

**ALLOCUTUS IN MANDATORY SENTENCES: CASE COMMENT ON *EDWIN V STATE*<sup>1</sup>**

JUSTIN ILEKA\*

**Abstract**

In a mandatory sentence, as in capital offences, the trial Judge has no discretion but to impose the statutory prescribed sentence if the defendant has been found guilty of the offence. If it were not a case of a mandatory sentence, the Judge may exercise the discretion to impose a sentence within the range of the minimum sentence to the maximum sentence. In such a case, one of the factors that may affect the exercise of this discretion is the plea for mercy or plea in mitigation, technically referred to as “*allocutus*” or “allocation” made by the defendant or counsel on his or her behalf the conviction. In the event the Judge must impose a particular specified sentence on the conviction of the defendant, it would appear that the *allocutus* would have no value as it cannot persuade the Judge whose “hands are tied” to be any more lenient than to impose the prescribed mandatory sentence. Of course, no amount of plea of mercy or plea in mitigation would move the Judge to mitigate or vary the mandatory sentence. Interestingly, the relevant laws providing for *allocutus* in criminal trial did not exclude the application of *allocutus* in cases of mandatory sentences. Moreover, the fate of the convicted defendant, even a defendant convicted of a capital offence is not permanently sealed even as the trial court becomes *functus officio*. Indeed, there is a host of reliefs still available after sentencing apart from the interventions of the appellate courts. To this end, the record of the *allocutus* and the Judge’s remark on it are very relevant in the determination of some of these post-sentence reliefs. Furthermore, *allocutus* has a therapeutic value in the criminal trial which value is not necessarily connected with mitigation of sentence, which the Supreme Court in *Edwin v State* believed to be the sole purpose of *allocutus* in criminal trials. This paper focuses on these other purposes of *allocutus* other than mitigation of sentence in arguing that *allocutus* is necessary even in cases involving mandatory sentences, including capital sentences.

KEY WORDS: *Allocutus*, Mandatory Sentences, Therapeutic Value.

**Facts of *Edwin v State***

The appellant (Chidi Edwin) was charged at the High Court of Ondo State, Akure, with murder contrary to s. 319 of the Criminal Code, Cap 30 Laws of Ondo State, 1978 for allegedly murdering one Happiness Ndubueze by striking her with machete. At the end of hearing, the trial court convicted the appellant and sentenced him to death by hanging.

The appellant unsuccessfully appealed the judgement at the Court of Appeal, thus the further appeal to the Supreme Court where the appellant, among other things, contended that the failure of the trial court to call upon him for his *allocutus* before sentence was passed on him amounted to a breach of his fundamental right to fair hearing. One of the issues for the Supreme Court’s

---

\*Lecturer II, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University Igbariam Campus, Anambra State, Nigeria

<sup>1</sup> (2019) 7 NWLR (part 1672) 553-572

determination is “whether the Court of Appeal was right in affirming the judgment of the trial court when it failed to accord the appellant the right of *allocutus* before sentencing him to death after conviction.” The Supreme Court unanimously dismissed the appeal in *Edwin v State* in its entirety and affirmed the lower court’s decision.

### **Highlights on the Supreme Court’s Decision**

In the main, the Supreme Court decided that *allocutus* cannot avail a person convicted of an offence with a mandatory statutory sentence.

The Supreme Court in its decision, while relying on its earlier decision in *Lucky v State*<sup>2</sup> defined *allocutus* as “a plea in mitigation of the punishment richly deserved by an accused for the offence with which he was charged and for which he was tried and found guilty and convicted accordingly.” The Supreme Court consistently maintained that because the *allocutus* cannot mitigate the mandatory sentence of death, it is of no moment in mandatory sentences.

It must be noted, with due respect, that the Supreme Court has limited the value and use of *allocutus* to a mere facility to mitigate the sentence to be imposed in deserving case excluding cases of mandatory sentences as in capital offences. The clear implication of the above line of reasoning is that *allocutus* is not applicable in cases involving mandatory sentences as there cannot be any mitigation of the mandatorily prescribed sentence. Further implication of this is that there is no other post-sentence measure where *allocutus* made during trial could be relevant.

It is respectfully submitted that this Supreme Court’s view of *allocutus* is not in consonance with the definition given by learned authors. Bryan A Garner has defined allocution as

an unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence<sup>3</sup>

This definition is more consistent with the present practice of *allocutus* in the Nigerian criminal justice jurisprudence.

