

**SUPREME COURT OF NIGERIA**  
25TH JUNE, 1993. SC.213/1992  
**CORAM:- A. G. KARIBI-WHYTE, S. KAWU,**  
**U. OMO, I. L. KUTIGI, E. O. OGWUEGBU, JJSC**

RASULU OLADIPUPO ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

*APPEALS* - *Criminal defence - ground of appeal - that ought to be struck out - whether to be considered - where the defence raised is open to accused*

*APPEALS* - *Trial court's sentence of death - upheld by the Court of Appeal - when to be substituted with manslaughter verdict*

*CRIMINAL LAW-* *Defence raised by accused - alleged to be contradictory or inconsistent - whether adequate consideration will be denied*

*CRIMINAL LAW-* *Defence of accident - finding that accused intended the harm - whether the defence will avail*

*EVIDENCE* - *Murder - Defence of provocation - No evidence of any act of provocation*

*MURDER* - *Mens rea - when intention to cause grievous harm or kill is not established - is conviction proper*

**FACTS**

The Appellant drove a vehicle in which the deceased was a passenger, when the deceased got out of the vehicle, a fight broke out between him and the Appellant. They chased one another around the vehicle until the Appellant threw pliers which hit the deceased on the head. He started bleeding and died on the way to hospital before receiving any medical attention. The doctor that performed post mortem certified the cause of death to be due to fracture of the skull. Appellant's evidence was that the deceased was running away with his ignition key. He threw the pliers at the deceased in order to stop him. He did not intend to harm or kill the de-

ceased.

The trial Lagos High Court found the Appellant guilty of murder and sentenced him to death. His appeal to the Court of Appeal was dismissed. On further appeal to the Supreme Court the defence of provocation and accident were unsuccessfully canvassed by Appellant's Counsel. But the apex court had to determine whether the Appellant had the intention (*mens rea*) to cause grievous harm or kill the deceased.

**HELD** (unanimously allowing the appeal with Karibi-Whyte JSC concurring on a different reason).

1. There was no evidence of any act of provocation offered by the deceased to the Appellant. As such, the two lower courts' finding that the defence of provocation failed completely was correct. (P. 102 L 29)
2. It is immaterial to the requirement that adequate consideration be given to any criminal defence raised by an accused that such defences are contradictory or inconsistent, provided they are available on the totality of evidence before the court as in this case. (P 102 L 37)
3. A ground of appeal that would have been struck out under normal circumstances for wrongfully alleging that the Court of Appeal erred in holding that the defence of accident was not available to the Appellant when no such issue was raised nor considered by that court, will be considered by the Supreme Court since that defence was equally open to the Appellant on the totality of evidence before the court. (P. 103 L13)
4. The lower courts were correct in their finding that the Appellant obviously intended to harm the deceased as he did. There was therefore no question of accident and the defence of accident must fail. (P. 103 L 28)
5. Although it is good law that a person should be taken to intend the natural and probable consequences of his action, on the facts as a whole the act of the Appellant and the surrounding circumstances can in no way be interpreted to mean that he intended to kill the deceased or cause him grievous harm. (P. 104 L 17)

6. Since the lower courts found that the Appellant neither intended to cause death nor grievous harm to the deceased, he could not have been properly convicted for murder as the charge was not proved (P. 105 L 1)
7. The standard under the Criminal Code is that grievous harm and not just harm must have been intended. There is no doubt that by throwing pliers at the deceased, Appellant intended to cause him harm only and not grievous harm. (P. 105 L 4)
8. In the circumstances of this case, the appeal must succeed. The verdict of guilty of murder and sentence of death on the Appellant are set aside and a verdict of manslaughter and a sentence of imprisonment for 7 (seven) years substituted (P. 105 L 10)

PER KARIBI-WHYTE JSC *"In the case before us, there is no doubt that the circumstances were sufficient to constitute provocation as defined, Appellant who was fighting with the deceased threw the pliers at the time he was suffering from loss of self-control, and before there was time for his passion to cool"*  
(P. 109 L 4)

### **REPRESENTATION**

M. P. Ohwovoriole, S.A.N

M. Osoala (Mrs), for the Appellant

Bode Rhodes-Vivour, Director of Public Persecutions, Ministry of Justice, Lagos State

