

**SUPREME COURT OF NIGERIA**  
16TH DECEMBER, 1994. SC. 105/1992  
**CORAM:- M. L. UWAIS, A. B. WALL, M. E. OGUNDARE,**  
**U. MOHAMMED, Y. O. ADIO, JJSC.**

INYANG ETIM AKPAN ..... APPELLANT  
(Alias Mbom Etim Akpan)

V

THE STATE ..... RESPONDENT

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**CRIMINAL LAW** - *Self defence - Murder - Where accused person's defensive measures are out of proportion to the danger he faced - whether self defence avails.*

**CRIMINAL LAW** - *Provocation - Existence of time for reflection Infliction of injury that is out of proportion - Whether plea of provocation is available to the accused.*

**CRIMINAL PROCEDURE** - *Murder - Onus of proof beyond reasonable doubt - Discharged by the prosecution - Defences of provocation and self defence held not available to accused.*

**EVIDENCE** - *Accused person's 1st statement to the Police - Use of part of its contents by the trial Judge - Where same conclusion would have been reached without reference to the said statement - Whether miscarriage of justice is occasioned.*

**EVIDENCE** - *Murder - Burden of proof of cause of death -And intention to inflict grievous bodily harm - Whether discharged by the prosecution.*

**EVIDENCE** - *Proof beyond reasonable doubt - Discharge of this burden by the prosecution - Does not imply calling every witness.*

**MURDER** - *Shooting another person with a gun - Death on the Spot - Whether accused has knowledge that death or previous bodily harm was the probable consequence.*

**MURDER** - *Cause of death - Attack with a lethal weapon leading to death on the spot - No need to prove cause of death - As it can properly be inferred that the inflicted wound caused the death.*

### **FACTS**

The deceased was one of those to be initiated as new members of Ekpo Masquerade Society in Uyo. The Appellant was the assistant head of Ekpo Society. He had a matchet and a cow horn at the PW2's house. The deceased came to that house, questioned why the appellant hit him with the cow horn, took the matchet and the cow horn and ran away. Subsequently, the Appellant arrived at the village square where the initiation ceremony was to take place, met many people including the PW1 and the deceased already assembled for the ceremony. According to PW1, without any incident between Appellant and the deceased or any other person, the Appellant brought out a gun from his pocket and shot the deceased who died on the spot.

The Appellant was charged before the trial High Court with murder. The trial court rejected the Appellant's story that the deceased and PW1 chased him and that the deceased flung a matchet twice over the Appellant's face. The defences of provocation and self-defence were canvassed by Appellant's counsel. The trial court found the Appellant guilty as charged and sentenced him to death. Appellant's appeal to the Court of Appeal was dismissed although that court found that the Appellant's 1st statement to the Police was not properly in evidence before the trial court. Being dissatisfied, the Appellant has now appealed to the Supreme Court to determine whether the defences of provocation and self-defence were available to the Appellant.

**HELD** (Unanimously dismissing the appeal per lead judgment of **ADIO JSC**)

### ***Proof of cause of death***

1. In view of the foregoing evidence of the P.W.1, the finding of the learned trial Judge was correct and the court below was justified in affirming the findings. The onus is on the prosecution to prove that it was the act of the

accused that caused the death of the deceased. The finding made by the learned trial judge stated above, which was affirmed by the court below, showed that the prosecution discharged the aforesaid burden. Also, the burden of proving that there was an intention to inflict grievous bodily harm on the deceased had been discharged by the prosecution.

***Probable consequence of shooting another person with a gun***

2. If, as in this case, a person shot another person with a gun and the person shot with the gun died on the spot, the person who fired the shot with a gun cannot properly contend that he did not know that the person he shot would die. This is because, in law, a man intends the natural consequences of his conduct. The act of the appellant was intentional with knowledge that death or grievous bodily harm was its probable consequence. (P. 59 L 27)

***Prosecution need not call every witness***

3. In any case, it is not necessary for the prosecution, in order to discharge the burden of proving its case beyond reasonable doubt, to call every available piece of evidence or number of witnesses. It is sufficient if enough evidence is adduced to discharge the burden. A (P. 60 L 12)

***Murder - When proof of cause of death is unnecessary***

4. There was also complaint by the appellant about alleged irregularities in the conduct of the post-mortem examination carried out on the corpse of the deceased. The correct legal position is that where a person attacked another person with a lethal weapon and the other person died on the spot, it is not necessary to prove the cause of death. It can properly be inferred that the wound inflicted on the deceased caused the death. (P. 60 L 17)

***When self defence does not avail***

5. The court below was justified in upholding the decision of the trial court that the defence of self-defence did not avail the appellant. In law, the defence of self-defence is not available to an accused if his 1st defensive measures to protect himself are out of all proportion to the danger which he faced (P. 63 L 24)

***Whether the defence of provocation avails the accused***

6. In the present case, if the-alleged slapping of the appellant by the deceased or the taking of the matchet and the cow horn was sufficient provocation, the  
5 fact that it was later in the day when the appellant came to the square, where the initiation ceremony was to take place, that he shot the deceased with a gun destroyed the excuse of sudden provocation. The appellant had time for reflection. Further, if, as in this case, the injury inflicted for a slight transgression is outrageous and out of proportion, the plea of provocation will not be avail-  
10 able to the accused. (P. 66 L 21)

***Discharge of onus of proof beyond reasonable doubt***

7. The prosecution proved beyond reasonable doubt that the appellant was guilty of the charge preferred against him, that is, murder. The defences of  
15 provocation and self-defence were not, in the circumstances, available to him and there was no irregularity in the proceedings. Consequently, it could not be said that there had been a want of fair trial. (P. 67 L 35)

***Reference to statement of accused - No miscarriage of justice***

20 8. In the circumstances in this case, the use made by the learned trial Judge, of parts of the contents of the first statement dated 19/7/86, made by the appellant to the police did not cause any miscarriage of justice because on the totality of the evidence before him he would have, without making use of parts of the aforesaid first statement, come to the same conclusion that the appel-  
25 lant killed the deceased and that the defences of self-defence and provocation were not available to the appellant. (P 70 L 51)

**NOTABLE POINTS OF INTEREST**

30 **ADIO.JSC**

***1. Duty of appellate court to exclude inadmissible evidence***

An appellate court has a duty to exclude inadmissible evidence wrongly admitted and to deal with the case on the basis of the remaining legally admitted  
35 evidence. Further, it is not enough, for the purpose of seeking a reversal of a judgment, merely to show that evidence was wrongfully admitted. An appel-

lant making the compliant has a duty to show that without such evidence the decision would have been otherwise. (P. 58 L 27)

**2. *Weight of evidence is not subject to number of witnesses called*** 5

It is sufficient to state, in this connection, that it is not the number of witnesses that is conclusive on the weight to be attached to the evidence led on a particular point. Except where it is otherwise provided by statute, there is no rule of law or practice stipulating that any particular number of witnesses should be called in proof of any case and the evidence of one credible witness 10 accepted and believed by the trial court is enough. (P. 60 L. 5)

**3. *Reliance on self defence - What accused must show***

In order to rely on the defence of self-defence, an accused has to show by evidence that his life was so much endangered by the act of the deceased that 15 the only means of escape from imminent death was to kill the deceased, see Nwede v. The State, (1985)12 S.C. 32 at page 36. Even if the allegation of the appellant that the deceased waved the matchet twice at the village square at the appellant had been accepted, the defence of self-defence could still not be 20 sustained at it was also the allegation of the appellant that the deceased was far away from the appellant when he did so. (P. 63 L 5)

**OGUNDARE JSC**

**4. *Whether trial court used a document not in evidence*** 25

The procedure of (a) admitting in evidence the statement made by the accused person to a police officer through another police Officer and (b) admitting two different statements in evidence as one exhibit may look rather odd and irregular but that is not the same thing as saying that the learned trial Judge made use of a document not in evidence before him. Had the court 30 below carefully examined the judgment and the documents forwarded to it from the trial court, the learned justices would not have said that the statement made on 19/7/86 was not before them. (P. 80 L 15)

**MOHAMMED JSC**

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**5. Provocation - Reasonable man’s test clarified**

A person slapped could not use a deadly weapon like a gun in retaliation against his assailant. Whatever is the case the test to be applied is that of the effect of the provocation on a reasonable man so that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did. (P. 82 L 21)

**REPRESENTATION**

10 Appellant absent and unrepresented  
Miss A.B. Usen Asst. Director of Civil Litigation, Akwa Ibom State for the Respondent.

