law in respect of a criminal offence, such as armed robbery, for which the person has been found guilty – see Kalu vs the state (1988) 11 – 12 S.C 4 on section 30(1) of the Constitution of the Federal Republic of

Nigeria, 1979 (hereinafter called the 1979 Constitution) in pari materia with section 33(1) of the 1999 Constitution.

I therefore resolve issue 1 against the appellant.

On issue 2, it is the submission of learned Counsel for the appellant that the Robbery and Firearms (Special Provisions) Act and the Robbery and Firearms (Special Provisions) (Amendment) Act No. 2 of 1999 being promulgations of the Federal Government are Federal Laws which created federal offences and that by the provisions of item 2 in part 1 of the Second Schedule to the 1999 Constitution, arms, ammunition and explosives are on the Exclusive Legislative List and only the National Assembly has the vires to legislate thereon and urged the court to resolve the issue in favour of the appellant.

On his part, learned Counsel for the respondent referred the court to Decree NO. 62 of 1999 and submitted that it vests the respective State High Courts with jurisdiction to try the offence of armed robbery; that the investiture of jurisdiction on the State High Courts make the offences created by the Act, State Laws; that section 298 of the Penal Code Law Cap. 94, Laws of Niger State creates the offence of Armed Robbery, and urged the court to resolve the issue against the appellant.

The issue under consideration was raised by learned Counsel for the appellant and decided by this Court in appeal NO. S.C/53/2008, TANKO VS THE STATE delivered on the 6th day of February, 2009 in which the court resolved the issue against the appellant and consequently dismissed the appeal. The judgment is reported in (2009) 1 – 2 S.C (pat 1) 198 at 214 – 217 ,,,,,

The above decision also dealt with issue NO. 3 as formulated by the appellant. It is the submission of learned Counsel for the appellant that the lower court was in error in holding that the Attorney-General of Niger State had the power to initiate the proceedings under the Robbery and Firearms (Special Provisions) Act without the consent of the Attorney General of the Federation. It should be noted that it is the same Attorney-General of Niger State that is involved in instituting the prosecution in both cases.

At pages 214 – 217 of the report, ADEREMI, JSC held as follows:-

> *"The appellant has, rightly in my view, submitted that by virtue of Section 14(2) (b) of the Constitution of the Federal Republic of Nigeria, 1999, the Federal and the State Government can legislate in respect of robbery. This submission is further reinforced by the provisions of Sections 318 of the Constitution. Section 14 (2) (b) of the said Constitution provides:*

> *"The security and welfare of the people shall be the primary purpose of Government."*

And "Government" is defined in Section 318 of the Constitution which provides:

> *"Government includes the Government of the Federation or of any State, or of a Local Government Council or any person who exercises power and duty."*

It follows from the above provisions that both the Federal and the State Government can legislate on Robbery. It was however contended very strongly by the appellant that once a Charge is brought under any of the Federal Act or State Law, the proper authority must institute or prosecute the charge. The charge against the appellant was brought under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Decree 1984, later amended by Decree No. 68 of 1999, which came into being on 28th May, 1999. The appellant's plea was taken on 18th November, 1999. The Rules of Procedure and power to institute proceedings under this amended decree are set out in Section 9 of the Robbery and Firearms (Special Provisions) Act, Cap. 398, which are as follows:

> *"9 (1) The rules as to the procedure to be adopted in prosecutions for offence under this Act before a tribunal and the forms to be used in such proceedings shall be as set out in the schedule to this act.*
>
> *(2) Prosecution for offences under this Act shall be initiated by the Attorney-General of the State or, where there is no Attorney-General, The Solicitor-General of the State in respect of which the tribunal was constituted or by such officer in the Ministry of*

Justice of that State as the Attorney-General or Solicitor-General, as the case may be, may authorize so to do. Provided that the question whether any authority or what authority has been given in pursuance of this subsection shall not be enquired into by any person other than the Attorney-General, or the Solicitor-General, as the case may be.

(3) Prosecution in respect of any person caught committing an offence under Section 1(2) of this Act shall be instituted within seven days after the receipt by the Attorney-General of the State concerned or where there is no Attorney-General, by the Solicitor-General of the State, as the case may be, of the file containing completed Police investigation in respect of the offence."

By the provisions of Section 2(1) and (2) of the Tribunals (Certain Consequential Amendment) Etc. Decree, No. 68 of 1999, the Federal High Court or the High Court of State is conferred with the Jurisdiction to try the offences of Armed Robbery. This much is conceded by both parties in this appeal. The grouse of the appellant in this appeal, as I have pointed out, is that the officials of the Ministry of Justice of a State cannot prosecute a case of armed robbery in a State High Court. Let me quickly say that I have had a close study of the contents of Second Schedule Parts 1 and 11, and I agree with the submission of the respondent that the offence of Armed Robbery is neither in the Exclusive List or the Concurrent List. It therefore can be at no other place other than the realm of Residuary Matters which is within the competence of a State Assembly to legislate on. Niger State has in Sections 296 of 307 of its Penal Code, Cap. 94, legislated on Robbery. Before I come to the logical conclusion which ought to be reached from the combination of all the provisions of the Constitution and Act which I have reproduced supra, I wish to make reference to

