

SUPREME COURT OF NIGERIA
7TH APRIL, 1995. SC 35/1994
CORAM:- M.L. UWAIS, I.L. KUTIGI, M.E. OGUNDARE,
E.O. OGWUEGBU, U. MOHAMMED, JJSC

1. JOSEPH KWAGHSHIR).
2. SIMON KWAGHSHIR) APPELLANT
V.
THE STATERESPONDENT

APPEALS - Concurrent findings - Culpable homicide - Where lower courts' verdict of guilty - Was based on wrongful evaluation of evidence - The basis exists for Supreme Court's interference.

CRIMINAL LAW - Culpable homicide - Right of private defence s. 65 of Penal Code - Where appellant was cut five times before he stabbed deceased - The defence of private defence avails.

CRIMINAL LAW - Common intention - Culpable homicide - When 1st appellant is not guilty - 2nd appellant cannot be found guilty pursuant to s. 79 of the Penal Code.

CRIMINAL PROCEDURE - Culpable homicide - Plea of private defence by appellant - Need to compare the evidence on both sides.

CRIMINAL PROCEDURE - Alibi - Raised by the 2nd appellant - In a charge of culpable homicide - When found to be false.

CRIMINAL PROCEDURE - Culpable homicide - Valid defences that exonerated appellants - Wrongful verdict of guilty by the lower courts - The Supreme Court mil interfere.

EVIDENCE - Previous statement of a witness - Contradiction therein to be established - The statement must be brought to the attention of the witness.

EVIDENCE - Contradiction - In previous statement of a witness - Where the statement was not admitted for Purposes of establishing the contradiction - Whether appellants can rely on that statement - In alleging contradiction.

EVIDENCE - *Discredit - Appellant's confession of stabbing the deceased once - Where supported by the medical report - Evidence of prosecution witnesses to the contrary held discredited.*

FACTS

The appellants' family had goats which used to go on the farm belonging to the family of the deceased to destroy the crops. In the morning of the day of the incident, the deceased killed one of the goats that went to their farm. The deceased has killed a total of six goats belonging to the appellants' family. The mother of the deceased on her way back home later in the day had an encounter with the appellants that attracted the deceased to the scene to help her mother who shouted for help. In the fight that broke out, the deceased who was on top of the 1st appellant stabbed him five times before the 1st appellant recovered the knife and stabbed the deceased once in order to escape. The deceased died on the spot.

The appellants were charged before the High Court Makurdi with culpable homicide punishable with death. The trial Court found them guilty and sentenced them to death. 1st appellant's claim that he acted in private defence was rejected while the 2nd appellant's plea of alibi was rejected for not being established. Appellants' appeal to the Court of Appeal was dismissed. They have now appealed to the Supreme Court to determine inter alia, whether the two lower courts were right in holding that the statutory defence of private defence did not avail the 1st appellant

HELD (Unanimously allowing the appeal per lead judgment of **UWAIS JSC**)

Previous statement of a witness - Contradiction therein

1. Now before any contradiction can be established between the evidence of witness and the statement made previously by the witness, the statement must be brought to the attention of the witness in accordance with the provisions of sections 199 and 209 of the Evidence Act, Chapter 112. In the present case PW.1 admitted under cross-examination that she made statements to the Police. The statements were not shown to her in cross examination though mentioned but were admitted by the learned trial judge when P.W.4 testified under cross-examination. The learned trial judge rejected admitting the statements under the first arm of Section 209 & "admitted the statements (Exhibit F and FI) under the proviso to section 209 of the Evidence Act. (p. 784 D)

Statement not admitted for purpose of contradiction

2. It follows, therefore, that the Appellants cannot use Exhibits F and F1 to contradict the evidence of P.W.1 since Exhibits F and F1 were not admitted for that purpose as provided by sections 199 and 209 of the Evidence Act, Chapter 112. (p. 785 C)

Evidence of prosecution witness held discredited

3. The 1st Appellant confessed of stabbing the deceased only once with a knife. The medical report (Exhibit D) based on the post mortem examination conducted on the deceased's corpse confirms that the deceased had only one "deep stab (wound) on left anterior chest. " This supports the evidence of 1st Appellant and discredits the evidence of P. W. 1, P. W. 2 and P. W. 3 as to the number of wounds inflicted on the deceased and the nature of the wounds. (p. 785 F)

