

SUPREME COURT OF NIGERIA
5TH MARCH, 1993. SC.85/1992
CORAM:- S. M. A. BELGORE, A. B. WALI, I. L. KUTIGI,
E. O. OGWUEGBU, S. U. MOHAMMED, JJSC

AUGUSTINE DURU APPELLANT

AND

THE STATE..... RESPONDENT

CRIMINAL LAW - Murder - what the prosecution must prove -
whether proved or not.

CRIMINAL LAW - Murder - whether defence of provocation,
accident, self defence avails or not

EVIDENCE - Murder-burden of proof - how to be discharged
- whether court speculated on the evidence.

FACTS

The Appellant was convicted and sentenced to death for murder of his brother by the High Court of Owerri. At the trial he raised defences of provocation, accident and self-defence. Five witnesses including the mother of both the Appellant and the deceased (PW1) testified for the prosecution while the Appellant testified for his own defence and called no witnesses. The trial Judge found him guilty as charged and sentenced him to death by hanging.

In arriving at his decision the trial Judge relied heavily on the evidence of PW1, the mother of both the Appellant and the deceased who stated in her evidence that there was no fight between the Appellant and the Deceased before the Appellant shot and murdered the Deceased with a gun.

The appellant appealed to the court of Appeal against his conviction and sentence. At the hearing of the Appeal, Counsel for the Appellant submitted that the Defence of provocation and self - defence availed the Appellant and the trial Judge should have held so. He further submitted that the trial Judge speculated on the evidence and made presumptions not supported by it. The court of Appeal dismissed his appeal, and he

36 DURU V. THE STATE (1993) 3 KLR 35; (1993) 3 NWLR

further appealed to the Supreme Court against the decision of the two lower Courts.

HELD (unanimously dismissing the appeal)

1. In any criminal trial, the burden is on the prosecution to prove its case beyond reasonable doubt. As this is a case of murder, the death, its cause, and the person murdered must be proved by the prosecution as required by law. The evidence of the pathologist as to the cause of death and the identification of the body is sufficient proof of the death of the deceased (P. 42 L. 10)
2. In the case at hand there was no evidence that the deceased was carrying any offensive weapon at the time he was shot to death in cold blood by the Appellant. There was nothing in the evidence considered and accepted by the trial Judge that could avail the Appellant of the defence of self-defence. (P. 44 L. 13)
3. Where a person who was attacked used a greater degree of force than was necessary in the circumstances and thereby caused death of his assailant, the trial Judge was entitled after considering the evidence adduced, to reject the issue of self-defence raised by the accused and convict him of murder. (P. 44 L. 17)
4. The learned trial judge applied the correct test enunciated in *R v. Duffy* (1949) 1 ALL ER 932 and *R. V. Afonja* (1955) 15 WACA 26 in considering the elements of provocation which would cause in any reasonable person, a sudden and temporary loss of self-control rendering the accused so subject to passion as to make him for the moment not master of his mind. These elements of provocation did not exist in the case at hand and as such the Court of Appeal's finding is subscribed to. (P. 45 L. 25)

5. There was no speculation on the evidence as contended by the learned Counsel for the Appellant. The evidence adduced was painstakingly considered by the learned trial Judge and he made proper findings supportable by that evidence in failing to believe that the defence of accident avails the Appellant. (P. 47 L. 1)

REPRESENTATION:

Chief Funso Akinyosoye with Lanre Abolaji and Miss M. Adewole, for the Appellant.

Dr. O.I. Ugbor, D.D.P.P, Imo State for the Respondent.