Section 211(1) of the Constitution of the Federal Republic of Nigeria, 1999, dealing with public prosecutions, it reads:

> *"211(1) The Attorney-General of State shall have power:*
>
> *(a) To institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court-martial in respect of any offence created by or under any law of the House of Assembly."*

From the provisions quoted supra, the only conclusion which must be reached and which I now reach is that not only does a State High Court have the Jurisdiction to try cases relating to Armed Robbery, the officials of the Ministry of Justice of a State are eminently qualified to prosecute the office of Armed Robbery in any High Court of a State. Let me also add that it will even be incongruous to the Concept of Federalism, which we practice, to contend otherwise."

In my concurrent judgment at page 234 I had the following to say:-

"I hold the firm view that by conferring Jurisdiction on the State High Courts to hear and determine charges relating to the offence of robbery under the Robbery and Firearms (Special Provisions) Act, it follows that initiation of prosecution for the said offence in the State High Courts can be done by the Honourable Attorney-General of the State concerned particularly as there is no specific provision of the relevant Act, stating that a State Attorney-General cannot do so or that only the Honourable Attorney-General of the Federation can do so."

The above remain the law applicable to the facts relevant to this case and as decided by this Court. The appellant and indeed everybody

including institutions of this country are, according to Constitutional provisions bound by same. This Court has since the earlier decision not found cause to change its position neither has learned Counsel for the appellant urged the court to do so in this appeal.

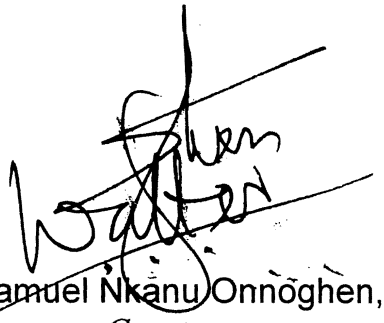
It is rather unfortunate that learned Counsel for the appellant formulated issues in this appeal knowing them to have been formulated by him in an earlier appeal decided before the filing of the instant appeal and that this Court had already given decision on same. I don't know the purpose which the action of learned Counsel is to serve. Is it intended to mislead the court or to tempt it to give a contrary/contradictory decision on the issues so formulated. Counsel should remain the gentlemen they are considered to be upon being CALLED TO BAR. The issues raised in the instant appeal are really uncalled for, the same haven been duly raised and decided in a previous appeal involving the very Counsel for the appellant and on the same facts.

This is a very busy court whose time ought not to be toyed with nor wasted or spent on issues which do no one any good.

In conclusion, haven resolved all the issues canvassed before this Court against the appellant, it is obvious that the appeal is without merit and is consequently dismissed by me.

The judgment of the lower courts are hereby affirmed.

Appeal dismissed.



Walter Samuel Nkanu Onnoghen,
Justice, Supreme Court.

CHUKWUMA-MACHUKWU UME ESQ for the appellant with him are Messrs EKPEDO CHINELO (MISS); O.C. UGWUOKE, and C.C. OKOYE

ROTIMI OJO ESQ for the respondent with him are Messrs ISAAC FOLORUNSO; TAIWO ADEBALE and JIMMY OJEH.

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HOLDEN AT ABUJA

ON FRIDAY THE 17TH DAY OF JUNE, 2011

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AND

THE STATE .. .. RESPONDENT

JUDGMENT

(Delivered by A. M. MUKHTAR, JSC)

I have had the advantage of reading in advance the lead judgment delivered by my learned brother Onnoghen, JSC. Indeed these same issues formulated in the appellant's brief of argument have been earlier raised and argued in an earlier appeal before this very court, and the appellant failed. It is unfortunate that the learned counsel would belabour this court again on these issues and argument, when he very well knows that it would come to naught. It is indeed an exercise in futility, and counsel knowing very well how busy this court is, shouldn't have overburden it with this unnecessary expose.

I am in full agreement with the reasoning and conclusion of my learned brother, that the appeal lacks merit and should be dismissed. I also dismiss it.

A. M. MUKHTAR
JUSTICE, SUPRME COURT

Chukwuma-Machukwu Ume Esq. for the appellant with him are Messrs Ekpedo Chinelo (Miss); O. C. Ugwuoke, and C. C. Okoye.
Rotimi Ojo Esq. for the respondent with him are Messrs Isaac Folorunso; Taiwo Adebale and Jimmy Ojeh.

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(Delivered by J.A.Fabiyi, JSC)

I have read before now the judgment just delivered by my learned brother – Onnoghen, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal is devoid of merit and should be dismissed.

Let me state it at this point that the appellant's counsel did not attack the findings of fact resulting in the conviction and sentence of the appellant. Same is deemed to have been

admitted by the appellant and the two courts below rightly acted on them. See Omoregbe V Lawani. (1980) 3 - 4 SC. 108, 117; Okerie V Ejiofor (1996)3 NWLR (pt. 434) 90 at 104.

