

SUPREMECOURTOFNIGERIA
12THDECEMBER, 1995. SC. 181/1994
CORAM: -S.M.A.BELGORE,A.B.WALL,M.E.OGUNDARE,
E.O.OGWUEGBU,S.U.ONU,JJSC.

JULIUS IZIREN APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL LAW - Self defence - Murder - Where appellant's defence is rejected by the trial court - Whether self defence can be predicated on any basis

CRIMINAL LAW - Defence of property - In a Murder charge - Whether available to the appellant.

CRIMINAL PROCEDURE - Witnesses - Failure to call a particular witness - Whether fatal to the prosecution's case.

FACTS

The appellant was tried before the High Court Afuze in the defunct Bendel State for the offence of murder. The deceased and the PW1 went to the house of the appellant at about 11.00pm to look for one Rosemary. The appellant pursued them with a matchet, inflicted a matchet cut on the deceased while the PW1 escaped. The deceased subsequently died of the wound sustained. The appellant's defence was that the deceased and PW1 were intruders who came to his house armed with cutlasses and threatened to force his front door open.

The trial court rejected the appellant's evidence and found him guilty as charged. Appellant's appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court raising 2 issues.

ISSUESFORDETERMINATION

1. Whether having regard to the evidence on record, the PW1 and the deceased were not intruders and therefore constituted a veritable danger to life and property of the Appellant as to warrant Appellant's defence of property.

2. Whether the trial Court and the Court of Appeal fully considered the full effect of screening away Rosemary as a vital witness for the prosecution.

HELD (Unanimously dismissing the appeal per Lead Judgment of **OGUNDARE JSC**)

Self defence - Defence of property

1. With the rejection by the learned trial Judge of the case for the defence, there can be no basis upon which the Appellant could predicate a defence either of self defence or of property. As the findings of the learned trial Judge above are amply supported by the evidence before him, I have no reason to interfere with them. The learned trial Judge also considered the defences of self defence and of property put up by the Appellant and rejected them. The court below affirmed the crucial findings made by the learned trial Judge. I think they are right. I resolve Issue (1) against the Appellant.

(p.2194H)

Failure to call a particular witness

2. The complaint was made in the Court below that the prosecution failed to call Rosemary mentioned by PW1 in his evidence and that that failure was fatal to the case for the prosecution. The court below rejected this argument. In his leading judgment Ubaezonu JCA reasoned as follows:

“The appellant has complained that the respondent did not call Rosemary or his two wives to testify. I may ask, what are they going to testify about? Neither Rosemary nor the appellant’s wives saw how the deceased met his death. Their evidence would be worthless. If however, the appellant felt that they would give useful evidence he could have called them. The prosecution is not bound to call any and every person who was present at the locus criminis. It is bound to call those witnesses who would, relevant evidence in proof of its case. Rosemary whom the appellant denied was living in his premises and who only surfaced when the appellant arrested and charged and who is not shown to have witnessed the encounter between the appellant and the deceased is certainly not such a witness

I agree entirely with him. Having regard to the evidence adduced at the trial and the findings made thereon by the learned trial Judge and affirmed by the Court below, I find no substance in this appeal and I dismiss it

(p.2195C)

REPRESENTATION

L. O. Akhindenor with E. I. Esene for the Appellant

Mrs. D. Ojo, Director of Public Prosecutions, Edo State for the Respondent

LEADJUDGMENTBYOGIDNDAREJSC

The Appellant was charge before the High Court of the now defunct Bendel State sitting at Afuze with the offence off murder contrary to Section 319 of the Criminal Code of Bendel State; in that he murdered one Oisami Ijjezele on 8th May, 1985.