Culpable homicide - plea of private defence

4. In determining whether the defence of private defence can succeed in this case the evidence adduced by the defence has to be compared with that adduced by the prosecution to see which is more cogent. The prosecution's case appeals to me to be inherently afflicted with contradiction as regard the nature of the wound suffered by the deceased. PW.1, PW.2 and PW.3 testified that the deceased received multiple cut wounds from machete and knife respectively. The medical report tendered by the prosecution - Exhibit D, established only one wound on the left side of the deceased's chest. This discrepancy was not explained by the prosecution and the learned trial judge failed to advert to it. (p. 786 H)

When the defence of private defence avails

5. The testimony of PW. 1 which contradicts that of the 1st Appellant has been shown to be unreliable in view of its not being corroborated by the medical report - Exhibit D, which supports the testimony of the 1st Appellant. For a proper evaluation of the evidence adduced before the learned trial judge, the testimony of the 1st Appellant is to be preferred to that of PW. 1. It is, therefore, clear from the testimony of the 1st Appellant that if he had been cut five times with a knife by the deceased who was on top of him, the 1st Appellant was justified in having the apprehension that the deceased was at least going to cause him grievous hurt if not death. In my opinion, the defence provided by section 65 read with section 59 of the Code is available to the 1st Appellant. (p. 788 F)

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LEAD JUDGMENT BY UWAIS JSC

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The appellants were charged in the High Court of Benue State holden at Makurdi and convicted of culpable homicide punishable with death contrary to section 221 (a) read with section 79 of the Penal Code.

The facts of the case are briefly as follows. The family of the deceased had a farm where they grew crops. The appellants' family had G goats which used to go on the farm to destroy the crops. In the morning of the day material to this case that is on 15th December, 1990, the goats went on to the farm and the deceased killed one of them .. The father of the appellants (D.W.1) complained to the elder brother of the deceased (P.W.3) about the incident making the point that the deceased had so far H killed 6 goats belonging to him (D.W.1). Later in the day, the mother of the deceased (P. W.1) went to a meeting of an association of women called Better Life for Rural Women. She was returning home in the evening when she came across the appellants who informed her that the deceased had

killed their goat and they called her bad name. Thereafter the 1st appellant pushed her down to the ground, and started to beat her. P.W.1 shouted for help while crying. The deceased who was at home heard P.W.1 crying for help and therefore left for the scene of the incident to help her. On deceased's arriving at the scene the appellants set on him and began to beat him. According to P.W.1 the deceased was also attacked with cutlass and knives by the appellants and one Magondo. She testified that she saw the appellants cut the deceased three times with the cutlass and once with a knife. As a result the deceased died on the spot. A report was lodged with the Police and the 1st appellant was arrested. Three days later the 2nd appellant was arrested by the Police when he went to the Police Station to see the 1st appellant. Both the 1st and 2nd appellants made statements to the Police under caution.

In his defence, the 2nd appellant pleaded alibi. He said that he was not present at the scene of the incident because he went to the house of P.W.5 to buy cigarette. The 1st appellant said that he met P.W.1 in the evening of the day in question on his way to buy kerosine. He spoke to P.W.1 about her son -. The deceased-killing his family's goat earlier in the day. P.W.1 began to shout calling for the deceased to come. Shortly thereafter the 1st appellant said he was stabbed on the upper part of his hand with a knife. He was stabbed in both his hands, then in the trunk and the chest, he was able to identify the deceased as his assailant. He was on the ground with the deceased on top of him when he received the fifth cut on his left thumb from the deceased. He struggled to snatch the knife from the deceased whilst still on the ground. On succeeding he stabbed the deceased once with the knife in order to escape without knowing where he exactly stabbed the deceased. The 1st appellant was able to free himself from the deceased and P.W.1. He ran away from the scene of the incident and got to his home where he collapsed and became unconscious. Later the 1st appellant was taken to the Police Station and then to the General Hospital at Makurdi where he was examined and treated by a doctor (D.W.5).

The defence of alibi set up by the 2nd appellant was investigated by the Police (P.W.4) and was found to be untrue. P.W.5 from whom the 2nd appellant said he bought cigarette denied in her testimony that the 2nd appellant went to her house at the time of the incident as he claimed.

In his judgment, the learned trial Judge (Ogbole J.) believed the prosecution's case and disbelieved the defence. He therefore, found the appellants guilty as charged.