Okafor P.K. Ederi Legal Officers, Ministry of Justice, Lagos State, for the Respondent

### **CASES REFERRED TO**

1. Nwosu v. The State (1986) 4 NWLR (pt. 35) 348
2. Obaji v. The State (1965) NMLR 417
3. Oladiran v. The State (1986) 1 NWLR (pt 14) 75
4. Bello & Ors v. A-G of Oyo State (1986) 5 NWLR (pt 45) 828
5. Ogundiyan v. The State (1991) 3 NWLR (pt 181) 683
6. Adelumo v. The State (1988) 1 NWLR (pt 73) 683
7. Olufosoye v. The State (1986) 2 SC 325
8. Adegbesan v. The State (1986) 4 SC 28
9. Ogoala v. The State (1991) 2 NWLR (pt 175) 517
10. Bakare v. The State (1987) 3 SC 1

11. Stephen v. The State (1986) 5 NWLR (pt. 46) 981
12. R. v. Ukpong (1961) All NLR 25
13. R. v. Golder (1961) 1 WLR 1169
14. Dim v. The Queen 14 WACA 154
- 5 15. Ogbodu v. The State (1987) 2 NWLR 20
16. R. v. Nwanjoku (1937) 3 WACA 208
17. R. v. Duffy (1949) 1 All ER 932
18. Ukwuanyi v. The State (1989) 4 NWLR (pt. 114) 131
19. R. v. Okoro (1942) 16 NLR 63

10

### **STATUTES**

1. Criminal Code ss. 319, 24, 316, 283, 318, 317
2. Supreme Court Act s. 22
3. Criminal procedure Act Laws of the Federation of Nigeria 1990
- 15 Cap. 80 vol. 5 s. 179 (2)

### **LEAD JUDGMENT BY KUTIGI JSC**

20 The appellant was in the Lagos High Court charged and convicted of the offence of murder contrary to section 319 of the Criminal Code. He was sentenced to death.

At the trial the prosecution called seven witnesses to prove the  
25 charge against the appellant. The appellant testified in his own defence but called no witnesses. The facts of the case on which the prosecution relied may be summarized briefly as follows-

On or about the 29th December, 1984 the appellant was the driver  
30 of a vehicle in which one Okoro Okoro, now deceased, was a passenger. On getting near to the bridge at Moroko, the deceased wanted to get out. He gave a N5 note to the appellant and asked for his change. The deceased ran to people who were selling things nearby and asked them for a change. They had no change. He went back to the appellant and de-  
35 manded for his change. Meanwhile the appellant got down from the vehicle. A fight broke out between the deceased and the appellant. They chased one another around the vehicle until the stage when the appellant brought out pliers from the vehicle and threw it at the deceased. The pliers hit the deceased on the head. He was bleeding. He fell down and fainted.

He was taken to hospital. He died on the way before receiving any medical attention. Dr Adebayo Doherty who testified as P.W.1 conducted post mortem examination on the body of the deceased. He certified the cause of death to be due to "fracture of the skull". The pliers was admitted in evidence at the trial as EXHIBIT E. In the course of investigation the appellant made two statements under caution to PWs 4 & 7. They were respectively admitted in evidence as EXHIBITS C & D. 5

The appellant on the other hand said in his evidence that it was when he was driving his vehicle that it slightly hit the deceased as he was trying to cross the road in Maroko. The deceased then hit the windscreen of the vehicle which got cracked. A fight ensued between the two of them. That the deceased pushed him inside the lagoon and removed the ignition key of his vehicle and tried to run away. It was then that he, the appellant, took the pliers (EXH.E), chased the deceased and threw EXH. E at him in order to stop him from running away. He said he did not intend to harm or kill the deceased although EXH. E hit the deceased on the head. He never intended to hit him on the head. 15

After a review of the evidence and a consideration of the defence raised by the appellant the learned trial judge Hunponu- Wusu J, found the appellant guilty of murder and sentenced him to death as earlier stated.

