

SUPREME COURT OF NIGERIA
10TH MARCH, 1995. SC. 109/1994
CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU,
U. MOHAMMED, S. U. ONU, Y. O. AD

OFOKE NWAMBEAPPELLANT

V.

THE STATERESPONDENT

CRIMINAL LAW - Provocation - Where Appellant did not cross-examine on a crucial issue - Whether defence of provocation avails.

CRIMINAL LAW - Provocation - When held not to avail - From the established evidence.

CRIMINAL LAW - Provocation - Disproportionality of the wound inflicted on deceased - Held to destroy the defence of provocation

CRIMINAL LAW - Self defence - Failure to show reasonable apprehension of death or grievous harm - Whether the defence will avail the accused.

CRIMINAL PROCEDURE - Murder - Assignment of Counsel to the accused - From the Legal Aid Council - Whether properly done.

CRIMINAL PROCEDURE - Murder - Duty of an accused person to arrange for his defence - Where no lawyer appeared for him - Whether court is to make provision for a defence counsel - In discharge of its statutory duty.

CRIMINAL PROCEDURE - Corroboration - Whether needed on the evidence of PW3 - Before Appellant can be convicted for murder.

CRIMINAL PROCEDURE - Murder - Whether conviction of Appellant - Affirmed by the Court of Appeal - Was justified in the circumstances.

STATUTES - *Inconsistency - Whether there is any inconsistency - In S.33(6)(c) of the 1979 Constitution and S.352 of the C.P.A.*

FACTS

The Appellant, without invitation visited the house of one Egwu Nwankwo (PW3), during a Party to mark the giving out of PW3's daughter in marriage. PW2 one of PW3's friends was present in the celebration. After being served with food and wine Appellant demanded for palmwine to be purchased with PW2's money. PW2 refused and this led to a quarrel. PW3 ordered Appellant out of his house and he refused. Then they tried to eject him. The Appellant thereupon stabbed PW2 and as he bolted away he was chased by PW3 and others including Nweke Ottah (now deceased). It was in that course that the Appellant stabbed the deceased who died soon thereafter.

Appellant was charged before the Abakaliki High Court for murder. Appellant denied the charge and gave a different version of the story. The trial court disbelieved the Appellant, found the case proved, convicted and sentence him to death. His Appeal to the Court of Appeal was dismissed. Appellant has further appealed to the Supreme Court to determine inter alia, whether his fundamental right to defend himself or by counsel of his own choice was violated by trial court's assignment of counsel to the Appeal through the Legal Aid Council.

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

Whether court is to make provision for a defence counsel

1. Primarily, it is the duty of an accused person in the position the appellant found himself on 15th December, 1986, to arrange for how he can defend himself. How he it, as no legal practitioner appeared far tan, the court was constrained and was indeed enjoined by the provisions of section 352 of the Criminal Procedure Act, to make provisions for this defence. In the instant case, the trial court in order to ensure that the appellant was represented by a legal practitioner, referred the matter of his defence to the Assistant Director of Legal Aid Council, a statutory body established to aid indigent accused persons and litigants. By that act, the trial court, in my view, had discharged the statutory duty it owed to the appellant. The appellant knowing fully well that he was being accused of the offence of

murder, which offence is serious, the burden lay on him to arrange for his defence and if he failed to do so, cannot now turn round, late in the day, to pick holes in the correct application of constitutional or procedural provisions governing such an assignment of counsel. (P.631F)

Statutes - Inconsistency

2. I cannot conceive of any known inconsistency between the provisions of Section 33(6)(c) of the 1979 Constitution and section 352 of the C.P.A. I will therefore decline the invitation to declare any purported inconsistency between these two legislations null and void as there is indeed no such inconsistency. (P.632E)

Assignment of counsel from the Legal Aid Council

3. The assignment of counsel from the Legal Aid Council to the appellant was regularly done. Hence, he neither raised any objection nor protested throughout the trial; nor furtherstill did he produce a counsel of his own choice in the alternative. It being patent that the Legal Aid Council stands in a better position to minister unto indigent accused persons, such as appellant in the assignment of counsel, the argument that failure to leave the matter of assignment of counsel in the hands of the trial court in the instant case, rendered the trial null and void, cannot in my view, be sustained. (P.634C)

Provocation - Where appellant did not cross examine

4. In considering whether the defence of provocation can avail the appellant, it is pertinent to point out how the story of his loss of a tooth as told in his testimony, was completely absent in Exhibit 'A'. Rather, in Exhibit 'A', all he said was that he was beaten up by PW.2 while he was going home after visiting PW.3. Moreover, the appellant did not cross-examine either PW2 or PW3 on the issue of knocking off his tooth. That singular omission or failure on appellant's part is fatal to his own version of the event. (P.635G)

Provocation - When held not to avail

5. The court below upheld the above findings of fact of the trial court and in addition distinguished the case of *Biruwa v. The State* (1985) 3 NWLR (Part 11) 167, from the instant case in which provocation as a defence, was not established. This is because as was clearly established in evidence, the deceased never offered any provocation to the appellant. (P.636D)

Provocation - Disproportionality of the wound inflicted

6. If in fact, the deceased held a stick he was to have wielded on the appellant before the appellant inflicted the fatal blow with his knife, which he confessed in Exhibit 'A' he had on him when he fell down, the weapon used (a knife as against a stick), the force used and the resultant wound inflicted by the appellant on the deceased as vividly described in the testimony of P. W.5, Dr. (Innocent Echiegbu), was disproportionate to the provocation. (P. 636G)

Self defence - Failure to show apprehension of grievous harm

7. As for self defence, as appellant was unable to show that he was at the time of the killing in reasonable apprehension of death or grievous harm, and that it was necessary at the time to use the force which resulted in the death of the deceased to preserve himself from danger, the defence does not avail him. Besides, the appellant had shown himself through and through to be the aggressor. (P. 637D)

Corroboration - Whether needed

8. The mere fact the witness (in the instant case, P.W.3, as alleged) had a grouse against the appellant and that the learned trial Judge did not warn himself before convicting him, will not weaken the evidence if found to be true. It is upon the same principle which is now firmly established that the court can convict upon the evidence of one witness. It is clear from all my illustration above, that in the instant case, no corroboration was needed of the evidence of PW3 before the trial court could convict the appellant thereon of the offence of murder. If (P. 639C)

Murder - Whether conviction was justified

9. The learned trial Judge rightly, in my view, convicted the appellant of the murder of Nweke Ottah after reviewing the evidence adduced thereat and the court below was justified in affirming the decision. It was sate to convict the appellant on the evidence of P.W.3 which needed no corroboration. As a general rule this court will not normally disturb or upset concurrent findings of facts by the Court of Appeal and the High Court unless there is some miscarriage of justice or violation of any principle of law or procedure. (P. 640D)

NOTABLE POINTS OF INTEREST

ONU JSC

1. Accused can disown counsel assigned to him

Besides, there is nothing rigid about the assignment of counsel; the appellant herein was at liberty to disown, reject or protest against or indeed change the counsel assigned to him. This seems to be taken care of by section 7(3) of the Legal Aid Act, Cap. 205. (P. 634A)