The appellant appealed to the lower court complaining inter alia that the learned trial Judge was wrong in holding that the defences of

provocation and private defence did not avail the 1st appellant and that the defence of alibi was not available to the 2nd appellant. In its judgment the Court of Appeal (Musdapher, Muhammad and Orah, J.J.C.A.) held as follows as per Muhammad, J.C.A. -

"I have very carefully considered the evidence adduced before the lower court, I have also carefully considered the judgment of the trial Judge. In the judgment he has extensively reviewed the totality of the evidence before him. He has meticulously evaluated the said evidence. He believed the prosecution witnesses one of whom was an eye witness to the killing. He made specific findings of fact. These findings of facts, considering the evidence are not perverse. He also, in my, view, drew the correct inferences from these findings of fact. The evidence offered by the prosecution clearly established that the appellants killed the deceased. The trial Judge was right in convicting the appellants."

Aggrieved by this decision, the appellants appealed further to this court. They formulated five issues for determination in their brief of argument. The issues read -

"(a) Whether or not the lower court was right in holding as the High Court did, that the contradictions and inconsistencies highlighted in the prosecution's case by appellants were mere discrepancies and/or minor variations as to details which did not affect then material issue(s) before the court;

(b) Whether or not the lower court was right in holding, in apparent affirmation of the trial High Court of Benue State's decision, that the appellants killed the deceased, whose death was proved;

(c) Whether or not the lower court when it failed, neglected and/or refused to consider and pronounce on all the issues canvassed before it with regard to various inferences made by the Judge of the trial High Court of Benue State leading to the conviction of the appellants, and if this failure did not lead to a miscarriage of justice by the lower court;

(d) Whether or not the lower court was right in holding as the trial High Court did, that the statutory defences of private defence and provocation did not avail the 1st appellant; and

(e) Whether or not the lower court was right in holding as the trial High Court did, that the defence of alibi did not avail the 2nd appellant."

The respondent has also raised issue for determination, in its brief of argument. The issues are -

"(a) Are there any material contradictions/inconsistencies in the prosecution's case to warrant a reversal of the decision of the 'lower courts?'

(b) *Are the statutory defences of self defence/provocation and, alibi available to the appellants respectively?*

(c) *Has prosecution failed to prove any of the ingredients of the offence charged?*

(d) *Did the courts below consider and make their findings on all the issues canvassed. And if not can the Supreme Court set aside the conviction and sentence on that basis?"*

It appears to me that the issues as framed by the respondent are less worded and clearer than those formulated by the appellant. As both the appellants' issues as well as the respondent's cover the same points and are based on the grounds of appeal. I intend to follow those formulated by the respondent.

With regard to issue (a) the appellants have identified in their brief of argument 10 instances of contradictions and inconsistencies in the testimonies of the prosecution witnesses. The first instance concerns the evidence of P.W.1 as .. eye-witness. It has been argued that her testimony contradicts her statements to Police - Exhibits F & F1. Now before any contradiction can be established between the evidence of a witness and the statement made previously by the witness, the statement must be brought to the attention of the witness in accordance with the provisions of section 199 and 209 of the Evidence Act, Chapter 112. In the present case P.W.1 admitted under cross-examination that she made 2 statements to the Police. The statement were not shown to her in cross-examination though mentioned but were admitted by the learned trial Judge when P.W.4 testified under cross-examination. The learned trial judge rejected admitting the statements under the first arm of section 209 but admitted the statements (Exhibit F and F1) under the proviso to section 209 of the Evidence Act, Chapter 112. The section states:-

"209. A witness may be cross-examined as to previous statements made by him in writing relative to the subject matter of the trial without such writing being shown to him, but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him:

Provided always that it shall be competent for the court at any time during the trial, to require the production of the writing for its inspection, and the court may thereupon make use' of it for the purposes of the trial, as it shall think fit."

The learned trial Judge made the following observation in his judgment "

I have considered the argument and contentions of both counsel, I pause here to ask whether there are real material contradictions and in-

consistencies to have rendered the prosecution's case so discredited and so unreliable that no reasonable tribunal can convict upon it. I have considered the evidence of PWs. 1, 2, 3, 4 and 5 and also Exhibit D, the doctor's report, and in particular PW.1's evidence which the defence counsel has heavily attacked and made heavy weather out of nothing and I am satisfied that there are no material contradictions or inconsistencies that have so discredited the prosecution's case and made same unreliable. What the learned counsel termed as contradictions or inconsistencies are mere discrepancies which are not uncommon in every case of this nature.....