**CASES REFERRED TO**

- 15 Akinfe v. The State, (1988) 3 N.W.L.R. (part 85) 729
- Ogba v. The State, (1992) 2 N.W.L.R. (part 222) 164
- Ayanwale v. Atanda (1988) 1 N.W.L.R. (Pt. 68) 22
- Onyenankeya v. The State (1964) 1 All N.L.R. 151
- Irek v. The State (1976) 4 S.C. 65 at page 67
- 20 Bakuri v. The State (1968) N.M.L.R. 163
- Kwuzoe v. The State, (1988) 1 N.W.L.R. (pt. 72) 529
- Akpan v. The State, (1992) 6 N.W.L.R. (pt. 243) 439
- Biruwa v. The State (1992) 1 N.W.L.R. (pt. 220) 663
- Green v. R. (1955) 15 W.A.C.A. 73
- 25 Akpakpan v. R. (1956) F.S.C. 1
- Mohammed v. Kano Native Authority (1968) 1 All NLR 424, 426.

**STATUE REFERRED TO**

Criminal Code Law, Cap. 31 s. 319 (1), 286

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**LEAD JUDGMENT BY ADIO JSC**

The appellant, Nyang Etim Akpan, alias Mbom Etim Akpan, was charged with the murder of one Enefiok Mbom Edet under section 319(1) of the Criminal Code Law, Cap. 31 of the Laws of the Cross River State of Nigeria, applicable in Akwa Ibom State of Nigeria. The evidence led by the prosecution was that on the 19th day of July, 1986, the deceased was one of those to be initiated as new members of Ekpo Masquerade Society in Mbiaya Uman, Uyo. The appel-

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lant (who was the assistant head of Ekpo Society) had a matchet in his armpit and held a cow horn and wooden gong in one hand. He walked to the house of P.W. 2. While there, the deceased too came to the house of P.W.2 and asked the appellant why he hit him (deceased) with the cow horn. The appellant said that it was Patrick Okon that he wanted to hit with the cow horn and not the deceased. The next thing that happened was that the deceased took the Matchet and the cow horn from the appellant and ran towards the direction of his (deceased's) house which was on the way to the village square where the ceremony was to take place. In response to the plea of the P.W.2, the appellant did not run after the deceased to take the Matchet and the cow horn from him.

Subsequently, the appellant arrived at the village square where the initiation ceremony was to take place and where he met many people, including the P.W.1 and the deceased, who had assembled there for the ceremony. According to the evidence given by the P.W.1, the appellant wore a big gown and without any incident, at that place, between him (appellant) and the deceased or any other person the appellant brought a gun out from his pocket and shot the deceased who died on the spot. Thereafter, the appellant took his Matchet and the cow horn, which were with the deceased, and left the place.

At the trial of the appellant before the learned trial Judge the defences of provocation and self defence were canvassed by the appellant's counsel. The learned trial Judge gave consideration to the evidence before him and the submissions of the learned counsel for the parties. He found the appellant guilty of the charge. He was convicted and sentenced to death by the learned trial Judge. The learned trial Judge expressed the view that it was common ground that the appellant shot and killed the deceased at the village square on the day in question. He held that the evidence of the appellant that the deceased and the P.W.1 chased him and that the deceased flung a matchet twice over his (appellant's) face was an after-thought and he rejected it. In his view, the evidence of the medical doctor who performed the post-mortem examination on the corpse of the deceased was absolutely unnecessary. Dissatisfied with the judgment, the appellant lodged an appeal against it to the Court of Appeal.

The Court of Appeal dismissed the appellant's appeal. The appellant made two statements to the Police, one was made on 19-7-86 and the second

one was made on 21-7-86. The statement made on 19-7-86 was according to the court below, not tendered throughout the proceedings. The learned trial Judge felt that it was tendered and admitted and therefore considered its contents along with other evidence. In the case of the one which was made on 21-7-86, the court cautioned on the applicability of the principle enunciated in *Oladejo v. The State*, (1987) 3 NWLR (Pt.61) 419 at page 427 on the ground that the appellant's evidence in the court contradicted his statement to the police as the Court of Appeal found that, in any case, the oral evidence of the appellant in court did not contradict his written statement to the police and that the principle in *Oladejo's* case did not apply. The court expressed the view that the learned trial Judge was right in rejecting the defences of provocation and self-defence. Dissatisfied with the judgment of the Court of Appeal, the appellant lodged an appeal against it to this court.

In accordance with the rules of this court, the parties duly filed and exchanged briefs. The appellant filed an appellant's brief and the respondent filed a respondent's brief. Three issues for determination were identified in the appellant's brief while two were identified for determination in the respondent's brief. The three issues for determination identified in the appellant's brief are sufficient for the determination of this appeal. They are as follows:-

*"1. Whether there has been a want of fair trial.*

*2. Whether the Court of Appeal was justified in upholding the decision of the trial court that the defence of self-defence did not avail the appellant.*

*3. Whether the Court of Appeal, was justified in upholding the decision of the trial court that the defence of provocation had also failed".*

No doubt, two of the main issues in this case are whether the defence of self-defence was available to the appellant and whether, in the circumstances of this case, the defence of provocation was available as a defence to the appellant. However, in a charge of murder it is necessary to find out what is the nature of the onus on the prosecution. In other words, what are the ingredients of the offence which the prosecution has to prove beyond reasonable doubt? It is after the burden of proving the ingredients of the offence beyond reasonable doubt has been discharged that the question whether the accused has a defence and, if so, the nature and proof of such defence can

arise and be considered. In a charge of murder, the burden is on the prosecution to prove the following ingredients beyond reasonable doubt:-

- i. that the deceased had died;
- ii. that the death of the deceased has resulted from the act of the 5 accused; and
- iii. that the act of the accused was intentional with knowledge that death or grievous bodily harm was its probable consequence.

See *Akinfe v. The State* (1988) 3 NWLR (Part 85) 729; and *Ogha v. The State*. (1992) 2 NWLR (Part 222) 164. 10

Bearing in mind the ingredients of the offence of murder which the prosecution had to prove beyond reasonable doubt in this case, I now consider the question raised under the first issue which is whether there had been a want of fair trial of the appellant. The complaints, in this connection, were many and they will be dealt with one by one. After the appellant had been 15 arrested, he made two statements to the police. One was made on the 19/7/86 (hereinafter called "the first statement") which, throughout the proceedings, was according to the court below, not tendered and admitted as an exhibit. The other statement was made on the 21/7/86 (hereinafter called "the second 20 statement") which was tendered during the proceedings and was admitted and marked as Exhibit "1". The matters which the learned trial Judge took into consideration in coming to the conclusion that the appellant committed the offence and that the defences of self-defence and provocation were not avail- 25 able to him, included some of the contents of the first statement. The position in relation to the first statement of the appellant, as far as the Court of Appeal was concerned, was clearly that the first statement was not part of the record of proceedings and should be ignored completely. The submission made for the appellant was that it was improper for the learned trial Judge, for the purpose of the determination of the question whether the appellant committed 30 the offence and, if so, whether the defences of self-defence and provocation were available to the appellant, to take into consideration part of the contents of the first statement. It was also submitted that the Court of Appeal made no comment about the improper use made by the learned trial Judge of the first statement and that the court finally considered the second statement without 35 considering how far the learned trial Judge had been influenced in coming to the decision on the relevant matters.