2. Mere anger is not provocation

At worst, appellant might well have been annoyed but it is the law that mere anger is not provocation. The deceased attempted to apprehend the appellant by his hands. The appellant on falling to the ground, then turned round to stab him with a knife, thus displaying an act of savage temper ruling out a plea of provocation. (P. 637B)

3. Discretion of prosecution to call enough material witnesses

There is no rule of law which imposes an obligation on the prosecution to call a host of witnesses; all the prosecution need do is to call enough material witnesses to prove its case and in so doing, it has a discretion in the matter. In fact, it is now an established principle of law that a court can convict upon the evidence of one witness without more, if the witness is not an accomplice in the commission of the offence and his evidence is sufficiently probative of the offence with which the accused has been charged. (P. 638D)

OGWUEGBU JSC

4. Failure to assign counsel - Breach of fair hearing

There is the statutory duty imposed on a trial judge under section 352 of the Criminal Procedure Act to assign counsel if the accused has none. While failure to assign counsel to an accused charged with a capital offence is clearly a breach of the right to a fair hearing, the right to counsel of one's own choice may be subject to qualification as illustrated in the celebrated case of Awolowo v. Federal Minister of Internal Affairs & or. (1966) H All N.L.R. (Reprint) 171. (P. 642C)

5. Allegation of incompetence of assigned counsel - Firmer ground of complaint

The appellant might have been on a firmer ground if his complaint had been on the incompetence, inexperience or otherwise in the handling of the defence by Mr. Ezeonwuka which led to his conviction. When the court assigns counsel under section 352 of the Criminal Procedure Act, it directs the Registrar of the Court to arrange for counsel for the accused and in doing that, the Registrar does not seek the opinion of the accused. The appellant is entitled to reject the counsel so assigned. Unless he does that, he cannot be heard on appeal that the said counsel was not that of his own choice. (P. 644B)

MOHAMMED JSC

6. No objection by appellant against assigned counsel - Effects

If the appellant, in this case, did not approve the appearance of counsel assigned to defend him he would have told the learned trial judge. Had the appellant raised an objection to the appearance of the counsel and court over-ruled the objection and allowed the legal practitioner to continue with the defence, the appellant would have a strong ground to plead a violation of the provision of the provisions of section 33(6)(c) of the Constitution. (P. 645C)

ADIO JSC

7. Assigned counsel - Effect of accused briefing another counsel

If the appellant in this case, had raised an objection to his being represented by the learned counsel assigned to him or had briefed another learned counsel who announced his appearance for the appellant during the proceedings, no doubt the learned to him would counsel assigned to him would have withdrawn or be made to withdraw horn farther participation in the proceedings. (P. 646E)

REPRESENTATION

H Kanu Agabi, Esq. with Eddy Ogon, Esq. for the Appellant
C. C. Eneh, Esq. Chief Legal Officer, Enugu State for the Respondent.

CASES REFERRED TO

Fawehinmi v. Nigerian Bar Association (No.1) (1989) 2 N.S.C.C.
 Awolowo v. The Federal Ministry of Internal Affairs & ore. (1962) KLR 177

Nemi v. The State (1994) 13 KLR (Pt. 200)	B
Oladejo v. The State (1987) 3 NWLR (Pt. 61) 419	
Okon v. The State (1994) 1 NWLR (Pt. 372) 382	
R v. Ebok (1950) 19 NLR 84	
Nwede v. The State (1985) 3 NWLR 444	
Nkemchor v. The State (1985) 5 SC. 1	C
Sadiku v. The State (1972) 2 SC. 169	
Bellow v. The State (1966) 1 All NLR 223 at 230	
Adaje v. The State (1979) 6-9 SC. 18 at P. 28	
Oteki v. A. G. Bendel State (1986) 2 NWLR (Pt. 24) 648	
Akalezi v. The State (1993) 3 KLR 132	D
Idahosa v. The State (1965) NMLR 85	
Overseas Construction Co. Nig. Ltd. v. Creek Ent. Nig. Ltd. (1985) 3 NWLR (Pt. 13)407	
Ezea v. The Queen (1963) All NLR (Reprint) 243	
Ibeh v. The State SC. 139/1993	E

STATUTES AND RULES REFERRED TO

Legal Aid Council Act Ss. 13(4), 7(3)	
Constitution of the Federal Republic of Nigeria 1979 S. 33(6)(c)	F
Criminal Procedure Act Ss. 352, 283	
Constitution of Nigeria, 1960 Ss. 21(5), 20(1)(f), 26(1)	
Robbery and Firearms (Procedure) Rules 1975 r.5	
Evidence Act Laws of the Federation of Nigeria S. 179(1) and (2)(a)	

BOOK REFERRED TO

Jowitt's Dictionary of English Law

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LEAD JUDGMENT BY ONU JSC

This appeal is from the judgment of the Enugu Judicial Division of the Court of Appeal dated the 28th of March, 1994 dismissing Ofoke B Nwambe (appellant's) appeal against the judgment of the High Court of Enugu State sitting at Abakaliki. The trial High Court had on 4th May, 1987, convicted the appellant of the murder of one Nweke Ottah punishable under section 319 (1) of the Criminal Code and accordingly sentenced him to death.

C The case for the prosecution briefly put is that on or about the 9th of February, 1986, one Egwu Nwankwo Agu, (PW3), organised a party to mark the giving-out of his daughter in marriage and for that purpose, invited his friends among whom was PW2 (Nwoba Ngiga) to his home in Mkprumeh Village in Inyimagu Izzi, for the celebration. The appellant who D later arrived at PW3's house uninvited, after being served with food and wine, demanded of PW2 for palm wine to be purchased with his (PW2's) money. When PW2 refused to accede to his request appellant insisted. This led to the intervention of PW3; who appealed to the appellant to leave PW2 alone. The appellant would not. So, PW3 ordered him out of his E house and aided by PW2 tried to eject the appellant therefrom.

The appellant thereupon stabbed PW2 and as he bolted away, he was chased by PW3 and others engaged at the meriment making including Nweke Ottah (now deceased). It was in the course of that chase and in order to avoid being apprehended, that he (appellant) stabbed the deceased F with a knife and he died soon thereafter of the injury he received.

Appellant's own version of the event is that he was duly invited to the feast but that as he could not attend on the first day, he went over early on the second day. There, he demanded of PW3 the refund of the dowry of N264.00 which he had paid when he married his wife but who PW3 had G taken away because she was and had been barren. PW3 thereupon promised to refer the matter to the family and so he left for his house. On the way, he met PW2 whom he requested to buy him palm wine, PW2, who said that he had no money on him to buy him wine until some other day, held him, beat him and knocked out his tooth. He, in retaliation, picked up H a bamboo with which he hit PW2 causing him some injury. Appellant, after denying seeing the deceased at the material time, denied the charge.