It is to be recalled PW.1 and .PW.3 gave evidence and were extensively cross-examined. But their statements to the police were never tendered through them with the view to contradicting them pursuant to section 209 of the Evidence Act Chapter 112 of 1990."

It follows, therefore, that the appellants cannot use Exhibits F and F1 to contradict the evidence of PW.1 since Exhibits F and F1 were not admitted for that purpose as provided by sections 199 and 209 of the Evidence Act, Chapter 112.

The next contradiction referred to by the appellants is in respect of the testimony of PW.1 vis-a-vis the testimonies of PW.2, PW.3, PW.4 and PW.5. While PW.1 said the deceased was cut 3 times with a knife, PW.2 said that he saw a stab wound in the stomach of the deceased, a matchet cut on the deceased's forehead and a cut on the right shoulder. PW.3 said the deceased was stabbed on the, stomach and had a matchet cut on the shoulder. Furthermore PW.1 said under cross-examination that PW.4 did not record her statement correctly while PW.4 said he did. What is significant here is not the contradiction inherent in the testimonies of PW.1, PW.2 and PW.3 but the fact that they all alleged that the deceased suffered a matchet cut. The 1st appellant confessed of stabbing the deceased only once with a knife. The medical report (Exhibit D) based on the post mortem examination conducted on the deceased's corpse confirms that the deceased had only one "deep stab (wound) on left anterior chest." This supports the evidence of 1st appellant and discredits the evidence of PW.1, PW.2 and PW.3 as to the number of wounds inflicted on the deceased and the nature of the wounds.

In view of the above contradictions I do not think it is necessary to go further into ,the other contradictions highlighted by the appellant, for the point has sufficiently been made. However I will return to this theme later in this judgment.

The next issue is whether the defences of self-defence, provocation and alibi avail the appellants respectively. The case for the 1st appellant is

that he was suddenly attacked with a knife at the scene of the incident. He did not at first know who was his assailant. He was brought down to the ground after being pounced upon. He received five stab wounds before he was able to snatch the knife used from the hand of the deceased. He stabbed the deceased once with the knife to enable him escape from the attack. He denied attacking P.W.1 at the time she began to shout for help. The fact that he received numerous stab wounds and that he stabbed the deceased only once had been corroborated by the medical reports on him and the deceased - Exhibits E and D.

The learned trial Judge rejected the defence and preferred the prosecution's case, in particular the testimony of P.W.1 as eye-witness. He held as follows:

"I have no slightest doubt in my mind that the accused attacked the deceased in the presence of P.W.1, stabbed him and killed him on the spot. I have no reason to disbelieve the evidence of P.W.1 as to the violent attack on the deceased and how he was killed by the accused."

It is argued in the brief of the appellants that the fact that the 1st appellant said in his statement to the police - Exhibit A and his testimony in court that he acted itself; defence and the support given to his defence by the doctor who examined him after the incident - D.W.5; was sufficient to convince the trial Judge. It is submitted that the trial court should have adverted its mind to the provisions of section 30 subsections (1) and (2) of the 1979 Constitution and Sections 59 and 222 of the Penal Code to Come to the conclusion that the 1st appellant acted in private defence and therefore was entitled to acquittal on the authority of *Milla v. The State* (1985) 3 NWLR (Pt.11) 190; (1985) 10 S.C. 177 at Page 230; *Oka v. The State* (1915) 9;11 S.C. 17 at Pages 33 and 37.

For the prosecution it is argued in the respondent's brief that there were material contradictions in the testimony of the 1st appellant setting up the defence of private defence. The doctor who examined him on 16/12/90 - a day after the incident - said the 1st appellant had lacerations in only 3 places and not 5. While it one breath the 1st appellant testified that after he snatched the knife from the hand of the deceased he could not run away from the scene of the incident when he tried to; he said in another breath that after stabbing the deceased he was able to run away from the scene. It is then submitted that if it was true that the 1st appellant was first attacked by the deceased, he should have run away when the attack ceased instead of stabbing the deceased when the deceased no longer posed any threat to him since the deceased became unarmed.