It is curious that the relevant law on *allocutus* which the Supreme Court considered in *Edwin v State*, that is to say s. 247 of the Criminal Procedure Law of Ondo State, Cap 37, 2006<sup>4</sup> which corresponds with s. 247 of the Criminal Procedure Act<sup>5</sup> has not in any way excluded the application of the provision in mandatory or capital sentences. The current position of the law on this subject is in s. 310 (1) of the Administration of Criminal Justice Act which states:

---

<sup>2</sup> (2016) 13 NWLR (part 1528) 128

<sup>3</sup> H.C. Black’s Law Dictionary, (9<sup>th</sup> ed.) Bryan A. Garner (ed.) Thomson West Group, America, 2009, 88.

<sup>4</sup> It provides: “If the court convicts an accused person or if he pleads guilty, it shall be the duty of the registrar to ask the accused whether he has anything to say why sentence should not be passed on him according to law but the omission of the registrar to ask him or his being asked by the Judge or magistrate instead of the registrar shall have no effect on the validity of the proceedings.

<sup>5</sup> This Act as well as the Criminal Procedure (Northern States) Act and the Administration of Justice Commission Act has been repealed by the Administration of Criminal Justice Act, 2015 (ACJA); see s. 493 of ACJA.

Where the finding is guilty, the convict shall, where he has not previously called any witnesses to character, be asked whether he wishes to call any witnesses and after the witnesses, if any, have been heard he shall be asked whether he desires to make any statement or produce any necessary evidence or information in mitigation of punishment in accordance with section 311 (3) of this Act.<sup>6</sup>

The law makers would have clearly indicated so if they intended *allocutus* not to apply in mandatory or capital sentences. Again, the law that prescribed the mandatory capital sentence in the case of murder<sup>7</sup> did not exclude the use of *allocutus* in such cases.

On the other hand, the apex court is categorical in stating that “*allocutus* is not a right in law.”<sup>8</sup> The status of *allocutus* as a right in law categorically denied at one breath per I.T Muhammad, JSC (in the leading judgment) was at another breath in the same judgment affirmed as a right per Peter-Odili, JSC. Peter-Odili, JSC puts it thus:

the right to fair hearing of an accused might be compromised by an *allocutus* not being made on his behalf in given circumstances because of the facts surrounding the particular case. However, that would not be the case in a case of mandatory sentence of death upon conviction, such as in a case of murder. This is so because *allocutus* would not mitigate the sentence of death which naturally flows with a conviction in a charge of murder as the penalty is a capital sentence... the bottom line is that by not asking the appellant or counsel on his behalf to make an *allocutus* the fair hearing rights of the appellant have not been infringed because what he would have said if he made an *allocutus* would not change the decision the Judge was obligated to deliver in sentencing.<sup>9</sup>

Granted that what would have been said during the *allocutus* would not have changed the sentence, it might have other effects beyond mitigating the mandatory sentence of death. Again, in as much as *allocutus* is an opportunity granted by the law to a defendant to be heard after conviction but before sentencing, one can confidently refer to it as a kind of right. Indeed, the right to fair hearing governs the whole process of criminal trial including the opportunity to make *allocutus* after conviction and before sentencing. This right is not a new one but rather an old aged right. “The right of a prisoner to speak in his own behalf before sentencing, sometimes called *allocutus*, was recognized by the Common Law as early as 1682.”<sup>10</sup>

---

<sup>6</sup> S. 311(3) of the Act states: “A court, after conviction, shall take all necessary aggravating and mitigating evidence or information in respect of each convict that may guide it in deciding the nature and extent of sentence to pass on the convict in each particular case, even though the convicts were charged and tried together.”

<sup>7</sup> S. 319(1) of the Criminal Code, Cap. 30, Laws of Ondo State, 1978

<sup>8</sup> note 1 at p 565 paragraph F

<sup>9</sup> See note 1 at p 570 paragraph C - G

<sup>10</sup> See Celine Chan, “The Right to Allocution: A Defendant's Word on Its Face or Under Oath?”, *Brooklyn Law*

### ***Allocutus* in Mandatory Sentences**

The use of the statements made in *allocutus* is not limited to the use of the trial court in view of mitigating sentences to be imposed by the trial court in deserving cases. For the Supreme Court in *Edwin v State*, *allocutus* is considered as relevant only towards mitigation of sentence such that where mitigation of sentence is not in issue, then *allocutus* is of no value and could be dispensed with without any effect. It is submitted with respect that there are other uses of *allocutus* other than mitigating of sentences after conviction.