Dissatisfied with the decision of the High Court, the appellant 20 appealed to the Court of Appeal, Lagos Division. Four grounds of appeal were filed. Written briefs were then filed and exchanged. In the appellants brief on page 97 of the record only one main issue and one subsidiary issue were submitted for determination as follows - .

25  
"3. *Issues For Determination:-*

*The main issue for determination is whether the defence of provocation put up by the accused was available to him in the light of the evidence before the court.*

*The subsidiary issue is whether the reaction of the accused to the provocation from the accused was disproportionate in all the circumstances of the case."* 30

The Court of Appeal in its lead judgment delivered by Kalgo J.C.A. (and concurred by Babalakin and Awogu JJ.C.A.) came to the conclusion that neither the defence of provocation or any other defence at all was on the facts, open to the appellant. The appeal was accordingly dismissed.

Still dissatisfied with the judgment of the Court of Appeal, the appellant has now further appealed to this Court. Only two grounds of

appeal were filed. Leaving out the particulars they read thus -

"Grounds of Appeal

1. *The learned Justices of the Court of Appeal erred in law and misdirected themselves on the facts when they held that the defence of provocation was not available to the appellant, whereas there was sufficient evidence to the contrary and thereby occasioned a miscarriage of justice.*
2. *The learned Justices of the Court of Appeal erred in law and misdirected themselves on the facts when they held that the defence of accident was not available to the appellant or that the act of the appellant was not covered by section 24 of the Criminal Code and thereby occasioned a miscarriage of justice."*

Counsel filed and exchanged briefs. They were adopted and relied upon. Oral submissions were also made at the hearing. In his brief Mr Ohwovoriol learned Senior Counsel for the appellant formulated two issues for determination in the appeal. They read -

1. *Whether having regard to the evidence before the court, the justices of the Court of Appeal were right in holding that the defence of provocation was not available to the appellant.*
2. *Whether the appellant is entitled to the defence of accident under section 24 of the Criminal Code having regard to the circumstances of this case."*

It was submitted that the defence of provocation was available to the appellant on the printed records. He said the case of the prosecution was replete with facts that there was a fight between the appellant and the deceased. He referred to the evidence of PWs 2, 3 & 5 and to the finding of learned trial Judge in the judgment on page 67 lines 5-23. He also referred to the lead judgment of the Court of Appeal at page 121 lines 2 - 7. It was contended that the record showed that the High Court and the Court of Appeal both rejected the defence of provocation put forward by the appellant solely on the account of lies allegedly told by the appellant. It was then submitted that the lower courts were wrong because it is settled law that an accused person cannot be convicted on the ground that he tells lies. He cited the case of Nwosu v. The State (1986) 4 NWLR (Pt.35) 348 at 349 in support. He said since the deceased met his death during the fight with the appellant, the appellant must have been provoked to have done what he did. He referred to the case of Obaji v. The State (1956) NMLR 417: Oladiran v. The State (1986) 1 NWLR (Pt.14) 75.

It was also counsel's view that on the facts and findings of the lower courts referred to above it was obvious too that the defence of accident was available to the appellant. He referred to section 24 of the Criminal Code and to the cases of *Bello & Ors v. Attorney - General of Oyo State* (1986) 5 NWLR (Pt.45) 282; *Adelumola v. The State* (1988) 1 NWLR (Pt.73) 5683; *Ogundiyan v. The State* (1991) 3 NWLR (Pt.181) 519.

It was submitted that since the pliers (EXHIBIT E) was not intended for any particular part of the deceased's body, the fact that it hit him on the head was purely accidental. If the pliers had hit him on the back, buttock or leg, he could not have died, he added. The court was urged either to acquit and discharge the appellant or reduce the offence to that of manslaughter since the appellant had no intention of killing the deceased.