In determining whether the defence of private defence can suc-

ceed in this case the evidence adduced by the defence has to be compared with that adduced by the prosecution to see which is more cogent. The prosecution's case appears to me to be inherently afflicted with contradiction as regard the nature of the wound suffered by the deceased. P.W.1, P.W.2 and P.W.3 testified that the deceased received multiple cut wounds from matchet and knife respectively. The medical report tendered by the prosecution- Exhibit D, established only one wound on the left side of the deceased's chest. This discrepancy was not explained by the prosecution and the learned trial Judge failed to advert to it. All the learned trial Judge said in this regard is -

"Although the (medical) report does not say that there are multiple cuts on the body the doctor found a "deep stab" on the body confirming the admission of the 1st accused in his evidence that he stabbed the deceased. To my mind, the failure of P.W.1, the mother of the deceased to have not mentioned specifically the part of the body stabbed by the accused resulting to (sic) the death of her son, is not fatal to the prosecution's case considering the physical and mental agony of P.W.1 in watching her son being brutally killed by the accused."

The Court of Appeal did not also advert to the discrepancy but simply stated as follows, Per Muhammad, J.C.A. -

"These findings of fact by the learned trial Judge; in my opinion, are not perverse. They are supported by cogent, positive and credible evidence. There is no reason why I should disturb these findings. It, therefore, follows that the defence of self-defence is not available to the 1st appellant. Where the prosecution adduced evidence which negates the offer of acts of self-defence, the defence must adduce credible evidence to establish self-defence - Wankey v. The State (1993) 5 NWLR (Pt.295) 542."

It follows from the foregoing that the lower courts did not properly evaluate the evidence adduced by the prosecution. In the case of Onubagu v. The State (1974) 9 S.C. 1 this court stated as follows on page 366 thereof, Per Fatayi- Williams J.S.C. (as he then was) -

"We are also of the view that where one witness called by the prosecution in a criminal case contradicts another prosecution witness on a material point, the prosecution ought to lay some foundation, such as showing that the witness is hostile, before they can ask the court to reject the testimony of one witness and accept that of another witness in preference for the evidence of discredited witness. It is not competent for the prosecution which called them, to pick and choose between them. They cannot, without showing clearly that one is a hostile witness discredit one and accredit the other. (See Summer and Leivesley v Brown & Co., (1909)

25 T.L.R 745. We also think that, even if the Inconsistency in the testimony of the two witnesses can be explained, it is not the function of the trial Judge, as was the case here, to provide the explanation. One of the witnesses should furnish the explanation and thus give the, defence the opportunity of testing, by cross-examination, the validity of the proffered explanation.”

See also Ateji v. The State (1976) 2 S.C 79 at pages 83-84 and Muka & Ors. v. The State (1976) 9-10 S.C. 305. The consequences of the conflicts, not being resolved in the aforementioned cases, were fatal to the cases for the prosecution. However, the situation in the present case is different in view of the consistent admission by the 1st appellant that he stabbed the deceased in private defence. It is, therefore necessary to examine the defence in the light of the relevant provisions of the Penal Code in order to determine its availability or otherwise to the 1st appellant.

By section 59 of the Penal Code, Chapter 89 of the Laws of Northern Nigeria 1963, nothing is an offence which is done in the lawful exercise of the right of private defence. Section 60 of the Penal Code provides Inter alia that every person has a right, subject to the restriction stated in the Penal Code, to defend his own body against any offence affecting human body. Furthermore, section 65 (a) of the Penal Code; states -

“65. The right of private defence of the body extends, under the restrictions mentioned in sections 62 and 63, to the voluntary causing of death only when the act to be repelled is any of the following descriptions, namely -(a) an attack which causes reasonable apprehension of death or grievous hurt.”

The restriction imposed by section 62 of the Penal Code is - “62. The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.”

The testimony of PW.1 which contradicts that of the 1st appellant has been shown to be unreliable in view of its not being corroborated by the medical report - Exhibit D, which supports the testimony of the 1st appellant. For a proper evaluation of the evidence adduced before the learned trial Judge, the testimony of the 1st appellant is to be preferred to that of PW.1. It is, therefore, clear from the testimony of the 1st appellant that if he had been cut five times with a knife by the deceased who was on top of him, the 1st appellant was justified in having the apprehension that the deceased was at least going to cause him grievous hurt if not death. In my opinion, the defence provided by section 65 read with section 59 of the Penal Code is available to the 1st appellant.