I should state straightaway that the learned counsel for the appellant

conceded that the foregoing complaint about the use made of the first statement by the learned trial Judge, was not one of the grounds of appeal to the Court of Appeal and that the issue was not raised in the Court of Appeal. The view of the learned counsel for the appellant in the last paragraph of section 3  
 5 1A, 10 of the appellant's brief was as follows:-

*"It is immaterial whether the appellant had not made this a ground of appeal in the Court of Appeal. Being a fundamental point of law it could be taken on appeal to the Supreme Court."*

10 I can't see in what way the court below could properly be said to be wrong in dealing with this aspect of the matter. The court below could not reasonably have dealt with a matter which was not covered by any ground of appeal. In any case, the complaint of the appellant was that the learned trial Judge should, in the circumstances, not have made use of the whole or parts  
 15 of the contents of the first statement for the determination by him of certain relevant issues, what the court below, per Oguntade, J.C.A., stated on the matter was, inter alia, as follows:-

*"With regards (sic) to the submission by appellant's counsel, I must say that the only statement by the appellant before us is the one tendered as  
 20 exhibit 1 and made on 21/7/86. I do not have before me any statement by the appellant on 19/7/86. Counsel was in error to have addressed us on a statement not forming part of the records of appeal. See Sommer & Ors v. Federal Housing Authority. (1992) 1 NWLR (Pt.219) 548 at 557 - 558".*

25 What was stated by the court below which was quoted above was consistent with its position that the first statement was not tendered and admitted throughout the proceedings. An appellate court has a duty to exclude inadmissible evidence wrongly admitted and to deal with the case on the basis of the remaining legally admitted evidence. See Ayanwale v. Atanda  
 30 (1988) 1 NWLR (Pt.68) 22. Further, it is not enough, for the purpose of seeking a reversal of a judgment, merely to show that evidence was wrongfully admitted. An appellant making the complaint has a duty to show that without such evidence the decision would have been otherwise. See Idundun v. Okumagba. (1976) 9 - 10 S.C. 227.

35 Finally, on this point, the provision in section 226(1) of the Evidence Act, Cap. 62 of the laws of the Federation of Nigeria, is that the wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so

admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted.

The learned trial Judge made a finding of fact, based on the evidence before him, that the appellant shot the deceased and that the deceased died as a result. In dealing with this aspect of the matter, the court below said, *inter alia* as follows:”

There was evidence from P.W.1, that the appellant shot and killed the deceased. The lower court accepted the evidence. The question that follows is did the trial Judge consider the defences available to the appellant on the ascertained facts?”

P.W.1 was an eye-witness of the shooting of the deceased by the appellant. His evidence on the point was *inter alia* as follows:-

*“At the square, after a time we saw the accused, Mbom Etim Akpan coming to the square. He wore a large gown. He pulled out a gun from his pocket and shot dead Enefiek Mbom Edet... The person he shot died on the spot.”*

In view of the foregoing evidence of the P.W.1., the finding of the learned trial Judge was correct and the court below was justified in affirming the finding. The onus is on the prosecution to prove that it was the act of the accused that caused the death of the deceased. See *Onyenakeya v. The State*. (1964) 1 All NLR 151; and *Lori v. The State*. (1980) F.N.R 475. The finding made by the learned trial Judge stated above, which was affirmed by the court below, showed that the prosecution discharged the aforesaid burden. Also, the burden of proving that there was an intention to inflict grievous bodily harm on the deceased had been discharged by the prosecution. If, as in this case, a person shot another person with a gun and the person shot with the gun, died on the spot, the person who fired the shot with a gun cannot properly contend that he did not know that the person he shot would die. This is because, in law, a man intends the natural consequences of his conduct. See *Irek v. The State* (1976) 4 S.C. 65 at page 67. The act of the appellant was intentional with knowledge that death or grievous bodily harm was its probable consequence.

It is necessary before consideration is given to the question raised under the second and the third issues to deal with the complaint of the appellant on the question whether it was necessary for the prosecution to call more eye-witnesses in order to prove the case of the prosecution against the appel-

lant beyond reasonable doubt. The contention was that there were about fifty people at the square who were eye-witnesses of the incident and the prosecution should have called two or more of them to testify.

5 It is sufficient to state, in this connection, that it is not the number of witnesses that is conclusive on the weight to be attached to the evidence led on a particular point. Except where it is otherwise provided by statute, there is no rule of law or practice stipulating that any particular number of witnesses should be called in proof of any case and the evidence of one credible witness  
10 accepted and believed by the trial court is enough. See *Adelumola v. The State* (1988) 1 NWLR (Part 73) 683. In any case, it is not necessary for the prosecution, in order to discharge the burden of proving its case beyond reasonable doubt, to call every available piece of evidence or number of witnesses. It is sufficient if enough evidence is adduced to discharge the burden. See *Alonge v. Inspector General of Police*, (1959) 4 F.S.C. 203.

There was also complaint by the appellant about alleged irregularities in the conduct of the post-mortem examination carried out on the corpse of the deceased. The correct legal position is that where a person attacked  
20 another person with a lethal weapon and the other person died on the spot, it is not necessary to prove the cause of death. It can properly be inferred that the wound inflicted on the deceased caused the death. In *Bakuri v. The State*, (1968) NMLR 163 what happened was that a son killed his father by stabbing him in his stomach. It was held that it was the wound inflicted that caused the  
25 death of his father who died almost instantaneously. A post mortem examination or a medical report was not absolutely necessary for the purpose of establishing the cause of death of the deceased. It was, in this case, proved beyond reasonable doubt that it was the act of the appellant that caused the death of the deceased.

30 With reference to the defence of the appellant, the court below pointed out that it was not necessary to dwell at length on the alleged errors committed by the learned trial Judge and expressed the view that the important thing was whether he came to the right conclusion inspite of such alleged errors.  
35 After setting out the portion of the judgment of the learned trial Judge dealing with the consideration and rejection of the defence of self-defence relied upon by the appellant, the court below stated, inter alia, as follows:-

*“When evidence called by an accused in support (of) a defence of self-defence is rejected or disbelieved by a trial Judge, such evidence must be incapable of sustaining that defence and the consequence is that the plea fails. The evidence of P.W.1 which the lower court accepted is that the deceased was at the village square waiting to be initiated into the Ekpo masquerade when the appellant walked in and shot him dead. The defence of self-defence was clearly not available to the appellant on the accepted facts.”*

In the view of the learned counsel for the appellant, the approach of the learned trial Judge and the court below on the question whether the defence of self-defence was available to the appellant was wrong. Reference was made to the use which the learned trial Judge made of the first statement, made by the appellant to the police, in the determination of the question. It was contended that the learned trial Judge came to a wrong conclusion, on this point, because of his erroneous view of the legal effect of a conflict between the written statements of the appellant and his oral evidence in court. What is important, for the present purpose, is that it was stated in the appellant’s brief at page 16, that the court below did not agree with the learned trial Judge on the use allegedly made of the first statement and on the question whether there was conflict warranting the application of the principle in Oladejo’s case, *supra*. It was, however, contended for the appellant that the court below fell into the same error as the learned trial Judge because the finding, on the point, made by the learned trial Judge, which the court below affirmed, was based on a wrong premise. Further, it was contended that the court below was in error in coming to the conclusion that the defence of self-defence was not available to the appellant simply because the trial court had accepted the evidence of the only eye-witness of the incident (P.W.1) who testified because, in any case, whether the evidence of P.W.1 was preferable was besides the point.

The respondent, on this aspect of the matter, pointed out that there was no incident or confrontation between the appellant and the deceased or any other person at the square immediately before the appellant brought out his gun and shot dead the deceased. It was also pointed out that the appellant was not in any imminent danger. For those reasons, it was contended for the respondent that the conclusion of the learned trial Judge that the defence of self-defence was not available to the appellant, which the court below af-

firmed, was justifiable.