The learned trial Judge in a well considered judgment disbelieved the appellant, found the case proved and convicted and sentenced him to the mandatory sentence of death by hanging. His appeal to the court be-

low having been dismissed, he has further appealed to this Court firstly, on a general original ground of appeal which was later abandoned and with leave, being later sought and granted, to argue four additional grounds inclusive of one on a point of law not hitherto taken in the court below.

Briefs of argument were eventually exchanged in accordance with the rules of court. The appellant submitted three issues as calling for our B determination, to wit:

1. Whether the appellant's fundamental right to defend himself by himself or by counsel of his own choice was not violated by the assignment to him of counsel by the court of first instance as was done in this case.
2. Whether on the evidence the plea of self defence or provocation availed C the appellant?
3. Whether it was safe to convict on evidence that was corroborated.

The respondent, on the other hand, proffered the following three issues:-

1. Whether from the evidence on record the defence of provocation and or D self-defence availed the appellant.
2. Whether the case against the appellant was proved beyond reasonable doubt?
3. Whether the assignment of Counsel from the Legal Aid Council to the appellant by the Trial Court violated appellant's constitutional right to de- E fend himself personally or by Council of his choice?

At the hearing of this appeal on 9th February, 1995, learned counsel for the appellant, Mr. Kanu Agabi, after adopting the appellant's brief filed on 8th June, 1994 briefly expatiated thereon. He urged us to uphold the appeal, particularly as appellant's right to fair hearing in regard to his F right on choice of counsel was denied him. He then adverted our attention to the purport of section 13(4) of the Legal Aid Council Act.

Learned Chief Legal Officer, Mr. C.C. Eneh, after adopting the respondent's brief filed on 12th January, 1995 urged us to dismiss the appeal since the appellant at the trial never complained about the counsel G assigned to him.

I deem it necessary to stick to the three issues stated by the appellant as those pertinently related to the grounds of appeal. I will commence considering them serially as follows:-

ISSUE 1:

It is learned counsel for the appellant's contention in his brief on this issue that on the 15th day of December, 1986 when the case first came before Offiah, J. the record showed that:-

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“Charge is read and explained in Ibo to the accused who understands the same and pleaded not guilty. Court - proofs of evidence and information to be forwarded to the Assistant Director of Legal Aid Enugu. The Assistant Director is to arrange for the defence of the accused”

(Italics is for emphasis)

B Accordingly, he asserted, when the case came up on the 26th of January, 1987, a Miss Ekpechi “for the Legal Aid Council” appeared for the appellant. Subsequently, he pointed out, the place of Miss E. N. Ekpechi was taken by Mr. Ezeonwuka. He queried whether both Miss E.N. Ekpechi and Mr. Ezeonwuka or either of them, can be regarded as counsel of the
C appellant’s choice. It was therefore learned counsel’s submission that they could not be so regarded; they, having been assigned to defend the appellant by the Assistant Director of Legal Aid at the instance of the court. Two questions, learned counsel argued, immediately arise: Whether the court had power to assign counsel to defend the appellant and whether that
D power could be delegated. Counsel then maintained that the power of Court to assign counsel is conferred by law and limits are set by that law to the exercise of the power so conferred. He added that unless the power is exercised strictly in accordance with the provisions of the relevant law, the power exercised cannot be deemed to be that conferred by law. Regarding
E delegation, he argued, it is apparent and undeniable that it is a power which the court cannot delegate, adding that all that the Legal Aid Council Act Cap. 205 sets out to achieve is to provide a machinery for the assistance of indigent litigants who require or desire assistance. Nothing in the Act, he said, entitles or enables it to take over the functions of a Court or
F Judge to assign counsel.

Secondly, learned counsel contended, the Director of Legal Aid could not arrange for the defence of the appellant without knowing his peculiar circumstances, the facts of the case and the competence and commitment of the legal practitioner to be retained. In that wise, he asserted, it
G cannot be assumed that the Director of Legal Aid was qualified to make the arrangement or that he exercised due care and caution in making it, moreso that these are matters that cannot be left to chance since the records should show that where the court assigns counsel. Measures have been taken to ensure that the Counsel so assigned, is capable of discharging the
H attendant responsibility. After pointing out that legal practitioners are not the same, that their aptitudes, interests, dispositions and abilities are different, learned counsel contended that however competent counsel may be, he should not be assigned to defend an accused who does not require his services. He added that however indigent an accused person is, he should

be consulted before counsel is assigned to defend him. In particular, he argued, he should approve of the counsel assigned to him and the records should so indicate. Otherwise, he contended, any counsel assigned to him is deemed to have been imposed. Such imposition without more, he pointed out, would annul the trial, for in that case, he is deemed to have been denied the opportunity of defending himself either by himself or by a legal practitioner of his choice. Where the court has failed to ascertain from the accused whether he approved of his services, he must communicate that fact to the court for the same to be recorded. This, learned counsel argued, was not done in this case. It may be argued, learned counsel pointed out, that the appellant not having complained throughout, is deemed to have waived his right to counsel of his choice. It is submitted further that such an assumption does not take into account the peculiar nature of our jurisprudence, quite apart from the fact that a fundamental right cannot be waived, pointing out how our Criminal procedure is alien and foreign for the appellant to realistically understand what it is all about, for him to be expected to object to any aspect of the proceedings. Such that if anybody comes forward to defend him or is assigned to defend him, the Court must ascertain from him whether he approves of such person, adding that it is only when he approves can he be bound by the legal practitioner's conduct of the case. Learned counsel further argued that the assignment of counsel for the defence of an accused not being a formality, it is an important part of the trial and the records must show, not only the processes by which the choice was made, but that serious thought has been given to the matter. It being that no presumption or guarantee that an accused person is necessarily best defended by a Legal practitioner and if the assignment of Counsel is based on that assumption, then the records must show that that was the view which the accused himself took of the matter or at least, that in the particular case, it was indeed so. Nothing, learned counsel maintained, should be left to assumptions or presumptions as it should not be done without the consent of the accused who, it should not be assumed, cannot defend himself and even better than a legal practitioner, no matter how competent. After we were referred to the provisions of section 33(6)(c) of the 1979 Constitution and Section 352 of the Criminal Procedure Act on the right of an accused person to defend himself in person or by legal practitioner of his choice as well as the power of court, where necessary, to assign counsel to do so respectively, learned counsel submitted that the latter section does not negate the appellant's constitutional right to choose his own counsel. On the contrary, he contended that section is inconsistent with section 33(6) (c) and so null and void to the extent of such inconsis-

tency. Learned counsel commenting on acquiescence and how by acceding to a court's exercise of its duty to assign counsel under section 352 of the Criminal Procedure Act, the appellant should not be taken as having acquiesced in the violation of his fundamental right. Otherwise a man who has killed another, he argued, can falsely claim that the other acquiesced in the murder. He referred us to some sections of the Legal Aid Act to buttress his argument and concluded that in the instant case, the appellant did not make the selection of counsel himself leading to his right of fair hearing being clearly violated and hence the trial rendered null and void.