In view of what I have just stated it becomes unnecessary for me

to consider the defence of provocation which, if it applies, will only reduce the offence charged against the 1st appellant from culpable homicide punishable with death to culpable homicide not punishable with death in accordance with the provisions of section 222 subsection (1) of the Penal Code.

Next is the complaint by the 2nd appellant this his defence of alibi was not properly considered by the lower courts. The alibi which the 2nd appellant set up was investigated by the police (P.W.4) and confirmed to be false by P.W.5, to whom the 2nd appellant said he went, at the time material to this case, to buy cigarette. It has been argued in the appellant's brief that the testimony of P.W.5 impliedly supported the alibi. Nothing can be further from the truth. The alibi pleaded by the 2nd appellant in his statement to the police - Exhibit B, is as follows-

".....I could remember on the 15/12/90 at on the same date at about 5 p.m. After bathing, I decided to go and buy cigarette in a nearby compound call (sic) Tombo, when I came back from where I went to buy the cigarette, at about 8 p.m of the same date, I saw my senior brother Joseph Kwaghshir with blood all over his body I asked him what happened. He told me that he fought with Abamber Avenda and Abamber gave him several wounds by stabbing him with knife, he also received the knife and stabbed Abamber with it. From there I decided to go and report the matter at "D" Division Police Station....."

I bought the cigarette from one woman by name Ramatu Iyoryem. I did not know anything that happened between my brother Joseph and Abamber I was not around when they fought. That it all what I have to say." (Italics mine)

Ramatu Iyoryem was called by the prosecution as P.W.5 and she testified as follows-

"On 15/12/90 I was in my house. There was in my house on that day a meeting. It was 'Better Life' Meeting. I know the 2nd accused. I know him for a long time. I did not sell anything to 2nd accused on the mentioned date So I did not know anything about the 2nd accused coming to my house on that day."

The witness said under cross-examination thus-

"I did not see the 2nd accused. I cannot say whether or not he came to buy cigarette in my house."

It is very clear, therefore, that the alibi of 2nd appellant was not confirmed by the P.W.5. In Muka & Ors. v. The State (supra) this court held on page 326 thereof as follows, Per Fatayi-Williams, J.S.C. (as he then was)-

"Even assuming that the accused persons lied in the defence of

790 Kwaghshir v The state (1995) 4 KLR Uwais JSC
alibi put forward by them, we nevertheless, wish to point out that mere lying by an accused person is not evidence of guilt. The prosecution must still prove the guilt of the accused beyond reasonable doubt. Certainly, there must be something more than the telling of lies before a man can be convicted of any crime, let alone murder."

B The evidence which directly connects the 2nd appellant with the offence is that of P.W.1 which has been discredited to some extent. The credible evidence establishes that the deceased was stabbed once by the 1st appellant only and that he died as a result of that singular act committed by the 1st appellant. The 2nd appellant was considered by the lower courts to be liable by virtue of the provisions of section 79 of the Penal Code which states -

C *"79. When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."*

D The act committed by the 1st appellant, even if the 2nd appellant had the common intention with him, has been established not to be an offence by virtue of the provisions of sections 59 and 65 of the Penal Code. Without the 1st appellant being guilty of the offence charged, the 2nd appellant cannot be held to be guilty pursuant to the provisions of section 79 of the Penal Code.

E The remaining two issues for consideration can be summarily disposed of by stating that the question is not whether the prosecution has failed to prove any of the ingredients of the offence charged but that even if the ingredients of the offence charged had been proved the appellants have valid defences that exonerate them from the offence charged. Indeed F the lower courts made findings on most of the issues canvassed before them but they were wrong in their evaluation of the evidence of the prosecution witnesses vis-a-vis the evidence adduced by the defence. Therefore, the basis exists for this court to interfere with the findings of the lower courts that are found to be perverse.

G In the final result, this appeal has merit and it hereby succeeds. The decision of the Court of Appeal affirming that of the trial court is hereby set aside. The appellants are found not guilty and they are accordingly acquitted and discharged.

H

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother Uwais, J.S.c. I agree with his conclusion that the appeal ought to succeed. It is clear from record that but for the extra-judicial statement of the 1st appellant (Exhibit A) and his evidence on oath wherein the 1st appellant

admitted stabbing the deceased once with a knife after he had struggled and seized the same knife from the deceased, the prosecution had virtually failed to prove the charge against the appellants. The medical witness (D.W. 5) called by the 1st appellant corroborated his statement (Exh. A) and testimony that in fact the deceased was using the knife on him (1st appellant) before he (1st appellant) seized same from the deceased after a struggle and stabbed him (deceased) only once when he believed that his (1st appellant's) life was in danger. One is not surprised that the deceased was the aggressor. His mother (P.W. 1) in her evidence in chief on page 39 of the record said amongst others:-

"As I was crying my son came, the deceased on hearing this cry came and said "when a snake enters your house, you had better kill it."