When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make effectual defence against the assault. The force which may  
5 be used, in such circumstances, must not be intended, and should not be such as is likely, to cause death or grievous harm. If the nature of the assault is such as to cause reasonable apprehension of death or grievous harm, and the person using force by way of defence believes, on reasonable grounds, that he cannot otherwise preserve the person defended from death or grievous  
10 harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous harm. Section 286 of the Criminal Code. In the present case, I have pointed out that the court below, for the purpose of determining whether the defences of self-defence and provocation were available to the appellant, disregarded the first  
15 statement made by him to the police. That was consistent with it's view stated above.

The argument in the appellant's brief on the alleged wrong use made of it by the learned trial Judge could, therefore, not be of any use to the appellant's case. There were before the learned trial Judge, apart from the first  
20 statement, the second statement made by the appellant, the oral evidence of the appellant in court, the evidence of the P.W.1 and the evidence of the P.W.2. The forgoing materials were among the materials considered by the learned Judge before he found that the defence of self-defence was not available to the appellant. The finding of a lower court will not be reversed by an appellate  
25 court unless it is shown that the finding was perverse. See *Ajuwon v. Adeoti*, (1980) 2 NWLR (Part 132) 271. That has not been shown in this case. So, the court below was, therefore, justified in affirming it particularly in view of the evidence of the P.W.2 that upon his plea to the appellant, the appellant did not pursue the deceased when the deceased took the machet and the cow horn  
30 from the appellant and fled. If the deceased had wanted to kill the appellant or to inflict grievous bodily harm on him, that was the time that he would have done so. The deceased had the Matchet which he took from the appellant, and the appellant at that time had nothing with which he could defend himself. There was also the evidence of the P.W.1 that subsequently when the appel-  
35 lant came to the village square, where the initiation ceremony was to take

place, there was no incident or confrontation between the deceased and the appellant or between the appellant and any other person before the appellant brought out a gun and shot the deceased dead.

In order to rely on the defence of self-defence, an accused has to show by evidence that his life was so much endangered by the act of the deceased that the only means of escape from imminent death was to kill the deceased. See *Uwede v. The State*. (1985) 12 S.C. 32 at page 36. Even if the allegation of the appellant that the deceased waved the matchet twice at the village square at the appellant had been accepted, the defence of self-defence could still not be sustained as it was also the allegation of the appellant that the deceased was far away from the appellant when he did so. The appellant could not, in the circumstances be said to be in imminent danger of being killed or of the deceased inflicting matchet cuts on him. Also, if, for the purpose of argument, the allegation of the appellant that the deceased slapped him was true, that could not reasonably warrant the shooting of the deceased by the appellant with a gun which obviously was out of proportion and totally unreasonable, because in order to rely on self-defence as a defence to a charge of murder, the force used must be proportionate to the force used or threatened by the deceased against the accused and reasonable in the circumstances in which it was used. See *Nwuzoke v. The State* (1988) 1 NWLR (Pt.72) 529. The answer to the question raised under the second issue is in the affirmative. The court below was justified in upholding the decision of the trial court that the defence of self-defence did not avail the appellant. In law, the defence of self-defence is not available to an accused if his defensive measures to protect himself are out of all proportion to the danger which he faced. See *Akpan v. The State*. (1992) 6 NWLR (Pt.248) 439.

The second defence relied upon by the appellant is the defence of provocation. The provision of section 318 of the Criminal Code, on the point, is as follows:-

*“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 of passion caused by grave and sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.”*

Section 318 of the Code quoted above does not contain a definition of the

word, "provocation" but the view of this court in the matter is that sections 283 and 318 of the Code should be read together. Provocation is an act or series of acts done by the deceased to the accused to make the latter for the moment not master of his mind. See *Kada v. The State* (1991) 8 NWLR (Pt.208) 134. The ingredients of the defence of provocation are:-

- (i) the act of provocation which must be grave and sudden;
- (ii) the loss of self control, both actual and reasonable; and
- (iii) the retaliation proportionate to the provocation.

All the three elements of the defence of provocation mentioned above must be present before the defence can be upheld or sustained. See *Biruwa v. The State*, (1992) 1 NWLR (Pt.220) 663. In the present case, the learned trial Judge considered the defence of provocation and rejected it. In his opinion, the allegation of the appellant that the deceased had earlier slapped the appellant before the appellant killed him was not true and he rejected it. The learned trial Judge did not also believe the allegation of the appellant that the deceased flung a matchet twice at the appellant and it was as a result of that that the appellant killed the deceased. The learned trial Judge went on to consider the appellant's allegation that the deceased took the matchet and the cow horn from him and the appellant's allegation that the Society to which he belonged and which was to conduct the initiation ceremony on the day in question, would fine him (appellant) a goat, a cow and wine if he was unable to produce the matchet and the cow horn at the ceremony, and the learned trial Judge came to the conclusion that none of them constituted sufficient provocation that could reduce the offence of murder to manslaughter. He also expressed the view that the force and weapon used by the appellant were disproportionate to the alleged act of the deceased. *Oguntade J.C.A.*, in affirming the finding of the learned trial Judge, stated as follows:-

*'I am in agreement with the reasoning of the trial Judge. Even if it is conceded that the snatching of the appellant's cow horn and Matchet could amount to provocation, I do not see that the appellant was justified in employing a gun to shoot dead the deceased. The act of the appellant in shooting dead the deceased just to recover the matchet and cow horn was senseless and extremely disproportionate to the provocation offered by the deceased.'*

The contention for the appellant was that the learned trial Judge was wrong in

not accepting the evidence that the deceased slapped the appellant. He was also wrong in holding that the slapping of the appellant by the deceased, the snatching of the Matchet and the cow horn by the deceased from the appellant, the fine which should have been imposed on the appellant by the Society if he was unable to produce the matchet and the cow horn at the initiation ceremony or the flinging of the matchet by the deceased at the appellant, did not constitute sufficient reason for the appellant to warrant his shooting the deceased with a gun, and the court below was equally wrong in upholding the finding. The learned counsel for the appellant contended that the matter should be considered in the light of what would be the reaction of an average member of Ekpo society in the same circumstances as the appellant at the material time. The appellant, the learned counsel contended, was above all an illiterate night watchman.

The submission made for the respondent was that the shooting of the deceased with a gun by the appellant was disproportionate to the alleged act of the deceased. For that reason, it was further contended that the defence of provocation was not available to the appellant.

Assuming, for the purpose of argument, that the allegations of the appellant that the deceased slapped him that the deceased snatched the matchet and the cow horn in possession of the appellant, that the Ekpo Society would have fined the appellant if he was unable to produce the matchet and the cow horn at the initiation ceremony, and that the deceased flung the matchet at the appellant, were true, none of them was, in the circumstances of this case, sufficient to be an excuse for or warrant the shooting of the deceased by the appellant. The shooting of the deceased by the appellant with a gun was out of proportion and outrageous as a reaction to any of the alleged acts. The evidence before the court, which was rightly accepted, was that, as a result of the plea of the P.W.2 the appellant did not pursue the deceased for the recovery of the matchet and the cow horn. It was later that the appellant came to the square where the initiation ceremony was to take place and at where the deceased and other persons had assembled. It was there that the appellant shot the deceased. In effect, there was time for the appellant to cool even if he was annoyed by what the deceased had done earlier on the day. With reference to the alleged flinging of the matchet by the deceased at the appellant, the evidence of the appellant himself was that the deceased was far away from him (appellant) when he shot the deceased. In any case, none of the allega-

tions made by the appellant against the deceased could reasonably or justifiably warrant the use of a lethal weapon such as a gun to shoot dead the deceased. Whenever there is sufficient interval for reflection during which a normal man can realise and understand the gravity of what he intends to do, the defence of provocation cannot be sustained. See Nwede's case, *supra*. In *Green v. R.*, (1955) 15 W.A.C.A. 73, the appellant came home one day and found that his wife had left the matrimonial home for her mother's home in the same village. One evening the appellant went to the mother-in-law's home and found his wife and another man having sexual intercourse. He went back to his house and brooded over his misfortune. After about four hours he returned to his mother-in-law's home with a matchet. When he pushed open the door of the room where his wife and her lover were asleep, the room was dark. The appellant inflicted injury on his wife with the matchet and his wife died as a result. It was held that there was grave provocation when the appellant found his wife and her lover having sexual intercourse and if he had there and then killed his wife the circumstances would almost certainly have called for a reduction from murder to manslaughter. The period of waiting (about four hours) destroyed the excuse of "sudden provocation" because the appellant had time for reflection. In the present case, if the alleged slapping of the appellant by the deceased or the taking of the matchet and the cow horn was sufficient provocation, the fact that it was later in the day when the appellant came to the square, where the initiation ceremony was to take place, that he shot the deceased with a gun destroyed the excuse of sudden provocation. The appellant had time for reflection. Further if as in this case, the injury inflicted for a slight transgression is outrageous and out of proportion, the plea of provocation will not be available to the accused. See *Akpakpan v. R.* (1956) F.S.C.I.