Responding Mr. Rhodes-Vivour learned Director of Public Prosecution submitted that the defence of provocation of any defence known to criminal law must be premised on established facts. He said it was clear from the record that the extrajudicial statements of the appellant (Exhibits C & D) so radically conflicted with his oral testimony in court that no reasonable tribunal would believe any of them. That the trial court found as fact that the appellant was not pushed into the lagoon by the deceased as was claimed. The trial court also found as a fact that the deceased did not take the ignition key of appellant's vehicle. He said the court accepted the evidence of the prosecution that the appellant chased the deceased round the vehicle and later threw the pliers at him. Unless findings of facts are perverse an appeal court will not substitute its own views for that of the trial court. The defence of provocation was therefore not available to the appellant. No foundation was laid for it he stressed. He referred to the following cases - *Thomas Olufosoye v. The State* (1986) 2 S.C. 325; *Adegbesan v. The State* (1986) 4 S.C. 28; *Ogoala v. The State* (1991) 2 NWLR (Pt.175) 509; *Bakare v. The State* (1987) 3 S.C. 1 at 23 -24; (1987) 1 NWLR (Pt.52) p. 579.

On the defence of accident, it was submitted that since it was clear that it was the appellant's voluntary act of throwing the pliers at the deceased which hit him on the head, that caused the death of the deceased and amply supported by the evidence of the medical doctor (PW.1), the act of throwing the pliers was deliberate. The defence of accident was therefore not open to the appellant. He cited in support - *Stephen v. The State* (1986) All NLR 25 (1986) 9 NWLR (Pt.46) 981;

R. v Ukong; R. v. Golder (1961) 1 WLR 1169 at 1172.

It was submitted that the defences of provocation and accident are different, inconsistent and irreconcilable and should be rejected. We were urged to dismiss the appeal.

It is settled law that to avail himself of the defence of provocation, the appellant must have done the act for which he is charged-

- (i) in the heat of passion;
- (ii) the act must have been caused by sudden provocation;
- (iii) the act must have been committed before there was time for passion to cool; and
- (iv) the mode of resentment must be proportionate to the provocation offered.

These four requirements must co-exist before the defence can succeed. (See Obaji v. The State (1965) All NLR 282; Stephen v. The State (1986) 5 NWLR (Pt.46) 978.

I have earlier on above set out the facts of the case which the trial court accepted. The trial court in its judgment considered the issue of provocation against this background starting from page 69 of the record and concluded on page 76 thus-

*"In view of the foregoing, I am unable to agree with the defence that there was provocation.....and I so hold. So that the act of throwing EXHIBIT E was not done in the heat of passion."*

The Court of Appeal also on page 120 had this to say-

*"From the admissible facts of this case as narrated by the prosecution witnesses, I agree with the learned trial Judge in his finding that there is no defence of provocation or any defence at all available to the appellant for doing what he did."*

I agree entirely with the finding that the defence of provocation failed completely. There was amongst others no evidence of any act of provocation offered by the deceased to the appellant as required by Obaji v. The State above.

The defence of accident is being raised for the first time in this Court. It was neither raised in the trial High Court nor in the Court of Appeal. Respondent's counsel said the two defences of provocation and accident are contradictory and inconsistent and for that reason ought to be rejected. I will also reject this submission. I believe it is a principle of criminal justice that a defence raised by an accused person ought to be adequately considered however weak, foolish or unfounded such a defence may appear. It is also immaterial to the consideration of such defences whether they are contradictory or inconsistent provided they are available



on the totality of evidence before the court as in the case herein, and not merely being formulated in the address or brief of counsel (See Stephen v. The State (supra).

Having said that, I have carefully read through the entire record of proceedings and particularly the judgments of the High Court and that of the Court of Appeal and I am unable to find anywhere any of the two courts considered section 24 of the Criminal Code and came to the conclusion that it (the defence of accident) was not open to the appellant. Although ground 2 of the grounds of appeal before this Court (see above) alleged that the Court of Appeal erred in holding that the defence of accident was not available to the appellant; neither in the ground of appeal before the Court of Appeal nor in the briefs filed in respect thereof, was the defence of accident raised. The Court of Appeal therefore did not say anything in its judgment about the defence of accident. The ground of appeal therefore under normal circumstance qualified for striking out.