CASES REFERRED TO

1. R. v. Chisom (1963) 47 CR App. RPT. 150
2. Adeyinka Albert Laiye v. the State (1985) 2 NSCC 1960
3. Kingsley Ogbor v. the State (1990) 3 NWLR 502
4. R. v. Igwe 4 W.A.C.A. 112
5. Stephen v. The State (1986) 2 NSCC 1416
6. Onwe v. The State (1975) 9-11 S.C. 23
7. The State v. Aibangbee (1988) 3 NWLR (pt 84) 548
8. Obaji v. The State (1965) 14 NNLR 47
9. R. v. Maye Nungu (1963) 14 WACA 379
10. R v. Isaac Pennington Black (1942) 8 WACA 118
11. Christopher Onubuogu v. the State (1974) 9 S.C. 1
12. Agwu & 2 ors v. The State (1965) NMLR 18
13. David Aganmonyi v. A.G. of Bendel State (1987) 1 S.C.N.J 33
14. Iwuanyanwu v. The State (1964) 1 ALL N.L.R. 413
15. Okonji v. The State (1987) 3 SCNJ 38
16. Laoye v. The State (1985) 2 NWLR (pt 10) 832
17. R. v. Duffy (1949) 1 ALL E.R. 932
18. R. v. Afonja (1955) 15 WACA 26
19. Ogbodu v. The State (1987) 2 NWLR (pt. 45) 20
20. R. v. Upkong (1961) ALL N.L.R. 25
21. Stephen v. The State (1986) 3 NWLR 976
22. Adepoju Ayanwale & ors v. Babalola Atanda & anor (1988) 1 SCNJ
23. N.M. Ali & anor v. The State (1988) 1 SCNJ 17
24. Chukwu v. The State (1992) 7 LRCN 83

STATUTES REFERRED TO

1. Criminal Code ss. 319(1), 318, 286 & 287.

5 **LEAD JUDGMENT BY WALI JSC**

The appellant was at the High Court of Owerri Judicial Division of Imo State of Nigeria convicted and sentenced to death for the murder of Ignatius Duru, contrary to section 319 (1) of the Criminal Code.

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The facts of the prosecution's case which was accepted by the learned trial Judge are as narrated by P.W.1 in her evidence. P.W.1 is the mother of both the appellant and the deceased. She testified before the trial court as follows-

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20 *"My name is Elizabeth Duru. I live at Umuobasi Ikembara. I am a house wife. I know the accused person. The accused is my son. I know Ignatius Duru. He was also my son. He is now deceased. Before my husband died during the Civil War, he showed me a piece of farmland which the accused wanted to take away from me after my husband's death. One day about 3 years ago, the accused pursued me with his gun and I ran into the deceased's*
 25 *house. He pursued me in his effort to take the said farmland from me. The deceased asked the accused why he the accused wanted to kill me, (the mother) with a gun. This question was put to the accused by the deceased as the latter was escorting me back to the house. It was at this juncture that the accused shot the*
 30 *deceased in the chest. The deceased then moved some distance and fell down and died on the spot. Other two small children were around. Their names are Nkiru (the daughter of the deceased), and Chinyere Duru (the daughter of the accused). I have to add that Eberechukwu Duru the son of the accused was also there.*
 35 *Nkiru was then about 6 years old. She is present in court. When the deceased fell I started to cry. I am over 70 years of age. Apart from the accused and the deceased I have three other children. The accused was older than the deceased who was my last issue. He was about 30 years of age when he was shot dead. My other*

three children I referred to were not at home when this incident happened. The matter was reported to the police.

After shooting the deceased the accused advised his children to return to their maternal grandfather. He then disappeared. After shooting the deceased the accused hid the gun in the bush, but later surrendered it to the police. The police has the gun up till now, The police came to the scene and saw the body of the deceased, and took the same to the General Hospital.

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In addition to the evidence of P.W.1 four other witnesses testified for the prosecution.

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In his own version of the story which he narrated in his evidence via voice, the appellant said on his return home from his day's work at about 7 p.m on the fateful day, he met one Paul Nwaneku, a maternal relation who told him that his (the appellant's mother) had a complaint against him. He then went to his mother to find out what the complaint was. It was then, according to the appellant that his mother (P.W.1) started shouting abuses on him, despite the fact that he was mourning the death of his wife. The appellant said P.W.1 proceeded to the house of the deceased which was about 130 metres away from his house where he was living with P.W.1. He said all along, the relationship between the deceased and him had been cordial until the former's name was associated with a gang of suspected armed robbers. He blamed P.W.1 for telling the deceased that it was him (the appellant) that was responsible for spreading such rumours against the deceased.