With reference to the contention that the matter should be considered in the light of what would be the reaction of an average member of Ekpo Society or a night-watchman in the same circumstance as the appellant at the material time, the submission for the respondent was that the shooting of the deceased with a gun by the appellant was disproportionate even if the deceased did any of the things alleged against him. The act of the appellant in shooting the deceased with a gun was a revenge which the law did not recognise as a defence. In *R. V. Adekonmi*, 17 N.L.R. 99, the wife of the ac-

cused jeered at him and taunted him with being impotent and told him that she was having sexual intercourse with other men. The accused, who was described as an illiterate and primitive peasant, was so infuriated that in the heat of passion he picked up the first weapon to hand, which was a cutlass, and killed his wife. He was committed 5 to trial on a charge of murder. In considering the degree of provocation required to reduce to manslaughter what would otherwise be murder and the relevant principle that the provocation suffered must be judged by the effect it would be expected to have on a “reasonable man” and not by the effect it did actually have, on the particular 10 person charged, the trial Judge directed himself the words “reasonable man” must be taken to mean “a reasonable man of the accused’s standing in life.” It was held that the accused was not guilty of murder but guilty of manslaughter. In coming to the decision in the case, Francis, J., after setting out the relevant principles of English Law, 15 stated, at page 101, inter alia as follows:-

*“In applying these principles to this case it is my considered opinion that the words ‘the effect it would be expected to have on a reasonable man’ must be taken to mean ‘the effect it would be expected to have on a reasonable man of accused’s standing in life’, for it would, I think, be 20 improper to examine the question in the light of what would be sufficient provocation in the case of an educated and civilized person. The accused, be it noted, is an illiterate and primitive peasant of this country, and it must be beyond doubt that the passions of such a type are far more readily aroused than those of a civilized and enlightened class.”* 25

Even if the consideration which should be given to a case when the accused is an illiterate and a primitive peasant, as stated in Adekanmi’s case, (supra), is given, in this case, to the appellant, the offence, which is otherwise murder cannot be reduced to manslaughter. This is because the weapon used by the appellant was not in reasonable proportion to the 30 alleged provocation. Further, there was time for passion to cool even if he was annoyed by what the deceased had done. The learned trial Judge was, therefore; right in holding that the defence of provocation had failed and the court below was justified in affirming the decision.

The prosecution proved beyond reasonable doubt that the appellant 35 was guilty of the charge preferred against him, that is, murder. The defences of provocation and self-defence were not, in the circumstances, available to him and there was no irregularity in the proceedings.

Consequently, it could not be said that there had been a want of fair trial.

I return to the questions relating to the first statement, that is, the statement made to the police by the appellant on the 19/7/86. The position taken by the court below was that it was not tendered and admitted throughout the proceedings and, for that reason, it did not form part of the record and ought to be ignored completely in determination of any issue in this case. The learned trial Judge felt that it was tendered and admitted during the proceedings and was, therefore, considered by him with other evidence for the determination of the relevant questions in this case. The relevant questions were (a) whether the appellant killed the deceased, (b) whether the defence of self-defence was available to the appellant, and (c) whether the defence of provocation was available to the appellant.

The confusion about the aforesaid first statement of the appellant made to the police on the 19/7/86 arose because of certain unusual circumstances pertaining to it. P.W.4 was one sergeant George Ekpong. He testified that he was the one who recorded the second statement of the appellant that was dated 21/7/86. When the prosecutor applied to tender the second statement on 5/4/89 there was an objection to its admissibility by the defence counsel. The objection was subsequently withdrawn on 2/5/89 and it appeared, from the record of proceedings, that the P.W.4 tendered the said second statement of the appellant along with other documents, including the first statement of the appellant dated 19/7/86, which were all admitted and marked Exhibit "1". The tendering and admission of the second statement along with other documents, including the first statement dated 19/7/86, and the marking of all of them as Exhibit "1" were not only unusual they were irregular. Apart from other things, the tendering, admission, and marking of each of them separately would have been better and neater as it would have been possible for the defence to object to the admissibility of any of them, if it so desired. There is also the fundamental question raised by the evidence of P.W.4 that he (P.W.4) recorded the second statement of the appellant but that the first statement of the appellant dated 19/7/86 was recorded by one Michael Ozigbo. The evidence of P.W.4 on the point, was as follows:-

*I recorded the statement of 21/7/86. I signed the statement below the cancellation. One Michael Ozigbo recorded the statement of 19/7/86."*

Michael Ozigbo did not give evidence or tender the said first statement of the appellant dated 19/7/86. So, it was the P.W.4 who was not the person that recorded the aforesaid statement that tendered it.

I have read the first statement of the appellant dated 19/7/86 and it is clear from it that the appellant agreed that he shot dead the deceased. The appellant said, inter alia, as follows:-

*“When I reached Ekpenyon Ekpe’s compound nearer to my house, this man Enefiock Mbom gave me a slap on my face blocking my both eyes. From there he took my cutlass and the traditional cultural cow horn. I was annoyed. I ran after him, and fired a shot at him he fell down died.”*

On the question whether the defences of provocation and self-defence were available to the appellant, the learned trial Judge found, and the court below affirmed the finding, that the aforesaid defences were not available to him. Both courts relied on, inter alia substantially on the evidence of P.W.2 who, as the appellant admitted, was present when the deceased asked the appellant why he hit him with the cow horn and the deceased took the cutlass and the cow horn from the appellant, and the evidence of P.W.1 who was present when the appellant arrived at the market square where the initiation ceremony was to take place and where the deceased and other persons had assembled for the ceremony. The evidence of the P.W.1 was that the appellant, on arrival at the market square, saw the deceased and, without any incident between the appellant and the deceased or between the appellant and any other person, the appellant brought out a gun under his big gown and shot dead the deceased. In the case of the taking of the cutlass and the cow horn from the appellant by the deceased, the evidence of the P.W.2 was that the deceased asked the appellant why he hit him (deceased with the cow horn and when the answer of the appellant appeared not to satisfy the deceased, the deceased took the cutlass and the cow horn from the appellant and fled. The appellant, according to P.W.2, did not pursue the deceased to recover the aforesaid things as a result of plea of the P.W.2. The P.W.2 never testified that the deceased slapped the appellant. The learned trial Judge held and the court below affirmed the finding, that the snatching of the cutlass and the cow horn by the deceased from the appellant could not be a justifiable excuse for the appellant to shoot the deceased dead with gun because there was enough time for the passion of the appellant to cool and, in any case,

the weapon used by the appellant was not in reasonable proportion to the alleged provocation. In the case of the defence of self-defence, the finding of the learned trial Judge, which the court below affirmed, was that the appellant was not in any imminent danger of being killed  
5 by the deceased when he shot the deceased dead. In the circumstances in this case, the use, made by the learned trial Judge, of parts of the contents of the first statement dated 19/7/86, made by the appellant to the police, did not cause any miscarriage of justice because on the totality of the evidence before him he would have,  
10 without making use of parts of the aforesaid first statement, come to the same conclusion that the appellant killed the deceased and that the defences of self-defence and provocation were not available to the appellant. That was the reason why the court below, rightly in my view, affirmed the finding of the learned trial Judge on the points.