But being a defence which I think was equally open to the appellant on the totality of evidence before the court it will have to be considered (see Stephen v. The State) (supra). The facts are the same as narrated when I considered the defence of provocation earlier on. I do not have to repeat them all over again. Suffice it to say that both the High Court and the Court of Appeal had found as a fact that the appellant did not intend to kill the deceased nor cause him grievous harm when he threw EXHIBIT E at him during the fight. They however found that he intended to cause him harm. The appellant in fact, in his own explanation in court said he threw EXHIBIT E at the deceased in order to stop him. So I have no difficulty in agreeing with the finding of the lower courts that the appellant obviously intended to harm the deceased and he did. He threw EXHIBIT E at him. It hit him and the deceased fainted. He had stopped him. There was therefore no question of any accident. The defence of accident must therefore fail just like that of provocation before it.

What is now left to be considered is whether on the established facts before the trial judge, the appellant was properly convicted of murder as charged. It is common ground in this case that there was a fight between the appellant and the deceased when the former at a stage threw the pliers (EXHIBIT E) at the latter. It hit him on the head and this finally led to his death. The learned trial Judge said on page 67 of the judgment that -

*"The 2nd PW., 3rd PW. and 5th PW. as well as the accused himself stated that there was a fight on the 29th December, 1984*

*between the deceased and the accused person.....That aside both the prosecution and the accused agreed that the fight lasted for sometime. According to the prosecution the accused was chasing the deceased round the vehicle until the accused got exasperated, took the pliers from the dashboard of the vehicle and threw it at the deceased. His intention was to stop the deceased. Unfortunately the plier hit the deceased on the head."*

In the Court of Appeal, Kalgo, J.C.A. in his lead judgment on page 121 stated-

*"From the facts of this case, there is no doubt that the appellant by throwing the pliers at the deceased, could not have intended to kill him, but only to cause him (deceased) some injury which may not necessarily be dangerous to life."*

The above findings by the two lower courts are clearly based on the facts as disclosed by the prosecution witnesses in court. The act of the appellant and the surrounding circumstances can in no way be interpreted to mean that he intended to kill the deceased or to cause him grievous harm. It is certainly good law that a person should be taken to intend the natural and probable consequences of his action (See Philip Dim v. The Queen 14 WACA 154), but on the facts as a whole it cannot be inferred that the appellant either intended to kill or to cause grievous harm. The trial court said clearly that his intention was to stop the deceased and not to kill him and the Court of Appeal agreed saying that his intention was to cause the deceased some injury only which may not necessarily be dangerous to life and not to kill him. It is important to remember that there was no evidence that the appellant directly aimed EXH. E at the head of the deceased. This makes the task of drawing inferences even more difficult. Now, the offence of murder is defined in section 316 of the Criminal Code as follows-

"316. Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say:

- (1) If the offender intends to cause the death of the person killed, or that of some other person;
  - (2) If the offender intends to do to the person killed or to some other person some grievous harm;
- is guilty of murder."

It is therefore doubtless that the appellant could not have been properly convicted for murder in the circumstances when as found by the lower courts the appellant neither intended to cause death nor to cause the deceased grievous harm.

It must be grievous harm and not just harm that must have been intended. (See section 1 of the Criminal Code). The charge of murder was therefore not proved. 5

I agree with the Court of Appeal, as the evidence disclosed, that there is no doubt that the appellant by throwing EXH. E at the deceased must have intended to cause him harm only and not grievous harm.

In the circumstances therefore this appeal must succeed. The verdict of guilty of murder and the sentence of death passed on the appellant by the High Court and confirmed by the Court of Appeal are set aside and a verdict of manslaughter and a sentence of imprisonment for seven (7) years substituted therefore. The sentence shall run from 10th October, 1986, the date of conviction in the High Court. 15

### **KARIBI-WHYTE JSC**

I have read the judgment of my learned brother Kutigi, J.S.C. I agree with his conclusion that this appeal should be allowed. I only wish to make my contribution to the nature of the defence put up by the accused and its consideration by the Courts below. 20

The defence of provocation was the only issue canvassed in the Court below. The Court of Appeal held that on the facts neither provocation nor any other defence was available to the appellant. The Judgment of the High Court was accordingly affirmed. Appellant has come before us on appeal against the judgment. 25

Before us two grounds of appeal were filed against the judgment. First the rejection of the plea of provocation and secondly, a defence of accident relying on section 24 of the Criminal Code were filed. 30