Before I embark on answering the questions on whether the assignment of counsel to the appellant in the instant case violated his fundamental right of choice of counsel under the Constitution of the Federal Republic of Nigeria, 1979 (hereinafter referred to as the 1979 Constitution) and as to whether the procedural law governing the assignment is inconsistent with the Constitutional provision and to the extent of that inconsistency, null and void, I shall first set out what in fact took place at the trial. On 15th December, 1986, when the appellant was first arraigned unrepresented by counsel before the trial Court, that court after reading or causing the Charge to be read to him and his plea was taken, made the following recording. *"Court - Proofs of evidence and information to be forwarded to the Assistant Director of Legal Aid, Enugu. The Assistant Director is to arrange for the defence of the accused."* The appellant was not produced in court on 15th January, 1987. That led to the adjournment of the case to 26th, January, 1987. On 26th January, the trial court's record indicated as follows:-

"Accused present.
Mr. Amaefuna for State
Miss E.N. Ekpechi for the Legal Aid Counsel
Plea - Count 1 - Not guilty.
Court - adjourned to 13th and 23rd February, 1987 for hearing.
Accused to continue in prison custody."

When trial commenced on 13th February, 1987 the trial court's minutes indicated that Mr. Ezeonwuka appeared for the appellant and he consistently did so to the conclusion of the case, culminating in its judgment on 4th May, 1987. Now, the switch by the Legal Aid Council from Miss Ekpechi to Mr. Ezeonwuka as counsel for the appellant although unexplained, is not tantamount to any suggestion, in my view, that Miss Ekpechi was a more competent Counsel than Mr. Ezeonwuka or vice versa. Besides, the appellant was not shown as having complained at the trial that either or both counsel were imposed on him. If anything, the assignment of a Legal Aid

Council - sponsored counsel to handle an accused person's case rather than a thing to be looked upon as an imposition, is a symbol of the indigency of the accused deserving of humanitarianism. It is no less so in the instant case where the appellant did not proffer a suggestion that he had employed the services of a legal practitioner from his own resources and the trial court persisted in trying his case with the counsel from the Legal Aid Council, nor has it been demonstrated that the appellant opted to defend himself in person and he was denied that opportunity.

Coming to the legal position, the 1979 Constitution provides in clear terms in section 33(6)(c) as follows:-

*"(6) Every person who is charged with a criminal offence shall be entitled -.....
(c) to defend himself in person or by legal practitioner of his own choice."*

By a long line of decided cases, this Court has held that an ordinary member of the public has a right to argue his case himself either at first instance or on appeal. Thus, in *Fawehinmi v. Nigerian Bar Association (No.1)* (1989) 2 NSCC.1, 21; (1989) 2 NWLR (Pt. 105) 494 at 532, this Court (per Obaseki. J.S.C.) observed:

"Every appellant, be he a barrister or solicitor or ordinary member of the public, has a right to argue his case either at first instance or on appeal in person."

See also *Peter Nemi & ors. V. The State* (1994) 10 SCNJ. 1 (1994) 9 NWLR (Pt.366) 1. Primarily, it is the duty of an accused person in the position the appellant found himself on 15th December, 1986, to arrange for how best he can defend himself. Howbeit, as no legal practitioner appeared for him, the court was constrained and was indeed enjoined by the provisions of section 352 of the Criminal Procedure Act, to make provisions for his defence. Section 352 of the C.P.A states:

"352. Where a person is accused of a capital offence the State shall, if practicable, be represented by a law office, or legal practitioner and if the accused is not defended by a legal practitioner the court shall, if practicable, assign a legal practitioner for his defence."

In the instant case, the trial court in order to ensure that the appellant was represented by a legal practitioner, referred the matter of his defence to the Assistant Director of Legal Aid Council, a statutory body established to aid

indigent accused persons and litigants. By that act, the trial court, in my view, had discharged the statutory duty it owed to the appellant. The appellant knowing fully well that he was being accused of the offence of murder, which offence is serious, the burden lay on him to arrange for his defence and if he failed to do so, cannot now turn round, late in the day, to pick holes in the correct application of Constitutional or procedural provisions governing such an assignment of counsel. In the case of Chief Obafemi Awolowo v. The Federal Minister of Internal Affairs & ors. (1962) LLR. 177, a civil case, the issue of section 21(5) of the Nigerian Constitution, 1960 which is in pari materia with section 33(6)(c) of the 1979 Constitution was considered. In that case Udoma, J. (as he then was) held that the section on choice of counsel must be construed to have a limit. The learned Judge held at page 185 of the Report that:

"The essential protection offered to an accused person by the provision of section 21(5)(c) is that he is entitled by law to be represented at his trial by a legal representative if he wishes, and that in such a case such legal representative must not be someone chosen for him by the prosecutor, or government or someone else not approved by him."

The above was the case in which Chief Awolowo and others engaged the services of a foreign counsel of their choice to defend them but the counsel could not get through with the Immigration Department, and the question then arose whether they were not denied their choice of counsel as enshrined in the 1960 Constitution. The court held that they were not denied their choice of counsel. It is in the light of the above that I cannot conceive of any known inconsistency between the provisions of Section 33(6) (c) of the 1979 Constitution and section 352 of the C.P.A. I will therefore decline the invitation to declare any purported inconsistency between these two legislation null and void as there is indeed no such inconsistency. See also Peter Nemi & ors v. The State (1994), NWLR (Pt366)1 (1994) 10 SCNJ 1 at pages 30-32 where Bello, C.J.N in his consideration of the provisions of section 33(6)(c) of the 1979 Constitution as well as section 352 of the C.P.A. and Rule 5 of the Robbery and Firearms (Procedure) Rules, 1975 and non-compliance therewith, held inter alia that -

"Representation by a legal practitioner at the trial of any person accused of a criminal offence is one of the fundamental rights guaranteed by section 33 of the Constitution and, if the charge is of a capital offence and the accused is not represented by a counsel of his choice, the court has a statutory duty to provide such representation."

The learned Chief Justice then went on to illustrate what this Court said in such other cases as *Oladejo v. The State* (1987) 3 NWLR (Pt. 61) 419; *Josiah v. The State* (1985) 1 NWLR (Pt. 1) 125 and *Udo v. The State* (1988) 3 NWLR (Pt. 82) 3 16.

1. In *Oladejo v. The State* (supra), an armed robbery case, where in concluding his lead judgment (with which Udoma, Eso, Aniagolu and B Uwais, JSC agreed) Irikefe, J.S.C., stated:

"In view of the undisputed non-compliance with the provisions of section 287(1)(a) (i)-(iii) of the Criminal Procedure Law, coupled with the fact that the appellant was neither defended by counsel nor had one assigned for his defence by the tribunal as stipulated under Rule 5 of the Robbery and Firearms Tribunal (Procedure) Rules, 1975, I was not in any doubt that the appellant in this case could not be said to have had a fair trial."

2. In *Josiah v. State* (supra) which was a murder case tried in the High Court of Bendel State, the trial Judge there failed to assign a legal practitioner to defend the accused as required by section 352 of the Criminal Procedure Law. He also failed to comply sufficiently with the provisions of section 287 of the said Law. This Court held -that the appellant had not had a fair trial and ordered a retrial.