15         On the whole, the appeal lacks merit. It does not succeed. The conviction and sentence of death passed on the appellant affirmed by the court below are hereby further affirmed by me. The appeal is accordingly, hereby dismissed.

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#### UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Adio, J.S.C. I agree with the judgment and I too dismiss the appeal and affirm the decision of the court below.

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#### WALI JSC

I have had a preview of the lead judgment of my learned brother, Adio J.S.C., and I entirely agree with it.

30         There was overwhelming evidence which the learned trial Judge accepted after painstaking consideration to support the appellant's conviction for murder.

       Having read the concurring judgment of my learned brother, Ogundare J.S.C. I agree with him that the appellant's statement made on 19th July 1986  
35 was properly admitted in evidence along with his other statement made on 21st July 1986. The two statements were marked as Exhibit 1. The learned trial Judge was therefore right to have considered and relied on the appellant's statement made on 19th July 1986.

For future guidance, where in the course of a trial two or more documents are tendered and admitted in evidence, each should be given a separate identification mark to facilitate easy reference to any of them. Like in the present case, the statements made on 19th July 1986 and 21st July 1986 which were simultaneously admitted in evidence should have been given identification marks as Exhibit 1 and 1A respectively. 5

The appeal lacks merit and the Court of Appeal was right in dismissing it. I also hereby dismiss it and affirm the conviction and sentence passed on the appellant.

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### OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Adio, J.S.C. just delivered. I agree with his conclusion that this appeal be dismissed. I however, wish to comment on issue 1 raised in the appellant's Brief. 15

In the Notice of appeal filed by the appellant to this court, there are 7 grounds of appeal. They read as follows:

#### *Ground One: Error In Law*

*The learned Justices of Appeal erred in law when they stated as follows:- 'with regards to the submission by appellant's counsel, I must say that the only statement by the appellant before us is the one tendered as Exhibit 1 and made on 21/7/86. I do not have before me any statement made by the appellant on 19/7/86. Counsel was in error to have addressed us on a statement not forming part of the records of appeal.'* 20 25

#### *Particulars:-*

*(1) Two statements made respectively on 19th July, 1986 and 21st July 1986 were admitted at the trial as Exhibit 1. (page 25 LL. 20-21 of the Records) (page 9, 3-16).*

*(2) Both statements were admitted and used by the trial court in its judgment. (Page 40, LL 17 to end).* 30

*(3) There was no appeal against the admission into evidence of both statements.*

*(4) The Court of Appeal was bound to confine itself to the matters raised in appeal before it.* 35

#### *Ground Two Error In Law*

*The learned Justices of Appeal erred in law when they held that the evidence of the appellant at the trial did not materially contradict his earlier 'statement' to the police, which finding was not an issue before the*

*learned Justices of Appeal.*

*Particulars:*

*(1) The Court of Appeal as an appellate court is strictly confined to the issues appealed against in the judgment of the court below.*

*(2) The issues were as contained in the Notice and grounds of Appeal.*

*(3) The trial court had found that material contradictions existed between the statements of the accused and his evidence at the trial*

*(4) This finding was not appealed against by both the appellant and the respondent.*

*(5) The Court of Appeal did not invite counsel to address it on the issue.*

*Ground Three: Error In Law And Fact:*

*The learned Justices of Appeal erred in law when they held that though the learned trial Judge was in error in relying on the appellant's statement to the police and his evidence in court (after finding that they were materially inconsistent), the error did not occasion a miscarriage of justice.*

*Particulars:*

*(1) If the appellant's evidence at the trial and his statement to the police are ignored, the only eye-witness account as to the killing of the deceased was the evidence of P.W.1*

*(2) The learned Justices of Appeal failed to consider the weaknesses inherent in the testimony of P.W.1.*

*(3) Many people sat between P.W.1 and the deceased, and there were over fifty people at the square and they were all conversing.*

*(4) The prosecution failed to call as witnesses people who sat nearer to the deceased than P.W.1, their evidence being vital and material in the circumstances, particularly, prosecution failed to call one Emmanuel Okan Effiong to testify.*

*Ground Four: Error In Law*

*The learned Justices of Appeal erred in law when they failed to consider the material contradictions and weaknesses inherent in the evidence of P.W.1 which issues were squarely raised in the appeal.*

*Particulars:*

*(1) P.W.1 testified that the deceased was the only person who went to the square without a matchet, but later said that he did not know if the deceased went there with a matchet.*

(2) P.W.1 also testified that after the shooting, appellant collected his gun and went home. Later, he testified that appellant ran off with a knife and a cow horn.

(3) P.W.1 admitted that he sat at some distance from the deceased, with many people sitting in between, that there were over 50 people conversing at the material time. 5

#### Ground Five: Error In Law

Learned Justices of Appeal were in error when they held that the defence of provocation was not available to the appellant.

#### Particulars

(1) The Court of Appeal held that the act of shooting the deceased was disproportional to the provocation of the appellant by the deceased. 10

(2) The Court of Appeal did not consider the status of the appellant in the society, particular, within the importance of the Ekpo masquerade in that community. 15

(3) The Court of Appeal like the trial court did not give any regard to the fact that the events constituted one uninterrupted chain of reaction.

(4) The trial court's rejection of the defence of provocation was based on its finding that if the deceased was shot dead at village square, it follows that the accused must have pursued him there from P.W.2's compound. 20

(5) The Court of Appeal like the trial court did not give any regard to the fact that the prosecution did not (sic) time of the deceased was unarmed at the time of the shooting, more so, as it would have been usual for the deceased to carry a weapon. 25

#### Ground Six: Error In Law

The learned Justices of Appeal erred in law when they rejected the defence of self-defence without there being proof that the deceased was unarmed at the time of the shooting.

#### Particulars

(1) The onus is on the prosecution to prove that the appellant did not act in self-defence. 30

(2) There was no position (sic) evidence that the deceased was unarmed at the time of the shooting. 35

(3) Every Ekpo masquerade in the crowd at the material time carried a matchet.

(4) The deceased was a member of the Ekpo society.

(5) *There was evidence by P.W.2 that the deceased snatched a matchet from the appelland and went away.*

*Ground Seven*

*That the judgment is unreasonable, unwarranted and cannot be supported having regard to the evidence.”*

In the appelland’s Brief, the following 3 issues are set out as calling for determination in this appeal:

1. Whether there had been a want of fair trial.

2. Whether the Court of Appeal was justified in upholding the decision of the trial court that the defence of self-defence did not avail the appelland.

3. Whether the Court of Appeal was justified in upholding the decision of the trial court that the defence of provocation had also failed.

I fail to see the grounds of appeal upon which issue 1 is predicated. What is a fair trial has been defined in the often quoted dictum of Ademola, CJN in *Isiaku Mohammed v. Kano Native Authority* (1968) 1 All NLR 424, 426. The learned Chief Justice in delivering the judgment of this court observed.

“...a fair trial of a case consists of the whole hearing. We therefore see no difference between the two. The true tests of a fair hearing, it was suggested by counsel, is the impression of a reasonable person who was present at the trial whether, from his observation, justice has been done in the case. We feel obliged to agree with this.”

There is none of the seven grounds of appeal above that question the fairness of the trial. Issue 1 as formulated, therefore, does not arise for consideration in this appeal.