The two issues for determination formulated by learned Counsel for appellant which are consistent with the grounds of appeal are as follows:-

- "1. *Whether having regard to the evidence before the Court, the Justices of the Court of Appeal were right in holding that the defence of provocation was not available to the appellant.* 35
2. *Whether the appellant is entitled to the defence of accident under section 24 of the Criminal Code having*

*regard to the circumstances of this case."*

The facts of the case have been very fully stated in the judgment of my brother Kutigi, J.S.C. I adopt them. The facts that there was a skirmish between appellant and the deceased. Appellant subsequently ran after the deceased who he alleged to have the ignition key of his car. On failing to  
5 reach him appellant stoned the deceased with a pliers, which struck to the head of the deceased. The deceased fell down, fainted, and subsequently died within the day.

The issue before us is whether these facts as found support the defences of provocation and accident, either together or in the alternative.  
10 In his submission, learned Counsel to the appellant contended that the defence of appellant was rejected solely on the ground that he told lies. That is not a good ground. Counsel cited and relied on *Nwosu v. The State* (1986) 4 NWLR (Pt.35) 348. He relied on provocation since there was a fight between appellant and deceased. The case of *Obaji v. The State* (1965) NMLR 417 and *Oladiran v. The State* (1986) 1 NWLR (Pt.14)  
15 75. were cited and relied upon.

Counsel also relied on the defence of accident. He cited Section 24 of the Criminal Code and the cases of *Bello & ors. v. A-G of Oyo State* (1986) 5 NWLR (Pt.45) 828, and *Adelumola v. The State* (1988) 1 NWLR.  
20 (Pt.73) 683; *Ogundiyani v. The State* (1991) 3 NWLR (Pt.181) 519. It was submitted that since the pliers (EXH.E) was not directed at any particular part of deceased's body, it was accidental that the deceased was hit on the head. We were urged either to acquit the appellant on the grounds of accident, or on provocation reduce the sentence of death to one of imprisonment on the ground that there was no intention to cause the death of the  
25 deceased.

Learned Director of Public Prosecution who appeared for the respondent submitted that the defence of provocation was not established on the facts. He argued that the Court did not find as a fact that the deceased  
30 pushed appellant into the lagoon or indeed seized the ignition key of his car. The findings of the court was based on the case of the prosecution. The findings having not been shown to be perverse, this court cannot and should not substitute its own views for those of the trial Court. The defence of provocation was therefore not established. Counsel cited *Olufosoye v. The State* (1986) 2 S.C. 325, *Adegbesan v. The State* (1986) 4 S.C. 28; *Ogoala v. The State* (1991) 2 NWLR. (Pt.175) 509; *Bakare v. The State* (1987) 3  
35 Sc. 1; (1987) 1 NWLR (Pt.52) 579.

He also urged us to reject the defence of accident. He argued that the event was caused by appellant's voluntary act of throwing the plier at

the deceased, hitting him on the head and causing his death. He cited Stephen v. The State (1986) 5 NWLR. (Pt.46) 978; R. v. Ukpong (1961) All NLR 25; R v. Golder (1961) 1 WLR 1169.

It was finally submitted that the defences are different inconsistent and irreconcilable and should be rejected.

I shall begin my consideration of the above submissions by agreeing with learned Counsel to the respondent, that the defence of provocation and accident founded on the same facts are patently inconsistent and irreconcilable. See Owie v. The State (1985) 1 NWLR (Pt.3) 470. This is because whilst the defence of provocation is based on the admission of the facts as established and merely raises justification for the act, a defence of accident is predicated on the grounds that the event was not as a result of the act intended by the accused. He neither intended nor foresaw that result arising from his act. A person who is provoked actually intended the act, and was reckless as to the consequences of his act because of this mental predisposition at the time of the doing of the act.

I shall now first dispose of the defence of accident which on the facts seem easily disposable. The defence of accident as provided by section 24 of the Criminal Code is as follows -

*"Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will, or for an event which occurs by accident."*

Very simply stated, where an event has resulted from an act or omission independent of the exercise of the will of a person, or where such event is the result of an accident, the criminal law does not hold the actor criminally responsible. An event which is neither intended nor foreseen by the actor, is said to be an accident.