I am inclined to agree with the 1st appellant that the deceased wanted to kill him before he seized the knife from him (deceased) I have no doubt in my mind that the 1st appellant, clearly discharged the evidential burden of proof of private defence. He is entitled to be discharged and acquitted. The 1st appellant made it clear both in Exh. A and in his evidence before the court that the 2nd appellant was never present at the scene. That was only the defence of the 2nd appellant. At any rate, the prosecution failed completely to prove the part, if any at all, played by the 2nd appellant in the episode. He is entitled to a discharge and acquittal too.

In conclusion, I also found the appellants not guilty of the offence charged. They are accordingly discharged and acquitted. This shall be the verdict of the lower courts.

F

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Uwais, J.S.C. just delivered. For the reasons given by him in the said judgment, I too allow the appeal of each of the two appellants. Consequently, I set aside the decision of the court below. I find each of the appellants not guilty and I accordingly acquit and discharge them.

H

OGWUEGBU JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Uwais, J.S.C. I agree with the reasons given and the conclusions reached by him.

The 1st appellant both in his statement to the police and his evidence in court stated that he stabbed the deceased once after the latter had stabbed him five times and was still on him.

After the deceased had given the 1st appellant the fourth stab wound, he struggled to get the knife from the deceased and in the process of the struggle, he got the fifth cut on the left thumb. He eventually got the knife from the deceased.

Part of his evidence-in-chief reads:

“Eventually, I was able to get the knife from him. He and his mother did not leave me As I had no means of going away, as he was still on me I used the knife in stabbing him back :I could not say exactly where I stabbed him. I was then able to run away from the scene.”

The question is whether the 1st appellant was entitled to be acquitted as having acted in private defence as provided in section 59 of the Penal Code Cap. 89, Laws of Northern Nigeria, 1963. Section 59 of the Penal Code provides:

“59. Nothing is an offence which is done in lawful exercise of the right of private defence.”

Section 60 thereof reads:

“60. Every person has a right, subject to the restrictions hereinafter contained, to defend-
(a) his own body and the body of any other person against any offence affecting the human body;
(b) ”

The 1st appellant asserted his right of private defence and in his evidence, gave full account of what happened. On the strength of the evidence, it could not be said that the violence used by the 1st appellant went far beyond anything that was required in the defence of his person or liberty. See the Queen v. Oji (1961)1 SCNLR 350; (1961) All NLR (Pt. 11) 262 and R. v. Igwe (1938) 4 WACA 117 at 118.

The 1st appellant explained the circumstances which gave rise to the right of private defence which he claimed in justification of the killing. It is the duty of the prosecution to disprove the defence. This it failed to do.

Even though, the 1st appellant had disarmed the deceased before stabbing him, he had no means of running away after disarming the deceased as the latter was still on him. It is clear that the 1st appellant acted within his rights in the heat of the moment.

The right of private defence availed him in the circumstances to exclude criminal responsibility for causing the death of Abamber Avenda.

Both appeals succeed and they are hereby allowed. The judgment of the High Court, Makurdi dated 23/10/92 whereby the appellants were

convicted and sentenced to death by hanging and that of the Court of Appeal dated 13/1/94 affirming the convictions and sentences are hereby set aside. Instead, a verdict of not guilty of culpable homicide is entered in respect of each appellant.

Each appellant is acquitted and discharged.

B

MOHAMMED JSC

The two appellants were convicted at the High Court of Benue State, Markudi, of culpable homicide punishable with death contrary to Section 221 of the Penal Code and sentenced to death by hanging. I have had the privilege of reading the judgment of my learned brother, Uwais, J.S.C., in draft and I agree with him that the appeal of the two convicts should be allowed.