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The appellant said P.W.1 was later accompanied to her room by the deceased who threatened him that should he misbehave again, he would kill him like his wife. He said the deceased then hit him with his fist on the chest, throwing him down on the ground. He also gripped him by the throat and in an effort to free himself from the deceased, the appellant said he kicked him with his foot. He then suddenly reached for his loaded gun that was inside his room, used it in hitting the deceased, but could not

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say whether in the course of the scuffle, the loaded gun exploded resulting in the deceased's death.

5 In all, five witnesses testified in proof of the prosecution's case while the appellant testified for his own defence. In a well considered judgment, the learned trial Judge found the appellant guilty as charged and sentenced him to death by hanging. The appellant's appeal to the Court of Appeal against conviction was also dismissed and the conviction and sentence as
10 pronounced by the trial court were affirmed. He has now appealed to this court.

Both the appellant and the respondent filed and exchanged briefs of arguments.

15 In the brief filed by the appellant the following three issues were formulated for consideration and determination by this court-

1. Whether the concurrent findings of the courts below that the
20 defence of provocation and/or self defence was not available to the appellant, were not perverse having regard to the prevailing circumstances of this case.
2. Whether in all circumstances of this case a defence of accident is available to the appellant.
3. Whether the learned trial Judge has any right to speculate on the
25 evidence not before the court.

The respondent also formulated three issues in his brief which are identical in substance to those formulated by the appellant.

30 The substance of the issues raised is mainly provocation, self-defence, accident and speculation on the evidence. In his submission on self defence, learned counsel for the appellant referred to the cases of R. v. Chisholm (1963) 47 Cr. App. Rpt. 150. Adeyinka Albert Laoye v. The State (1985) 2 NWLR (Pt.10) 832; (1985) 2 NSCC 1960, Kingsley Ogbor
35 v. State (1990) 3 NWLR (Pt.139) 484 and R. v. Igwe (1938) 4 WACA 117 at 118 and submitted that the appellant reacted in self defence as a result of the deceased's threat to kill him. He urged this court to hold that the appellant acted in self defence and that therefore robbed him automatically of the necessary mens rea of the offence he was charged with.

On provocation, learned counsel referred to Section 318 of the Criminal Code and submitted that the three conditions laid down in that section to enable him benefit from that defence were met. He said there were sufficient facts in support of this defence. It was the contention of learned counsel that the degree of force used by the appellant against the deceased 5 was proportionate having regard to the facts of the case. He referred to and relied on *Stephen v. The State* (1986) 5 NWLR (Pt.46) 978; (1986) 2 NSCC 1416 at 1422. He also submitted that if the learned trial Judge had cared to consider section 286 in conjunction with Section 287 of the Criminal Code, he would have come to the conclusion that the defence of provocation 10 was available to the appellant.

On the issue of speculation, learned counsel submitted that the learned trial Judge speculated on the evidence, made presumptions not 15 supported by it. He particularly referred to the evidence of PW.1 and submitted that such evidence could not reasonably be said to be evidence of premeditation since the appellant did not go to the house of the deceased with the gun, but rather it was the deceased that came to his (appellant's) 20 house and got him humiliated. He referred to *Onwe v. The State* (1975) 9-11 S.C. 23 at 31 and *The State v. Aibangbee* (1988) 3 NWLR (Pt.84) 548 and urged this court to allow the appeal and set the appellant free.

In his own submissions to the issues of defence of provocation and 25 self defence raised by the appellant, the learned counsel for the respondent contended that the evidence considered and accepted by the learned trial Judge could not support such defences. He submitted that both the trial court and the Court of Appeal rightly considered these defences and rejected them. He cited *Obaji v. The State* (1965) NMLR 417 in support. He 30 also submitted that the degree or amount of force used by the appellant bore no reasonable relation to the provocation received if any, as the use of a gun shot in response to the verbal attack was by no stretch of imagination reasonably proportionate. He said the shooting of the deceased by the gun 35 was deliberate and by so doing, he intended the natural consequences of his action - *Maye Nungu v. R* (1953) 14 WACA 379; *R. v. Isaac Pennington Blake* (1942) 8 WACA 118 and *Stephen v. The State* (supra). Learned counsel for the respondent also referred to section 287 of the Criminal Code and submitted that with the appellant's extra-judicial statement -

Exhibit A. The defence of either accident or self defence could not avail him. He finally submitted that the learned trial Judge properly considered the evidence and that there was no speculation in his findings. He urged the court to dismiss the appeal and to confirm the judgment of the trial court as affirmed by the Court of Appeal.