The defence of accident was not raised at the trial, although the evidence disclosed the desirability for its consideration. It is also not one of the grounds of appeal in the Court below. Accordingly the Court of Appeal has not pronounced on it. In the strict sense the defence should not be a subject matter of appeal before us. Since both Courts below have found as a fact that appellant intended to cause the deceased harm by throwing the pliers at him. He intended to hit the accused and did hit him by throwing the pliers at him to, as he admitted, stop him. The result of his throwing the pliers at the deceased and hitting him was therefore not accidental. He intended to throw the pliers at the deceased, and actually did so with the intention of hitting him. The pliers he threw at the deceased hit him, and as he wished, stopped him. It may well be that the appellant did not, by

intending to stop the deceased intend to cause his death. That is a different consideration. He intended to cause harm and did cause harm, now resulting in death. The accident does not lie in the death of the deceased. This is because the aiming at the deceased with the pliers and throwing the pliers and hitting him was not accidental. That entire course of conduct cannot  
5 in any sense be regarded as accidental. A defence of accident is therefore on the facts not available to the appellant.

I shall now consider the defence of provocation relied upon by the appellant. It is common ground that there was a fight between appellant and the deceased. It is therefore crucial for appellant to establish acts which  
10 constitute provocation. The Court can only consider the defence of provocation on facts suggesting the defence. See *Ogbodu v. State* (1987) 2 NWLR (Pt.54) 20.

Section 283 of the Criminal Code has defined provocation as follows -

15       "283.    *The term "provocation", used with reference to an offence of which an assault is an element, includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another*  
20       *person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control, and to induce him to assault the person by whom the act of insult is done or offered."*

25 Thus to establish provocation, appellant must establish

- (a) a wrongful act or insult,
- (b) such as is likely to cause in the ordinary person, the loss of self-control, and
- (c) Actually caused in the accused, loss of self control, and
- 30 (d) made him commit the offence before there was time for his passion to cool.

- See *Stephen v. The State* (1986) 5 NWLR (Pt.46) 978; *R. v. Nwanjoku* (1937) 3 WACA. 208. These ingredients are similar to those enshrined in the definition offered by Devin J. in *R v. Duffy* (1949) 1 All ER. 392 .The  
35 two different conditions of provocation as is defined in law and a provocative incident are usually misunderstood and confused. A provocative incident may not constitute provocation as defined because of its evanescent nature. It is only when the above ingredients co-exist do we have defence of provocation established - See *Ukwunnenyi v. State* (1989) 4

NWLR (Pt.114) 131.

In the case before us, there is no doubt that the circumstances were sufficient to constitute provocation as defined. Appellant who was fighting with the deceased, threw the plier at the deceased at the time he was suffering from loss of self-control, and before there was time for his passion to cool. In that situation even if he intended to kill and death 5 resulted from his act, section 318 of the Criminal Code will operate to reduce the severity of the consequence - See R. V. Okoro (1942) 16 NLR. 63.

Section 318 of the Criminal Code provides -

*"When a person who unlawfully kills another in circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat or passion caused by grave and sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only."* 10

The learned trial Judge did not consider the defence of provocation which was on the evidence available to the appellant. In the Court below Kalgo, J.C.A., in the lead judgment had this to say

*"From the facts of this case, there is no doubt that the appellant by throwing the plier at the deceased, could not have intended to kill him, but only to cause him (deceased) some injury which may not necessarily be dangerous to life."* 15

The circumstances in which appellant threw pliers at the deceased ought normally to have been taken into consideration in determining whether there was provocation at the time he did the act which resulted in the death of the deceased. 25

Appellant stated that his intention for throwing the pliers at deceased was to stop him and not to kill him. There is no doubt he was reckless as to the consequences of that act. His conduct has satisfied the essential ingredients of the offence of murder. He intended to cause grievous harm, he actually caused grievous harm which has resulted in death - See section 316 of the Criminal Code. 30

Section 316 of the Criminal Code provides -

*"Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say;* 35

- (1) *If the offender intends to cause the death of the person killed, or that of some other person;*
- (2) *If the offender intends to do to the person killed or to some other person some grievous harm.*

*is guilty of murder."*

As I have already pointed out the severity of this sentence has been ameliorated by section 318 of the Criminal Code which has provided that an unlawful killing resulting from provocation will be punishable as manslaughter only.