3. In *Udo v. State* (supra) this Court in quashing appellant's conviction and ordering trial de novo, held that partial non-representation by a legal practitioner of the accused during a murder trial which substantially affected the trial, was not concomitant with a fair trial. At page 333 of the Report Nnaemeka-Agu, J.S.C. held inter alia, as follows:-

"It appears clear to me, therefore, that the purport and intent of section 352 of the Criminal Procedure Law and section 33(6) (c) F &(d) of the Constitution of the Federal Republic, 1979 is to introduce or perpetuate what Lord Denning described as "the fundamental principles of a fair trial" See Tameshwar v. The Queen (1957) A.C. 476, at 486 into our administration of criminal justice. It was breached in this case when the learned trial Judge failed or neglected to consider the learned defence G counsel's application for an adjournment under rather compelling circumstances. It was trampled down upon with impunity when he proceeded to take the evidence of PW3, Bassey Asuquo Effiong; a most important witness for the prosecution in the absence of the legal practitioner for the accused person who was standing trial for his life. It was also not adverted H to when PW5, Dr. John Akpan Inieke, gave his evidence in chief in the absence of the learned counsel for the appellant. I shall not visit the sins, if any, of the defence counsel on the court, as the learned counsel for the appellant appears to urge."

Besides, there is nothing rigid about the assignment of counsel; the appellant herein was at liberty to disown, reject or protest against or indeed change the counsel assigned to him. This seems to be taken care of by section 7(3) of the Legal Aid Act, Cap. 205, wherein it is stated inter alia that

- B “(3) A legally assisted person shall have the right to change the legal practitioner assigned to him provided that -
 (a) he first gives notice in writing to the Director-General of his intention to do so and gives reasons;”

I do not find the reference made to section 13 of the above Act helpful in C this case.

I therefore take the firm view that the assignment of counsel from the Legal Aid Council to the appellant was regularly done. Hence, he neither raised any objection nor protested throughout the trial; nor further still did he produce a counsel of his own choice in the alternative. It being D patent that the Legal Aid Council stands in a better position to minister unto indigent accused persons, such as appellant in the assignment of counsel, the argument that failure to leave the matter of assignment of counsel in the hands of the trial court in the instant case, rendered the trial null and void, cannot in my view, be sustained. It was rather the indigency of the E appellant, I dare say, that led to the constraint, if any in the choice of counsel assigned from the Legal Aid Council of legal representation to him, than failure on the part of the trial court, which in any case, acted statutorily and benevolently in assigning counsel for his defence. The instant case being neither one of non-appearance or partial appearance of the assigned F counsel as exemplified in the cases enumerated in the Peter Nemi case (supra), has carved for it. Its own distinguishing features of full and unfettered representation by counsel for which there can be no complaint. See also this court’s recent decision of Nseabasi Nse Okon v. The State (1995) 1 NWLR (Pt. 372) 382. wherein the trial High Court and the Court of G Appeal were each obliged to assign a Legal Aid counsel for the defence of an unrepresented murder accused and the latter turned round to complain before the Supreme Court that it was wrong of the two courts below to have assigned counsel to him, when there was no evidence that he was indigent. It was held at page 392 of the Report, inter alia; that the duty H imposed on the court to assign counsel to defend an accused person who is unable to brief a legal practitioner for his defence in a capital offence, does not call for or require the consent or any consultation with such an accused person before the same may be discharged.

My answer to Issue 1 is accordingly rendered in the negative.

Issue 2 complains of whether on the evidence the plea of self-defence or provocation availed the appellant.

In considering these two defences jointly, it should be borne in mind that they must be based on existing proved and accepted facts. From the testimony of PW2 and PW3, it was clear that the appellant stabbed PW2 in the house of PW3, necessitating the chasing of appellant by PW3 B and others including the deceased, who lost his life in the hot pursuit while trying to apprehend the appellant. The appellant never denied visiting PW3 on the day of the incident, i.e 10/2/86. It was common ground that PW3 accepted the appellant to the marriage ceremony and the contention that PW2 could not have been stabbed by the appellant for the former's inability to buy wine for him (appellant), is not borne out by the evidence before the trial court; indeed, the trial court rejected the appellant's defence in relation to that aspect of the case.

In the first place, in his statement (Exhibit'A'), made a day after the incident, the appellant stated, inter alia - D
"On the 10/2/86, at about 12 noon while we were drinking in the house of Egwu Nkwuda (m) of same address, after sometimes I decided to go home. While I was going, one Nwoba Nguga (m) also of same address came and gripped me and started beating me. He never told me what I did to him. The villagers started pursuing me and I started running to my E house....."

Secondly, in his testimony in defence, appellant described how he met PW2 on the road where the latter demanded palm wine to be bought for him and his promise to do so at some future date, an offer which was unacceptable to PW2. That instead, PW2 held him and joined by PW3, F beat him up and knocked off a tooth from his (appellant's) mouth. He in addition testified that he lodged a report against PW2 and PW3 for the assault on him with the Police.

Appellant under cross-examination stated as follows:-

"I was within the compound of PW3 when PW2 met me and blocked the G road and demanded that I bought him some wine. It was only PW3 who later came to the scene and not the deceased."

In considering whether the defence of provocation can avail the appellant, it is pertinent to point out how the story of his loss of a tooth as told in his testimony, was completely absent in Exhibit'A'. Rather, in Exhibit'A', all he said was that he was beaten up by PW2 while he was going home after visiting PW3. Moreover, the appellant did not cross-examine either PW2 or PW3 on the issue of knocking off his tooth. That singular omission or failure on appellant's part is fatal to his own version of the

event.

Thirdly, the appellant in his evidence said that he was attacked and beaten by PW2 and PW3 and never had anything to do with the deceased. Of this, the learned trial Judge after expressing his preference for the evidence of PW3 as against appellant's held:

B *"It is my view that for provocation to succeed as a defence, the said provocation must move from or be offered by the person who is in fact killed or the person who the prisoner intended to kill. It would be stretching the law to a dangerous extent to say that provocation from one person would justify the killing of another, refer to R. v. Ebok (1950) 19 NLR. 84; R v. Nwanjoku (1937) 3 WACA 208 and Sunday Omeninu v. The State (1966) NMLR 356. I am satisfied that the defence of provocation under S. 284 of the Criminal Code is not available to the accused. It is also my view that self-defence under either S. 286 or S. 287 of the Criminal Code Law does not avail the accused."*

D The court below upheld the above findings of fact of the trial court and in addition distinguished the case of *Biruwa v. The State* (1985) 3 NWLR (Pt 11) 167, from the instant case in which provocation as a defence, was not established. This is because as was clearly established in evidence, the deceased never offered any provocation to the appellant.

E *Biruwa v. State* (supra), was a decision of the High Court, Yola which convicted the appellant of culpable homicide punishable with death under section 221 (a) of the Penal Code. By a majority of 2 to 1, the Court of Appeal dismissed the appeal and upheld the conviction and sentence of the trial court., In that case, provocation in law was held to consist mainly

F of three elements, VIZ -

- (i) the provocative act
- (ii) the loss of self-control, both actual and reasonable
- (iii) proportionality of retaliation.