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In any criminal trial, the burden is on the prosecution to prove its case beyond reasonable doubt. As this is a case of murder, the death, its cause and the person murdered must be proved by the prosecution as required by law. There was the evidence by P. W.4, the pathologist, that on 29th March 1987 he performed a post mortem examination on the body of Ignatius Duru, Before doing so, the body was identified to him as that of 15 Ignatius Duru, by Samuel Duru, P.W.5. P.W.4 gave the approximate date of death as 28-03-78 and identified the wound on the corpse and the cause of death as follows-

20 *"Multiple bullet wounds in the chest. The cause of death was due to massive internal haemorrhage arising from the bullet wounds inflicted on chest. The wounds were not self-inflicted."*

This is sufficient proof of the death of the deceased. It was not in dispute 25 that the deceased died as a result of wounds received from a gun shot. In his evidence, the appellant admitted owning the loaded gun at the time of the incident but denied in his evidence before the court shooting the deceased with it while in Exhibit A, his extra judicial statement to the police, which was accepted by the learned trial Judge, he admitted shooting the 30 deceased in self defence.

In his judgment, the learned trial Judge considered the evidence of a fight between the appellant and the deceased and in doing so, he examined 35 the evidence of P.W.3. the daughter of the appellant who said there was a fight. He compared her earlier statement to the police, Exhibit D and the evidence she gave in court and found her to be an unreliable witness having regard to the material contradictions therein. He chose to ignore it, supporting his conclusion by the decisions in Christopher Onubogu v. The

State (1974) 9 S.C. 1 and Agwu & 2 ors v. The State (1965) NMLR 18. I entirely agree with this conclusion of the learned trial Judge.

On self defence, the learned trial Judge after examining the evidence, came to the following conclusions - 5

"Section 287 of the Criminal Code provides for self-defence against provoked assault. It states as follows- 'When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults him with such violence as to cause reasonable apprehension of death or grievous harm and to induce him to believe on reasonable grounds, that it is necessary for his preservation from death or grievous harm to use force in self defence, he is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous harm'. 10 15

The second limb of the section makes the section inapplicable where the person resisting the initial assault uses force which causes death or grievous harm first began the assault with intent to kill or do grievous harm to some person 20

According to the evidence before me which I believe, the accused threatened P.W.1 with Exhibit 'B', and in my view the deceased was justified in going to the house of the accused to find out why he the accused wanted to kill P.W.1 -their mother. Further more, there is no evidence before me as to the nature of the injury sustained by the accused when he was slapped in the face and gripped in the throat. In fact I am of the view that no such injuries were inflicted on him by the deceased. Even if I am wrong in reaching this conclusion, I hold that any such injuries received by him were no justification for him to resort to the use of gun on the deceased. Consequently in my opinion the accused cannot avail himself of the defence of self-defence in this case." 25 30 35

In affirming this finding of the learned trial Judge, the Court of Appeal, not

only re-examined the evidence adduced but also examined decided cases related to that and concluded -

5 *"The learned trial Judge in treating self-defence observed that the accused did not run into his house to lock the door against the deceased. The accused did not retreat from further combat, he went to arm himself spoiling for a tragic battle, although the deceased had no weapon to fight. In such circumstances, the accused cannot avail himself of the defence of self-defence."*

See Stephen v. The State (1986) 5 NWLR (Pt.46) 978 and R. v. Isaac Pennington Blake (1942) 8 WACA 118.

In the case on hand, there was no evidence that the deceased was carrying any offensive weapon at the time he was shot to his death in cold blood by the appellant. There was nothing in the evidence considered and accepted by the learned trial Judge that could avail the appellant of the defence of self-defence. Where a person who was attacked used a greater degree of force than was necessary in the circumstances and thereby caused the death of his assailant, the learned trial Judge was entitled, after considering all the evidence adduced, to reject the issue of self-defence raised by the accused and to convict him of murder. The test under section 287 of the Criminal Code is objective. See David Aganmonyi v. A.-G. of Bendel State (1987) 1 NWLR (Pt.47) 26; (1987) 1 S.C.N.J. 33. Obaji v. The State (1965) NMLR 417 and Maye Nungu v. R (1953) 14 WACA 379. Iwuanyanwu v. State (1964) 1 All NLR 413, Okonji v. State (1987) 1 NWLR (pt.52) 659; (1987) 3 S.C.N.J. 38 and Laoye v. State (1985) 2 NWLR (Pt.10) 832.