C

The case of the 1st appellant, Joseph Kwaghshir, is not, in my view, an easy one. He admitted stabbing Abamber Avenda, the deceased, with a knife during a fight. The injury Abamber Avenda received had been certified by a medical officer to be the cause of his death. The 1st appellant explained to the court, in his testimony, that the incident which led to the encounter between him and the deceased arose when the deceased was accused of killing goats that entered his farm. The 1st appellant told his father to forget about the goats because since Abamber Avendar had no wife if he killed other people's goats the owner would ask his wife to cook the goat for him. Abamber Avenda began to quarrel with the 1st appellant. The 1st appellant was then asked to go away. The 1st appellant continued with his testimony and said:

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"I left there and went back to our house. Around evening, I took my bath. I then took a bottle to go and buy kerosine. As I was going I met Abamber's mother on the way. She is called Andura Avenda - PW 1. I told her that her son Abamber had killed our goat again. It was getting dark at the time. As I was talking to her in this way she began to shout calling her son's name Abamber Avenda. short time, I received a stab at my upper part of my hand. I received the 2nd one on my right hand side of my chest. I got the third on my left arm. I got the 4th one on my left side of my trunk. When I got the 4th stab, I got hold of the knife. It was Abamber who was giving me stabs. I saw him. I was struggling with him to get the knife from him. In the process of the struggle, I got the fifth cut on my thumb. Eventually, I was able to receive the knife from him. He and his brother did not leave me. I tried to run but could not because I was weak because of the, wounds I received. As I had no means of going away as he was still on me I used the knife in stabbing him back. I did so to save myself so that I could go away.

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I could not say exactly where I stabbed him. I stabbed him only once."

It is clear from the above testimony that the deceased went to the scene following a distress call from his mother. He was therefore on a rescue mission. The 1st appellant pleaded self-defence in stabbing the deceased. Four cardinal conditions must have existed before the taking of the life of a person is justified on the plea of self-defence. Firstly, the accused must be free from fault in bringing about the encounter; secondly, there must be present an impending peril to life or of great bodily harm, either real or so apparent as to create honest belief of an existing necessity; thirdly, there must be no safe or reasonable mode of escape by retreat; and fourthly, there must have been a necessity for taking life.

In an Indian case of *Kasavalu Naidu* (1930) MWN 502. It was held that a person cannot avail himself of the plea of self defence in a case of culpable homicide when he was himself the aggressor and willfully brought on himself, without real excuse, the necessity for the killing. What happened in *Kesavalu Naidu*'s case discloses facts similar to the case in this appeal. In *Naidu*'s case, the accused was the aggressor and the deceased attacked him with a knife and the accused stabbed him in self-defence. It was held that the accused was not entitled to claim the right of self-defence, but was guilty of culpable homicide not amounting to murder. In another Indian case of *Indar Singh* (1943) All India Reports (L) 163, it was held that an accused who is the aggressor cannot claim the right of private defence against the rescuer of his victim.

In the case in hand, it is not clear from the evidence what happened between P.W. 1, the mother of the deceased and the 1st appellant when he stopped her near her house. Her evidence was so contradictory that it is clearly unsafe to rely and act on it. One point which is without doubt however is that the 1st appellant stopped her on her way to her house, in the night, and that she shouted for her son, the deceased, to come to her rescue. Whether the 1st appellant simply accosted her as he claimed or used force on her is not clear. Another factor to consider is the earlier quarrel between the 1st appellant and the deceased when the latter was accused of killing a goat belonging to the appellant's father in his (deceased) farm. All these factors must be considered in determining whether the 1st appellant can claim the right of private defence in this case.

In his evidence in chief, part of which I reproduced above, the 1st appellant told the trial court that the deceased stabbed him five times before he got hold of the knife and stabbed the deceased once. The reports of the two doctors who examined the 1st appellant and the deceased agreed

with his testimony. Thus even though the 1st appellant brought about the encounter which resulted in the death of the deceased, there is no evidence to show that the mother of the deceased, was in impending peril to life or grievous bodily harm when the 1st appellant accosted her on the way. The only cause for the vicious attack by the deceased on the 1st appellant with a knife could be attributed to the earlier quarrel between them when the deceased was accused of killing a goat belonging to the father of the appellants. I agree with my Lord Uwais, J.S.C., that the 1st appellant had reasonable apprehension that the deceased wanted to kill him when he was pinned down and stabbed five times with a knife. B

For the above reasons and the fuller reasons in the lead judgment, I too allow this appeal, set aside the conviction and sentence passed on the two appellants by the High Court which was affirmed by the Court of Appeal, Jos. I enter a verdict of acquittal and discharge. C

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