As was indeed decided in *Omeninu v. State* (supra), even if the appellant

G was provoked by PW3 and PW2 that could not be enough justifiable provocation in law for the appellant to kill the deceased. If in fact, the deceased held a stick he was to have wielded on the appellant before the appellant inflicted the fatal blow with his knife, which he confessed in Exhibit 'A' he had on him when he fell down, the weapon used (a knife as against a

H stick), the force used and the resultant wound inflicted by the appellant on the deceased as vividly described in the testimony of PW5, Dr. (Innocent Echiegu), was disproportionate to the provocation. See *Nwede v. The State* (1985) 3 NWLR (Pt.13) 444 and *Chukwu Obaji v. The State* (1965) NMLR. 417. The decisions in *Omeninu* and *Biruwa* (supra) hinged on the point

that the act of provocation must move from or be offered by the person who is in fact killed, or the person whom the accused intended to kill. Even if it were to be argued that it was PW3 who offered the appellant the provocation, since he allegedly took away the appellant's wife a long time before the incident, that act by itself could not constitute provocation, nor could PW2's refusal to buy him wine constitute an act of provocation. At worst, appellant might well have been annoyed but it is the law that mere anger is not provocation. See *Nkemchor V. The State* (1985) 5 Sc. 1. It was common ground that it was PW3 who held a stick while pursuing the appellant, namely, after PW2 was stabbed and the trial court so held. The deceased attempted to apprehend the appellant by his hands. The appellant on falling to the ground, then turned round to stab him with a knife. Thus displaying an act of savage temper ruling out a plea of provocation. See *Lamidi Sadiku v. The State* (1972) 2 SC 169. As appellant's conduct savoured of the wreaking of vengeance, the defence of provocation is negated by that singular desire to revenge. See *Akang v. The State* (1971) D NMLR 36.

As for self defence, as appellant was unable to show that he was at the time of the killing in reasonable apprehension of death or grievous harm, and that it was necessary at the time to use the force which resulted in the death of the deceased to preserve himself from danger, the defence does not avail him.

Besides, the appellant had shown himself through and through to be the aggressor. This issue is answered in the negative.

ISSUE 3:

The question here properly put is whether it was safe to convict on evidence that was uncorroborated. My answers to issues 1 and 2 above are hereby adopted in the discussion of this issue. In addition, in order to give a full and satisfactory answer to this issue, one would have to ask firstly what corroboration means. Corroboration is not expressly defined by the Evidence Act but section 179, Cap. 112 of the Laws of the Federation of Nigeria sets out the number of witnesses for the proof of certain facts and in particular, where corroboration may be required. The section provides inter alia-

"179(1) Except as provided in this section, no particular number of witnesses shall in any case be required for the proof of any fact.

(2)(a) No person charged with treason or with any of the felonies mentioned in section 40, 41 and 42 of the Criminal Code can be convicted except on his own plea of guilty or on the evidence in open court of two witnesses at the least to one other act of the kind of treason or felony

alleged, or the evidence of one witness to one overt act and one other witness to another overt act of the same kind of treason or felony."

(Italics above is mine for emphasis).

Now, corroboration is defined by JOWITT'S Dictionary of English Law as "*a confirmation of a witness's evidence by independent testimony.*" This

B Court had, occasion to give an insight into what corroborative evidence is in *Odojin Bello v. The State* (1966) 1 All NLR 223 at 230 wherein it held,

"Corroborative evidence is evidence which shows or tends to show - not merely that the crime has been committed but that it was committed by the accused,"

C From the italicized portions of section 179 (1) and (2)(a) of the Evidence Act it will be erroneous and indeed not the law that

(i) any particular number of witnesses are required for the proof of the type of offence (in this case murder) with which the appellant was charged and

D (ii) murder punishable under section 319(1) of the Criminal Code is not one of the types of offences for which the type of plea and the number of witnesses required for their proof, are stipulated therein.

The above provisions of the Evidence Act aside, there is no rule of law E which imposes an obligation on the prosecution to call a host of witnesses;

all the prosecution need do is to call enough material witnesses to prove its case and in so doing, it has a discretion in the matter. See *Samuel Adaje v.*

The State (1979) 6- 9 SC 18 at page 28; *E.O. Okonofua & Anor v. The State* (1981) 6-7S.C 1 at 18 and *Ogoala v. The State* (1991) 2 NWLR (Pt.

F 175) 509 at 527. Infact, it is now an established principle of law that a court can convict upon the evidence of one witness without more, if the

witness is not an accomplice in the commission of the offence and his evidence is sufficiently probative of the offence with which the accused has

been charged. See *Oteki v. A.G. Bendel State* (1986) 2 NWLR (Pt. 24) 648

G and *Mallam Numo M. Ali & anor v. The State* (1988) 1 NWLR (Pt. 68) 1. In the *Oteki Case* (supra), the Supreme Court in a murder case at page 669

(*Oputa, J.S.C.*), expatiated on the point inter alia thus:

"..... Prosecution witness 1's evidence proved that issue to the satisfaction of the trial Court. The prosecution having discharged this onus through PW1 there was no further obligation on it to call more witnesses on that issue"

H Further still, in *Ali & anor v. The State* (supra), where the cold-blooded murder (If the deceased, a Senior Police Officer attempting to apprehend

the appellant, was perpetrated by the appellant hacking the deceased in the chest with a knife and causing his death instantaneously, this Court on appeal dismissed it and held at page 20 of the Report (per Oputa, J.S.C.) thus:

"I thought we had passed this stage in our criminal jurisprudence. The duty on the prosecution is to prove its case. The testimony of one witness who is credible and who is believed is worth much more than those of a host of witnesses whom the Court cannot believe. Truth is not discovered by the impressive number and preponderance of witnesses who testified, for one side but by the credibility of those witnesses no matter how few."

The mere fact that the witness (in the instant case, PW3, as alleged) had a grouse against the appellant and that the learned trial Judge did not warn himself before convicting him, will not weaken the evidence if found to be true. It is upon the same principle which is now firmly established that the court can convict upon the evidence of one witness that Ogwuegbu, J.S.C. in *Akalezi v. The State* (1993) 2 SCNJ 19; (1993) 2 D NWLR (Pt.273) 1, poignantly re-iterated the law at page 13 of the latter Report thus:

"Proof beyond reasonable doubt is not attained by the number of witnesses fielded by the prosecution. It depends on the quality of the evidence tendered by the prosecution"

It is clear from my illustration above, that in the instant case, no corroboration was needed of the evidence of PW3 before the trial court could convict the appellant thereon of the offence of murder.