The appellant's counsel, who did not raise any finger of complaint in respect of defences available to the appellant tried to bank upon the academic question as to whether mandatory death penalty constitutes breach of appellant's right of appeal vide section 241 (1) (e) of the 1999 Constitution of the Federal Republic of Nigeria. Such a stance was geared to appellant's chagrin as it did not positively advance his cause in any respect.

The appellant's counsel should be reminded of the doctrine of Separation of Powers as enshrined in the 1999 Constitution. The Legislature is to enact laws while it is the duty of the Judiciary to interpret the laws as enacted. And where a mandatory sentence is provided as in this matter, same must be pronounced without any reservation. There is no

escape route. All arguments tacitly advanced by the appellant's counsel to the contrary were to no avail.

Learned counsel for the appellant herein who raised similar issues in the case of Tanko V. The State (2009)1 – 2 SC (pt. 1) 198 should stop similar pranks; as his grouse has been duly pronounced upon by this court therein.

My learned brother said it all in the lead judgment. I adopt the reasons therein contained. The appeal has no chance or modicum of success. I hereby dismiss the appeal and affirm the judgment of the Court of Appeal.

J. A. FABIYI
JUSTICE, SUPREME COURT

CHUKWUMA-MACHUKWU ESQ for the appellant with are Messrs EKPEDO CHINELO (MISS); O.C. UGWUOKE, and C.C. OKOYE.
ROTIMI OJO ESQ for the respondent with him are Messrs ISSAC FOLORUNSO; TAIWO ADEBALE and JIMMY OJEH

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
ON FRIDAY THE 17TH DAY OF JUNE 2011
BEFORE THEIR LORDSHIPS

ALOMA MARIAM MUKHTAR	JUSTICE, SUPREME COURT
WALTER SAMUEL NKANU ONNOGHEN	JUSTICE, SUPREME COURT
FRANCIS FEDODE TABAI	JUSTICE, SUPREME COURT
JOHN AFOLABI FABIYI	JUSTICE, SUPREME COURT
BODE RHODES-VIVOUR	JUSTICE, SUPREME COURT

SC.283/2009

BETWEEN:

JOSEPH AMOSHIMA — APPELLANT

AND

THE STATE — RESPONDENT

JUDGMENT
(Delivered by Bode Rhodes-Vivour, JSC)

I read in draft the leading judgment delivered by my learned brother, **Onnoghen, JSC**. I agree with his lordship that there is no merit in this appeal, and it ought to be dismissed.

The appellant was charged with conspiracy to commit armed robbery and armed robbery contrary to sections 5 (b) and 1 (2) of the Robbery and Firearms (Special Provisions) Act 1984.

Both courts below found the appellant guilty and the sentence to death was confirmed by the Court of Appeal.

Surprisingly there is no appeal on the findings by the both courts that the appellant did commit the offences for which he was charge. Rather the issues raised are constitutional. They are:

1. Whether the mandatory death penalty as Provided by Robbery and Firearms (Special Provisions) Act. And upheld by the Hon. Court of Appeal is not unconstitutional being a negation of sections 4 and 6 and in breach of Appellant's right of appeal under section 241 (1) (a) etc of the Constitution.

2. Was the court below right in its decision that the Robbery and Firearms (Special Provisions) Act, Cap. 398 is a state law.

3. Whether the Hon. Court of Appeal was right to hold that the Attorney-General of Niger State had the Constitutional power and competence to initiate proceedings under the Robbery and Firearms (Special Provisions) (Amendment) Act No. 62 of 1999 has withdrawn his powers to prosecute under the said statute.

Similar issues were decided in the case of **Tanko v. The State 2009 1-2 SC pt. 1 pg. 198.**

It has been the position of the courts to determine live issues and not spend time on what in effect is an academic exercise. See

Adelaja & Sons v. Alade & another 1999 6 NWLR pt. 608 pg. 544

Bakare v. A.C.B. Ltd 1986 3 NWLR pt. 26 pg. 47.

This appeal to my mind is an academic exercise. In any case the well laid down position is that the legislature is to make laws, while the judiciary is to interpret the laws made by the legislature. That is the doctrine of separation of powers, and in the interpretation of statues the words used must be given their ordinary meaning, at all times to give effect to the intention of the legislature. On no account should a judge interpret statutes as he likes or rewrite the statute. See **Chief Awolowo v. Alhaji Shagari 1979 6 – 9 SC pg. 51**

"Shall" in Section 1 (2) (a) (b) means must. A matter of compulsion. The judge has no discretion. Once the act of the appellant fell within the warm embrace of the section (supra) the sentence is death. It is mandatory.

In (3) "May" means "May". The authorities are given an option as to how to carry out the death sentence pronounced by the court.

For this and the much fuller reasoning in the leading judgment delivered by my learned brother **Onnoghen, JSC** which I was privileged to read in draft, I would dismiss the appeal.

B. Rhodes-Vivour

BODE RHODES-VIVOUR
JUSTICE, SUPREME COURT

APPEARANCES

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