I observe, however, that the arguments set out in the appelland’s Brief on this issue touch not on the fairness of the trial but on the use made by the learned trial Judge and the comments thereon by the court below of a Statement of the appelland made on 19/7/86. I think the appelland is grossly mistaken in referring to his complaints in grounds 1 -3 above as want of fair trial. Whilst these grounds may be valid complaints against the Judges of the two courts below, they do not relate to the fairness of the trial in the trial court. I agree with Miss Usen learned counsel for the respondent that there was no want of fair trial in this case.

Be that as it may and because of the seriousness of the charge against the appelland - capital offence, I will consider the arguments advanced on

issue 1 for all that they are worth. It is observed in the appellant's Brief that P.W.4 Sergeant George Ekpang only tendered the statement he obtained from the appellant on 21/7/86 which statement was marked Exhibit 1. It is equally observed in the Brief that the appellant's earlier statement of 19/7/86 was never tendered in evidence. It is argued that that statement could not have been tendered through P.W.4 because the statement was not made to him. It is further argued that the record of proceedings does not show that any attempt was ever made to tender the statement through the witness. In paragraph 3.1 A.02 of the Brief this argument subsequently follows:-

*3.1 A.02 However, in an unorthodox manner the learned trial Judge referred to this statement, and, in a material particular in his judgment, made use of the said statement which was never tendered in evidence. At page 37 lines 8 to 15 of the records of proceedings the learned trial Judge said:-*

*'Giving an account of the incident at the earliest opportunity, when the incident was very fresh in the mind of the accused, the accused said in Exhibit 1 dated 19th July, 1986 –*

*(a) " ...I went down to my place, when I reached Ekpenyong Ekpe's (P.W.2's) compound nearer to my house, this man Enefiok Mbom (the deceased) gave me a slap on my face blocking both eyes. From there he took my traditional cow horn. I was annoyed. I ran after him and fired a shot at him. He fell down and died. I used a locally made single shot gun"*

*3.1 A.03 Yet, this statement which the learned trial Judge had referred to as Exhibit 1 was never tendered in evidence. The statement that was tendered in evidence as Exhibit 1 was the statement made to P.W.4 Sergeant George Ekpang by the appellant on 21/7/86. The constable to whom the appellant made the statement on 19/7/86 at Eman Uruan Police Station was not called to testify as a witness in the case.*

*3.1 A.04 It is strongly submitted that in a murder case, especially where the defences of provocation and self-defence are being made, the issue of the first-statement made by the accused person to the police is of primary importance. The statement ought to have been tendered in evidence or an explanation given to the court for its absence. What the trial court had marked as Exhibit 1 is the statement of the appellant made to P.W.4 which the appellant identified in court see page 7 of the proceedings.*

*At page 9 lines 17 to 18 of the proceedings the court recorded -' the*

*Statement of the accused person tendered admitted and marked Exhibit I.'*

*The court never marked the statements of the appellant of 19/7/86 and 21/7/86 as Exhibit I.*

*How the learned trial Judge could have then referred to the statement of the accused made on 19/7/86 as Exhibit I cannot be conjectured. In any event, the record of proceedings only showed that the second statement of the appellant made on 21/7/86 was marked as Exhibit I See pages 52 to 53 of the records.*

*3.1 A.05 It is strongly submitted that the judgment of the learned trial Judge should be confined only to the evidence and exhibits properly tendered before the court. It was most improper for the learned statement of the appellant to the police of 19/7/86 in his judgment which was never tendered in evidence.*

*3.1 A.06 And what is more, the learned trial Judge used the said statement that was never tendered in court as an Exhibit to the detriment of the appellant. Indeed, the learned trial Judge used the said statement in coming erroneously to the conclusion that the appellant's story was not 'cogent, positive and credible'.*

*Complaining about the attitude of the Court of Appeal to the alleged lapse of the trial Judge, it is argued in the appellant's Brief as follows:-*

*"3.1A.08 The Court of Appeal was apprehensive of the fact that the alleged statement of the appellant made to the police on 19/7/86 had not been admitted in evidence as an Exhibit. But unfortunately the Court of Appeal made no comment about the improper use that had been made by the learned trial Judge of the said statement. All that the Court of Appeal had said of the statement could be seen on page 106 of the record to wit:-*

*'The appellant made a statement to the police on 21/7/86 two days after the incident. It would seem he had previously made a statement on 19/7/86 but that statement was not tendered.*

*3.1A.09 Again, the Court of Appeal said on page 109 lines 28 to 31:-*

*'With regard to the submission by appellant's counsel, I must say that the only statement by the appellant before us is the one tendered as Exhibit I and made on 21/7/86. I do not have before me any statement made by the*

*appellant on 19/7/86. Counsel was in error to have addressed us on a statement not forming part of the records of appeal. -See Sommer & Ors. v. Federal Housing Authority (1992) 1 NWLR (Pt.219). 548 at 557 to 558.*

*But the fact remained that the trial court reproduced part of the said statement in its judgment and did use the statement in making its findings of fact.*

*3.1A.10 The Court of Appeal finally went on to consider the statement of the appellant made on 21/7/86 without looking into the use that had been made by the trial court of the statement of the appellant on 19/7/86. It is strongly submitted that the Court of Appeal ought to have looked into the issue of how far the trial court had been influenced in its findings by use of such extraneous evidence as the statement of the appellant of 19/7/86. It is indeed submitted that the trial court should have confined itself only to a consideration of the legal evidence adduced in the case. If there is evidence that the trial court had been influenced in a material particular by use of extraneous evidence such as the statement of the appellant of 19/7/86 not tendered in evidence, the judgment should be set aside.*

*It is immaterial whether the appellant had not made this a ground of appeal in the Court of Appeal. Being a fundamental point of law it could be taken up on appeal to the Supreme Court."*

Replying to the submissions in the appellant's Brief the learned Deputy Director of public Prosecution Akwa Ibom State submits in the appellant's Brief that the fact that the learned trial Judge used a statement made by the appellant on the 19/7/86 which was never tendered in court did not occasion any miscarriage of justice. She further submits that the learned trial Judge would still have arrived at the same conclusion even if he did not make any extensive use of the statement made by the appellant on 19/7/86. She finally argued that the Court of Appeal was right to have overlooked the issue since it was of no consequence whatsoever. In her submission before us at the hearing of the appeal, Miss Usen Assistant Director of Civil Litigation Akwa Ibom State, for the respondent submits that the erroneous use made by the learned trial Judge of the statement made by the appellant to the police on 19/7/86 and which was never tendered in evidence at the trial amounted only to misdirection but that the misdirection did not occasion a miscarriage of Justice as without it the decision would still have been the same.

The entire argument of the appellant is based on a wrong premise

and runs counter to the particulars to ground one of appeal. The particulars to that ground show that the two statements “were admitted at the trial as Exhibit 1”; that they “were admitted and used by the trial court in its judgment” and “that there was no appeal against the admission into evidence of both statements”. With these admissions by the appellant, he cannot be heard to argue that the statement of 19/7/86 was never admitted in evidence and therefore wrongly made use of by the learned trial Judge.