Having arrived at the view that the trial court needed no corroboration of the evidence of PW3 before convicting the appellant - that witness not having been shown to be an accomplice - the various submissions made on appellant's behalf by his counsel, to wit: firstly, that the PW3 was an enemy of the appellant: secondly, that he had broken his (appellant's) home and had refused to refund to him his dowry paid by him as custom demanded; thirdly, that he did not invite him to his daughter's marriage but rather chased him out of his home and so could not be trusted to be fair to him, moreso that death ensued and PW3's version of the stabbing of PW2, coming as it did only at the Police Station, was open to justifiable suspicion. Fourthly and finally, that PW3 coming as he did, within the category of interested person as decided in the case of *Idahosa v. The State* (1965) H NMLR 85, his evidence was that of a tainted witness which ought to have been received with considerable caution. All these, in my respectful view, are misconceived. This is the moreso, when it is known that in Exh. 'A', the statement appellant made a day after the offence, he made mention of

PW3 only in passing and alleged none of these things.

In order to exemplify that what the appellant is now saying in his brief under this issue relating to the conduct and actions of PW3 constitute no more than an afterthought. I deem it pertinent, for its sheer brevity and B relevance, to set out Exhibit 'A' in its entirety as follows:-

"On the 10/2/86, at about 12 noon while we were drinking in the house of Egwu Nkwuda (i.e. PW3) (m) of same address. After sometime Nwoba Nguza (m) (PW2) also of same address came and gripped me and started beating me. He never told me what I did to him. He told me down, C while I was on the ground I withdrew my knife and stabbed him, but I don't know the actual place I stabbed him. The villagers started pursuing me and I started running to my house. I was drunk. I only know I stabbed Nwoba Nguga (m). I can't remember if, I at any time stabbed Nweke Ottah (m) of same address." (Parenthesis is mine).

D The learned trial Judge rightly, in my view, convicted the appellant of the murder of Nweke Ottah after reviewing the evidence adduced thereat and the court below was justified in affirming the decision. It was safe to convict the appellant on the evidence of PW3 which needed no corroboration. As a general rule, this court will not normally disturb or upset concurrent findings of facts by the Court of Appeal and the High Court unless E there is some miscarriage of justice or violation of any principle of law or procedure. See Overseas Construction Co. Nig. Ltd v. Creek Enterprises Nigeria Ltd. (1985) 3 NWLR (Pt. 13) 407; Enang v. Adu (1981) 11-12 SC 25; Lokoyi v. Olojo (1983) 2 SCNLR 127 (1983) 8 SC 61 at 63-73 and F Okagbue v. Romaine (1982) 5 SC 133. In the instant case, there has not been shown any miscarriage of justice or violation of any principle of law or procedure to warrant my upsetting the concurrent findings of the two courts below.

Issue 3 is accordingly resolved against the appellant.

G The result of all I have been saying is that this appeal lacks merit and it is accordingly dismissed by me. The decision of the court below is affirmed.

H **BELGORE JSC**

I read in advance the judgment of my learned brother Onu, J.S.C. I am in full agreement with his reasoning and conclusion. I have nothing to add and I also dismiss this appeal as he has done.

OGWUEGBU JSC

I have read the judgment of my learned brother Onu. J.S.C. in this appeal and I agree with the reasoning therein and the conclusion that the appeal be dismissed.

I wish to make a few comments of my own in respect of the issue whether the appellant's fundamental right to defend himself in person or by counsel of his own choice was not violated by the assignment to him of counsel by the court of first instance.

I will now consider the provisions of sections 33(6)(c) of the Constitution of the Federal Republic of Nigeria, 1979, 13(4) of the Legal Aid Act, Cap. 205, Laws of the Federation of Nigeria, 1990 and section 352 of the Criminal Procedure Act, Cap 80, Laws of the Federation of Nigeria, 1990.

The learned counsel for the appellant submitted that the power to assign counsel is conferred by law and that limits are set by that law to the exercise of the power so conferred. It was contended that, that power was not exercised in strict accordance with the provisions of the relevant law in this case; that it is a power which the court cannot delegate and that there is nothing in the Legal Aid Act which entitles the Legal Aid Council to take over the functions of a Court or Judge to assign counsel to an accused.

It was further submitted that since the appellant did not make the selection himself as provided in section 13(4) of the Legal Aid Act, his right to fair hearing enshrined in section 33 (6)(c) of the Constitution was violated and the violation rendered the trial null and void. We were urged to uphold the submission and allow the appeal.

Section 33(6)(c) of the 1979 Constitution provides:

"(6) Every person who is charged with a criminal offence shall be entitled

(a)

(b)

(c) to defend himself in person or by legal practitioner of his own choice;

(d)

(e)

Section 352 of the Criminal Procedure Act states:

"352. Where a person is accused of a capital offence the State shall, if practicable, be represented by a law officer, or legal practitioner and if the accused is not defended by a legal practitioner the court shall, if practicable, assign a legal practitioner for his defence."

Section 13(4) of the Legal Aid Act provides:

“(4) Where a person is entitled to receive Legal Aid, the legal practitioner to act for him shall be selected from the appropriate panel, and he shall be entitled to make the selection himself:

Provided that -

- B (a)
 (b)
 (the Italics is for emphasis only).

The provisos do not apply to this case.

The entrenched constitutional right provided in Section 33(6)(c) is C that an accused person is entitled to represent himself in person or by a legal practitioner or his own choice. There is the statutory duty imposed on a trial Judge under section 352 of the Criminal Procedure Act to assign counsel if the accused has none. While failure to assign counsel to an accused charged with a capital offence is clearly a breach of the right to a D fair hearing, the right to counsel of one's own choice may be subject to qualification as illustrated in the celebrated case of *Awolowo v. Federal Ministry of Internal Affairs & or.* (1966) All NLR. (Reprint) 171.

In that case, section 21(5)(c) of the Constitution of the Federation of Nigeria, 1960 was considered. Its provision is in pari materia with section E 33(6)(c) of the 1979 Constitution. Chief Awolowo was charged along with others with the offences of treasonable felony and conspiracy. He engaged for his defence counsel from England, who was enrolled as a legal practitioner in Nigeria and had a travelling pass but was not a citizen nor a native of Nigeria. On his arrival in the country, the Minister prohibited his entry into F Nigeria. The plaintiff (Chief Awolowo) sued for a declaration that the prohibition was ultra vires having regard to the right of an accused person under section 21 (5) (c) of the Constitution to have counsel of his own choice. He failed in the High Court.

On appeal, this court held that section 21(5)(c) should not be read G in isolation; that the right of an accused person under it to counsel of his own choice may be curtailed for various reasons for example, the counsel of his choice may be under detention and the like. The court further held that sections 20(1)(f) and 26(1) of the 1960 Constitution necessarily implied that a person who is not a citizen of Nigeria may be refused entry in H accordance with the legislation in force; that there is nothing unconstitutional in the absolute discretion conferred by section 13 of the Immigration Act upon the Minister to refuse entry of any person who is not a citizen of Nigeria and that the court was not concerned with whether or not he acted reasonably in the circumstances.

In the present appeal, the appellant did not engage counsel of his own choice and the court did not impose one on him. He has the constitutional right to conduct his own defence and to reject any counsel appointed for him. The appellant did not inform the court that he would like to conduct his defence in person or that he did not approve the counsel assigned to him. That notwithstanding, we are urged to nullify the trial because he B did not make the selection himself.