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On the issue of provocation, the learned trial Judge considered the evidence adduced and accepted the evidence of P.W.1, the mother of both the deceased and the appellant as to how the incident happened. P.W.1 was categorical in her evidence that there was no fight between the deceased and the appellant before the latter shot and murdered the former with Exhibit "B" which was later recovered by P.W.2, the police sergeant that investigated the case. P.W.2 said

35 *"The accused took me to the bush where he hid the gun along Ikembara Road. There I collected it."*

The learned trial Judge, after considering section 318 of the Criminal Code applied the appropriate test that -

The learned trial Judge did not also lose sight in considering the defence of accident and rejecting it where he said -

5 *"Let me first of all dispose of what appeared to be the defence of accident being put forward by the accused when he gave evidence. He told me at one stage that he hit the deceased with Exhibit 'B' but was unable to remember what part of Exhibit 'B' hit him nor was he able to remember whether the bullet went off. Later he said:*
 10 *I did not shoot at him but I hit him with it; then the deceased pulled the gun towards himself when my fingers touched the trigger and the gun exploded and I ran away; but I did not know that the bullet got him as I was running away.' I must say that I do not believe this piece of evidence. I reject it. I find as a fact that the accused willfully fixed Exhibit 'B' at the*
 15 *deceased. I therefore reject the defence of accident. Exhibit 'A' was quite in support of this finding."*

This finding was affirmed by the Court of Appeal. In doing so, it re-examined the appellant's statement - Exhibit A and his evidence-in-chief. It applied the ratio decidendi in R.v. Ukpong (1961) 1 SCNLR 53; (1961) All NLR 25 and concluded

25 *"While the accused admitted in his statement Exhibit 'A' that he shot the deceased because of a fight, in his testimony he said the deceased pulled the trigger and the gun accidentally exploded. The learned trial Judge was justified in disbelieving the evidence at the trial."*
 30 *See Stephen v. The State (1986) 3 NWLR (Pt.46) 978 particularly the observation of Karibi- Whyte, JSC. at 988.*

Having read the record myself, I find no speculation on the evidence as contended by learned counsel for the appellant. The evidence adduced was painstakingly considered by the learned trial Judge and he made proper findings supportable by that evidence. See Adepoju Ayanwale & ors v. Babalola Atanda & anor (1988) 1 NWLR (Pt.68) 22, (1988) 1 SCNJ 1. Ogbodu v. State (1987) 2 NWLR (Pt.54) 20 and N.M. Ali & anor v. The State (1988) 1 NWLR (Pt.68) 1; (1988) 1 SCNJ 17. No extraneous matters were considered by the trial Judge in making his findings.

On the whole, I find no substance in this appeal, the defences of

provocation, self-defence and accident raised by the appellant having all been considered and failed. See *Chukwu v. The State* (1992) 1 NWLR (Pt.217) 253; (1992) 7 LRCN 83. It is accordingly dismissed. The decision of the trial court which was affirmed by the Court of Appeal is hereby further confirmed.

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BELGORE J.SC

I read in advance the judgment read by my learned brother Wali, J.S.C. with which I am in full agreement. For the reasons advanced in the judgment which I adopt as mine, I also dismiss this appeal.

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KUTIGI JSC

I have had the opportunity of reading in draft the judgment of my learned brother Wali, J.S.C. just delivered. I agree with his reasoning and conclusions. The appeal is accordingly dismissed.

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OGWUEGBU JSC

The Supreme Court was unable to make the judgment of the Hon. Justice Emanuel Obioma Ogwuegbu, J.S.C. available for publication because the Hon. Justice was involved in a motor accident which occurred on Tuesday, 9th February, 1993.

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We wish the Hon. Justice a very quick recovery.

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S. U. MOHAMMED JSC also agreed with the lead judgment.

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