This observation notwithstanding, there is a puzzle about the statement made to the police on 19/7/85. Was it ever tendered in evidence? It is not in dispute that a statement was made to the police by the appellant on 19/7/86. P.W.4 in his evidence given on 5/4/89 testified as follows:-

*“In July 1986 I was attached to the D.C.B. Uyo. I know the accused person. On 19/7/86 I was on morning duty at the D.C.B. Uyo, when a case of suspected murder was referred to me through an extract from Eman Uruan Police Sargent. Before the case was reported to me the deceased was already removed to the mortuary at St. Luke’s Catholic Hospital Anua by one Inspector Micheal Ozigbo.*

*I moved to Eman Uruan police station and there from to the scene of crime at Mbiaya Uruan. I visited the scene and obtained statements from witnesses. I also arrested the accused person, charged and cautioned him (sic) in English language. He volunteered a statement in English Language which I recorded in English also. I read it over to him and he accepted the correctness of the statement before appending his signature. I also counter-signed it as the recorder. Statement shown to the witness who identifies it. Statement shown to the accused person who accepted that the statement shown to him is the statement he made to the police. The statement of the accused was confessional statement. I took him down to the D.C.O. Mr. Patrick Usenu who read the statement to the accused and he voluntarily accepted it as being correct and signed it.”*

When the statement was sought to be tendered the court observed that the certification on it had been cancelled. He then observed as follows:-

*‘Court: At this stage the admissibility of the statement of the accused becomes a thorny issue. The court will on suo motu adjourn this case for the defence counsel to appear to take up the issue.’*

On the resumption of the evidence on 2/5/89 witness testified further:

*"I testified in this case on 5th April, 1989. On the 5/4/89 (sic) I obtained a statement from the accused after duly cautioning him in English Language. At the end of the recording, we all signed the statement, thereafter I took the accused person before the D.C.O. Mr. Uselu together with his statement, before Mr. Uselu, the statement was again read to the accused, the accused signed the statement as being correct, one Patrick Okon, Mr. Uselu and I also signed it."*

There followed some arguments as to the admissibility of the statement sought to be tendered. For the purpose of clarity, I think I better set out in full what is recorded in the record. The record of appeal reads:

*"The witness is shown the statement and he identifies it as the statement of the accused. The accused says the statement are his. The state counsel seeks to tender it as an exhibit in the case. Objection by Mr. Ikpo The statement sought to be tendered has been cancelled in its entirety and no foundation has been laid as to the reason for the cancellation of the whole documents. The statement of the accused having been cancelled, there is nothing before the court."*

*Mr. Ukana: The statement of the accused is numbered 15A and 15B. At the back of 15B is the certification before the Senior Police Officer. It is this certification that appears cancelled. The matter before the court, if the certification has actually been cancelled is what weight to be attached (sic) to the statement of the accused 15A and 15B. The accused has not denied that the statement 15A and 15B are his statement. There is also the statement of accused dated 19/7/86 marked 15. That statement has also been signed by the accused and dated. Mr Ikpo now agrees that non-appearance of the certification by a Superior Police Officer or Administrative Officer does not render the statements inadmissible. It goes to the weight the court will attach to the statement. I now withdraw my objection, he says. The statement of the accused person tendered admitted and marked Exhibit 1."*

It is not clear what the learned trial Judge marked Exhibit 1 but whatever ambiguity that might have arisen from the above account seemed to have been cleared by the learned trial Judge in his judgment. Summarising the evidence of P.W.4 the learned trial Judge in his judgment said as follows:-

*"P.W.4 was the I.P.O who said he investigated the case of murder referred to him at Uyo from Eman Uruim Police. He visited the scene of crime and obtained statements from witnesses. He arrested, charged and cautioned the accused person who volunteered a statement in English, read same over*

to him and he (the accused) accepted it was correct and signed it. Witness countersigned same. On 2nd May 1989 (sic) witness resumed his evidence in Chief and tendered five exhibits - Exhibits 1-5 and the six under cross-examination. Exhibits 1 was statement of the accused dated 19th July 1986 and 21st July 1986." (Italics mine)

It would appear from the judgment therefore, that what the learned trial Judge admitted as Exhibit I are the statements made by appellant on 19/7/86 and 21/7/86. What was copied in the record as Exhibit I was of course the statement made on 21/7/86. Going through the documents sent from the trial court to the Court of Appeal and further to this court, however, the statement made on the 19/7/86 is one of the documents forwarded from the trial court. It is therefore, not surprising that the learned trial Judge quoted from this statement. The procedure of (a) admitting in evidence the statement made by the accused person to a police officer through another police officer and (b) admitting two different statements in evidence as one exhibit may look rather odd and irregular but that is not the same thing as saying that the learned judge made use of a document not in evidence before him. Had the court below carefully examined the judgment and the documents forwarded to it from the trial court, the learned Justices would not have said, that the statement made on 19/7/86, was not before them. The conclusion I reach is that I find no substance in the complaint of the appellant.

The second complaint raised in the appellant's brief against the judgment of the court below relates to the absence of medical evidence as to the cause of death. It is not in dispute that the doctor who performed the post mortem examination did not testify at the trial but his report was tendered as Exhibit 5. I don't think this complaint arises in this appeal in that there is no ground of appeal covering it. The complaint should be struck out. In any event it is not in dispute that the deceased died as a result of a gun shot inflicted on him by the appellant. This so much was admitted in the appellant's statements to the police.

All the other complaints advanced in the appellant's Brief under the issue dealing with lack of fair trial are non-issues of fair trial in that there are no grounds of appeal on which they could be predicated and they are not incidents of lack of fair trial which is all that issue 1 is about. These complaints are rejected by me.

I agree entirely with my learned brother Adio, J.S.C. in his consideration of issues 2 and 3, I too conclude that on the totality of the evidence adduced at the trial, the defences of self defence and provocation were rightly rejected by the learned trial Judge whose judgment was rightly, in my respectful view, affirmed by the court below. 5

For the reasons given herein and the reasons given by my learned brother on issues 2 and 3, I too dismiss this appeal and affirm the judgment of the court below.

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#### MOHAMMED JSC 10

I agree with the learned brother, Adio, J.S.C., in the lead judgment which I have had the privilege to read in advance that this appeal ought to be dismissed. I only wish to say a few words on the issue of provocation which the learned counsel for the appellant made heavy weather of the trial court's failure to accept it as a defence in this case. 15

The facts as given in the lead judgment are clear. The learned counsel for the appellant repeated those facts, in the appellant's brief, during his submissions in respect of the third issue in which he queried the Court of Appeal for upholding the decision of the trial court that the defence of provocation did not avail the appellant. 20

The learned counsel summarised the facts as follows:-

*"The appellant was said to be going to the Ekpo Masquerade initiation ceremony on the day in question. The appellant was the assistant head of Ekpo Society. The evidence on all sides was that every Ekpo Society member must have a matchet. The appellant had his matchet as well as the traditional cow horn. The evidence was that there could not be an Ekpo Masquerade without the traditional cow horn. On the way the deceased accosted the appellant and accused the appellant of hitting him with the horn.* 25

*The appellant apologised to the deceased. The deceased, according to the appellant, then slapped appellant in the eye. According to P.W.2, the deceased snatched the matchet and horn from the appellant's armpit and ran away. According to the appellant, when the deceased slapped him on the eye he covered his eyes with his hand and the matchet and the horn fell down and the deceased collected both and ran away. According to P.W.2, the appellant did not feel happy that the deceased had snatched his matchet and horn".* 30 35

It is not disputed therefore, that there was an interval between the two

events, that is, the act of snatching the matchet and cow horn from the appellant, and the shooting of the deceased at the village square. It is well settled from a line of authorities that to avail himself of the defence of provocation in a charge of murder, under section 318 of the Criminal Code, the accused must  
5 have done the act for which he is charged:-

- (i) in the heat of passion
- (ii) caused by sudden provocation; and
- (iii) before there is time for his passion to cool.

Provocation to have that result must be grave and must have temporarily deprived the person provoked of the power of self control. See *Chukwu Obaji v. The State* (1965) 1 All NLR 269.  
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The appellant, in this case, did not attack the deceased soon after the deceased had slapped him and snatched his horn. It is evident that the deceased ran away when he snatched the horn from the appellant. Even if the act  
15 of the deceased against the appellant amounted to provocation there was sufficient interval to allow a reasonable man time to cool.

It should be taken into account that the mode of resentment to the provocation must bear reasonable relationship to the act which provoked the  
20 appellant. A person slapped could not use a deadly weapon like a gun in retaliation against his assailant. Whatever is the case the test to be applied is that of the effect of the provocation on a reasonable man so that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did. See *R. v. Onyemaizu*  
25 (1958) NR NLR 93. The appellant cannot avail himself of the defence of provocation in this case and I am satisfied that he has been rightly convicted.

For the above reasons and the fuller reasons in the lead judgment this appeal fails and it is dismissed.  
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