The case of the appellant is even worse than that of the appellant in *Ezea v. The Queen* (1963) 2 SCNLR 97: (1963) All NLR (Reprint) 243. In that case, the appellant was charged with the offence of murder. The learned trial Judge assigned counsel to him in accordance with section 352 C of the Criminal Procedure Act. The counsel appeared for him and conducted his defence. He did not inform the Judge that he had counsel of his own choice. He appealed against his conviction and his complaint was that he did not have a fair trial contrary to section 21(2) of the 1960 Constitution which provides as follows:

"Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing within a reasonable time by a court."

This court held that there was no breach of the provision in section 21(5)(c) of the Constitution. The appellant having accepted the counsel E assigned to him at the trial and having refrained from telling the trial Judge that he had another counsel of his own, he could not reasonably complain that he had not been allowed to have his defence conducted by counsel of his own choice.

The learned trial Judge did not impose counsel from the Legal Aid F Council on the appellant. It has been the practice of the courts in accordance with section 352 of the Criminal Procedure Act to assign counsel to a person accused of murder if he has no counsel of his own. The appellant was accused of murder and he had no counsel of his own. He did not inform the trial court that he wanted to defend himself in person. G

The learned trial Judge, in the absence of any indication from the accused that he had counsel of his own choice or that he would conduct his own defence complied with the provision of section 352 of the Criminal Procedure Act. The court record of 15:12:86 showed the following notes:

"Court - Proofs of evidence and information to be forwarded to the Assistant Director of Legal Aid Enugu. The Assistant Director is to arrange for the defence of the accused." H
Case adj. 15:1:87."

The case did not go on 15:1:87 but the accused was represented on that day by Miss E.N. Ekpechi from the Legal Aid Council and the plea of the accused was taken again on that day. From 13:2:87 when hearing commenced till 4:5:87 when the learned trial Judge delivered judgment in the case, Mr. Ezeonwuka of the Legal Aid Council represented the appellant.

The appellant might have been on a firmer ground if his complaint had been on the incompetence, inexperience or otherwise in the handling of the defence by Mr. Ezeonwuka which led to his conviction. When the court assigns counsel under section 352 of the Criminal Procedure Act, it directs the Registrar of the Court to arrange for counsel for the accused and in doing that, the Registrar does not seek the opinion of the accused. The appellant is entitled to reject the counsel so assigned. Unless he does that, he cannot be heard on appeal that the said counsel was not that of his own choice. See *Ezea v. The Queen* supra.

The learned trial Judge was acting under the provision of section 352 of the Criminal Procedure Act when he referred the defence of the appellant to the Legal Aid Council. There was nothing before him to show that the appellant was entitled to legal aid under that Act. I would say that the learned trial Judge went far in spelling out where the defence should come from. He should have directed the Registrar of the Court to do so. Assuming that he acted under section 13(4) of the Legal Aid Act (which I do not think), the failure of the appellant to make the selection himself did not occasion any miscarriage of justice. His right under section 33(6)(c) of the Constitution was not breached.

For the above reasons and the fuller reasons in the lead judgment of my learned brother, Onu, J.S.C. with which I am in complete agreement, I, too, will dismiss the appeal. I hereby dismiss it and affirm the decision of the court below.

MUHAMMED JSC

I agree that this appeal ought to fail for the reasons given in the judgment of my learned brother, Onu, J.S.C., just read. I have had the privilege of reading the draft of the judgment in advance before now.

This court had once decided that if an accused is arraigned for a capital offence and if he is not defended by a legal practitioner the court shall assign counsel to defend him. See Section 352 of the Criminal Proce-

dure Act and the case of Okon v. The State (1995) 1 NWLR (Pt. 372) 382. It is not correct as Mr. Agabi, learned counsel for the appellant submitted that the Assistant Director of Legal Aid assigned counsel to defend the appellant.

The proceedings on 15th December, 1986 show clearly that it was the court that directed for the assignment of counsel to defend the appellant. The proceedings in respect of that issue, on that day, clearly showed that it was the court which directed the Assistant Director Legal Aid, Enugu, to arrange for the defence of the appellant. The assignment was therefore on the direction of the court. In Okon v. The State (supra) when counsel appeared and announced his representation for the accused, Mr. Okon did not raise any objection. A similar situation has arisen here.

If the appellant, in this case, did not approve the appearance of counsel assigned to defend him he would have told the learned trial Judge. Had the appellant raised an objection to the appearance of the counsel and the court over ruled the objection and allowed the legal practitioner to continue with the defence, the appellant would have a strong ground to plead a violation of the provisions of Section 33(6)(c) of the Constitution.

For these reasons and the fuller reasons given in the lead judgment by my learned brother, Onu, J.S.C., I hereby dismiss the appeal. I affirm the decision of the court below in which it confirmed the conviction and sentence imposed by the trial High Court.

ADIO JSC

I have had the privilege of reading, in advance, the judgment just delivered by my learned brother, Onu, J.S.C., and I agree that this appeal lacks merit and should be dismissed. If in a murder case the learned trial Judge fails to ensure that a counsel is provided or assigned to the accused for the purpose of defending him where he is so indigent that he cannot, at his own expense, retain one, the argument will be that the accused does not have a fair trial. In the present case, the appellant was indigent. He could not, at his own expense, retain a learned counsel for the purpose of his defence. A learned counsel was assigned to him for the aforesaid purpose. The learned counsel defended him from the commencement of the trial to the end without any objection or protest by him in relation to the arrangement. The complaint by the appellant was that the learned counsel assigned to him was imposed on him.

The complaint of the appellant that a learned counsel was imposed on him for the purpose of his defence cannot be sustained in view of the clear provision of section 7(3) of the Legal Aid Act, Cap. 205, which provides as follows:-

B *“7(3) A legally assisted person shall have the right to change the legal practitioner assigned to him provided that -
(a) he first gives notice in writing to the Director General of his intention to do so and gives reasons.”*

In SC 139/1993, Ibeh v. The State which came before this court recently, and to be precise on the 9th February, 1995, a learned counsel C was assigned a state brief to defend the appellant in that case who was charged with murder. After the learned counsel, so assigned, had announced his appearance for the appellant in that case, a senior advocate also announced that he appeared for the said appellant and he pointed out that D he was briefed by the family of the appellant. When the learned counsel previously assigned to the appellant wanted to insist that he should be allowed to continue to represent the appellant, this court ruled that if the appellant had briefed his own counsel the practice of this court was to allow him to do so. Counsel previously assigned would withdraw from further participation in the proceeding because the state brief had terminated. E If the appellant in this case, had raised an objection to his being represented by the learned counsel assigned to him or had briefed another learned counsel who announced his appearance for the appellant during the proceedings, no doubt the learned counsel assigned to him would have withdrawn or be made to withdraw from further participation in the proceedings. F

It is for these reasons and the fuller reasons given by my learned brother, Onu, J.S.C., in the lead judgment, that I agree that the appeal lacked merit. I too dismiss it.

G

H