The first use of *allocutus* we shall consider outside of or beyond mitigation of sentence at trial court is with regards to the exercise of the prerogative of mercy whereby the President or the Governor, after consultation with the State Council or advisory council of the State on prerogative of mercy, respectively, can grant a person convicted pardon or any other respite.<sup>11</sup> This prerogative of mercy is applicable even in capital offences. The practice is that the Board on Prerogative of Mercy consults the remark made by the Judge on the defendant's *allocutus* in advising the President or the Governor on whether to exercise the prerogative of mercy in favour of any convict.

Moreover, s. 312 of the Administration of Criminal Justice Act, 2105 provides that "the court may, in any case in recording sentence, make a recommendation for mercy and shall give the reasons for its recommendation." This provision is applicable to all cases including cases of mandatory sentence or capital sentence. It is obvious that the said trial judge's recommendation for mercy is not a recommendation to the trial judge himself. It is not for the trial judge's own use and the Judge cannot make the recommendation with reasons in a vacuum. The reasons so required to be given for the recommendation would be garnered from sources including the *allocutus*. It is doubtless that *allocutus* would provide veritable materials for such recommendation. To deprive a convict such opportunity is a fatal disadvantage to the convict.

Another value of *allocutus* in mandatory sentences is its therapeutic value. A defendant as well as the victim of the crime and the society in general enjoys a tremendous therapeutic outlet when the opportunity is given to the defendant to be heard on why mercy should be shown to him or her; on how he or she feels about the crime he or she committed; on what he or she has to say to the victim of the crime; on what he or she wants from the society; on what advice he would like to give to the public; on whether he regrets his or her actions or omissions that constituted the crime. This opportunity contributes a lot to the administration of criminal justice. It benefits all the parties affected by the crime. It embraces the tenets of restorative justice which the new era of the Administration of Criminal Justice Act promises to promote.

Being that Restorative justice is not satisfied with merely getting the offender punished as in the conventional criminal justice system, it goes out to address the issue of the welfare of the victims as well as the rehabilitation of the offenders. It integrates

---

*Review* (vol. 75, 2009) p. 580

<sup>11</sup> See s. 175 and 212 of the Constitution of the Federal Republic of Nigeria (1999) as amended.

the obligations of the offender, the victims and the greater community in this process towards healing.<sup>12</sup>

## Conclusion

*Allocutus* is an opportunity for the defendant to accept responsibility for his or her crime; express remorse; to apologize; to say other things beneficial to the public, especially those affected by the crime or potential victims. To this extent, *allocutus* is a therapeutic outlet. This healing potential available in the criminal justice system ought to be explored even more in mandatory sentences. The law allows permits it. Indeed, it has rightly been observed that “the right of allocution has survived more for its therapeutic effect on the defendant than its practical effect on the Judge’s determination.”<sup>13</sup>

The American Bar Association offers the following insight into this gold mine of the healing value of *allocutus* especially in the current reign of shift towards restorative justice:

Outside of sentencing, allocution statements serve several different purposes for the parties involved in a particular case and for society at large. They allow the court to quickly recognize the humanity of the matter before it, and provide the judge with a better understanding of the defendant. Allocution statements also benefit victims and their families, as well as the defendant’s family. They also help defendants accept responsibility for their actions, and make the defendant a meaningful part of the sentencing process.<sup>14</sup>

*Allocutus* has values beyond mitigation of sentences. Mitigation is not the core purpose of *allocutus*. It is relevant even more in serious offences like capital offences that are mandatory sentences. *Allocutus* throws light into the inner being and circumstances which might remain hidden in the trial battle preceding conviction. It can reveal the defendant’s remorse or regret or even defiance. The statements made during *allocutus* and the Judge’s remark on them, especially in capital offences are often referred to by the Board on the Prerogative of Mercy. *Allocutus* should no longer be seen as mere formality or empty ritual.

It is believed that the Supreme Court would at the next available opportunity give a judgment that will portray the actual values of allocution in criminal trial even in cases where *allocutus* cannot result in the mitigation of sentence.

---

<sup>12</sup> J Ileka, ‘Appraisal of the Restorative Criminal Justice Measures in Nigeria’ (2016) 1 African Journal of Criminal Law and Jurisprudence, 99

<sup>13</sup> US v Jackson, 700 F. 2d 181, 191 (5<sup>th</sup> Cir. 1983)

<sup>14</sup> “What is an Allocution Statement?”, November 20, 2018 available at:

[https://www.americanbar.org/groups/public\\_education/publications/teaching-legal-docs/what-is-an-allocution-statement/](https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-allocution-statement/) (accessed last on January 14, 2020)