5 In the circumstances of this case this Court in the exercise of the powers under section 22 of the Supreme Court Act will allow the defence of provocation available to appellant on the evidence. Accordingly, the appeal is allowed. The verdict of guilty of murder and sentence of death are set aside. In its place appellant is convicted of manslaughter, and a sentence of imprisonment for seven years is hereby substituted.

10 The sentence shall run from the 10th October, 1986, the date of conviction of appellant in the High Court

15 **KAWU JSC**

I have had the advantage of reading before now, the lead judgment of my learned brother, Kutigi, J.S.C. which as just been delivered. I am in complete agreement with his reasoning and his conclusion that the appeal has merit and should be allowed.

20 On the evidence adduced it is also my view that the appellant did not intend to kill the deceased and accordingly the offence of murder as defined in Section 316 of the Criminal Code had not been proved against the appellant. The appellant, by throwing a pliers at the deceased must have intended to cause him harm but not grievous harm. I will also allow the appeal and set aside the verdict of murder and the sentence of death passed on the appellant by the trial court and affirmed by the Court of Appeal. I will, instead substitute a verdict of manslaughter and a sentence of seven years imprisonment.

30

**OMO JSC**

I have been privileged to read in draft the judgment of my learned brother KUTIGI, J.S.C., and I agree with him that this appeal succeeds.

35 Even though the defences of provocation and accident do not avail the appellant, his conviction for murder cannot stand because all the ingredients of that offence as set out in Section 316 of the Criminal Code were not established. The required mens rea which will suffice to establish the offence of murder are either an intention to cause death or intention to do



some grievous harm. In the instant case both the learned trial Judge and the Court of Appeal (per Kalgo, J.C.A.) made findings on the issue which excluded the existence of the necessary mens rea. Whilst the former found that the appellant threw the offending instrument - the pliers, with the intention of stopping the deceased but it unfortunately hit him on the head, the latter found that the appellant "could not have intended to kill him (my 5 note: the deceased), but only to cause him some injury which may not necessarily be dangerous to life." The conviction of murder must therefore be set aside.

Section 317 of the Criminal Code however provides that-

*"A person who unlawfully kills another in such 10  
circumstances as not to constitute murder is guilty of  
manslaughter"*

The killing so contemplated must be neither authorised nor justified or ex-  
cused by law. Such is the killing of the deceased by the appellant in this  
case. In the circumstances therefore the appellant, by application of sec- 15  
tion 179(2) of the Criminal Procedure Act, can be convicted of the lesser  
offence of manslaughter which his killing fits. I will therefore substitute for  
the offence of murder, for which he was wrongly convicted, a conviction for  
the offence of manslaughter. I also set aside the sentence of death imposed  
on the appellant and substitute therefore a term of imprisonment for 7 20  
years, effective from 10th October, 1986, the date of his conviction in the  
High Court.

---

### OGWUEGBU JSC

25

I had a preview of the judgment which has just been delivered by  
my learned brother Kutigi, J.S.C. and I am in complete agreement with his  
reasoning and conclusion.

Since the court below found from the facts of the case that the 30  
appellant could not have intended to kill the deceased but only to cause  
him (deceased) some injury which may not necessarily be dangerous to life,  
the offence of murder as defined in S.316 of the Criminal Code had not  
been proved.

The appellant should have been convicted of manslaughter. Where 35  
an offence charged and facts are proved which reduce it to a lesser offence,  
the accused may be convicted of the lesser offence although he was not  
charged with it. See S.179(2) of the Criminal Procedure Act, Cap. 80 Vol.  
5 Laws of the Federation of Nigeria, 1990.

In the circumstance, the appeal succeeds. The conviction and sentence of death passed on the appellant are hereby set aside. A conviction for manslaughter is hereby substituted. The appellant is sentenced to seven years imprisonment effective from the date of conviction which is 10th October, 1986. Appeal allowed.

5

10

15

20

25

30

35