The case for the prosecution was that at about 11.00 P.m. of the fateful day, the deceased and another young man Oisaunaye Ademole (PW1) went to the house of the appellant in search of one Rrosemary, a student who was said to be living in the house. They knocked at the door and the appellant, from within the house, asked who it was that \Was knocking. The deceased and PW1 answered and said they were looking: for Rosemary. On hearing this, the Appellant armed with a matchet, came out of the house and gave the deceased and PW1 a chase. Both men had, ton seeing the Appellant with the matchet, took to their heels. PW1 escaped but the Appellant caught up with the deceased and inflicted a matchet cut on him. The deceased cried out that he was dying. He subsequently died off the wound sustained. PW1 heard the Appellant telling people that he had injured the deceased. The Appellant was advised by the people he so informed to report to the police which he did. PW1 also reported the incident to the police. The report the Appellant made was to the effect that two boys were threatening his life. In consequence of his report PW1 was detained I by the police at the Police Station. In the morning of the following day the father of the deceased (PW2) reported at the Police Station that his son was killed. The Appellant was then arrested and charged to court.

Appellant's defence was to the effect that the deceased and PW1 came to his house at about 11.00 P.m. of the fateful day, armed with cutlasses and demanded that the front door of his house be opened and threatened to fore the door open. The two boys pulled the door down and one of them cam' into the house. There was a scuffle between the one that came in and the Appellant during which the members of the Appellant's family were shouting for help. The Appellant succeeded in pushing the intruder out of hi house and reported the matter to the police at about midnight.

The learned trial Judge accepted the evidence for the prosecution and rejected that for the defence. Having considered and rejected the defence which he (the learned trial Judge) considered \Were open to the Appellant, he convicted him as charged and sentenced him to death.

Being dissatisfied with his conviction and sentence, the Appellant appealed to the Court of Appeal which latter Court dismissed the appeal. He has now further appealed to this Court upon two grounds of appeal which were substituted for the original grounds filed by the Appellant in his Notice of

Appeal. The two grounds without their particulars read as follows:

1. *That the trial court and the Court of Appeal erred in law in denying the Appellant the defence of property available to him under Section 282 of the Criminal Code.*

2. *That the Court of Appeal erred in law and in fact in failing to properly consider the full effect of the prosecution's failure to call Rosemary as a witness."*

Two issues are formulated in the Appellant's Brief as calling for determination to wit:

"(I) Whether having regard to the evidence on record, the PW1 and the deceased were not intruders and therefore constituted a veritable danger to the life and property of the Appellant as to warrant Appellant's defence of the property.

(ii) Whether the trial Court and the Court of Appeal fully considered the full effect of screening away Rosemary as a vital witness for the prosecution."

D ISSUE1:

The arguments in the appellant's Brief on this issue are based on the facts of the case put up by the defence. The learned trial Judge, based on the evidence before him, made these crucial findings of fact:

"After a calm view of the evidence before (me) and after reading the Exhibits tendered, I am thoroughly satisfied that the PW1 and the deceased on the night in question went to accused's house not as intruders but as Visitors to one Rosemary who lived in the accused's house. I am equally satisfied that during their visit the deceased and PW1 did not have any cutlasses or lethal weapon in their possession. The visit of the two men piqued the accused, especially when the time was about 10—11pm. I also find that at no time did the deceased and or PW1 threaten the deceased's (sic) life or property or threaten any of the occupants of the deceased's (sic) house inmate. Most importantly I find and believe that no damage was made to the accused's external door to show that the said door was forced open. It is my view that it was the accused who was armed with cutlass and he used it on a defenceless lad who refused to sleep in his house at night, in search of one Rosemary. When the 2 lads saw the accused advancing menacingly towards them with a cutlass, the men tried to escape but the accused unlawfully inflicted the mortal injury on the deceased and killed him."

H

With the rejection by the learned trial Judge of the case for defence there can be no basis upon which the Appellant could predicate a defence either of self defence or of property. As the findings of the learned trial Judge above are amply supported by the evidence before him, I have no reason to interfere

with hem.

The learned trial Judge also considered the defences of self defence and of property put up by the Appellant and rejected them. He found as follows:

“The defence of self defence in any form does not avail the accused person. The accused was neither defending himself nor defending his property. Rather the 2 lads merely knocked at the door as they asked for one Rosemary. This does not amount to invasion of the accused’s house or his person. The accused was not in danger at any time of being killed by the deceased. Similarly having regard to the circumstances of his case, I reject that the defence of accident avails the accused person.”

The court below affirmed the crucial findings made by the learned trial Judge. I think they are right. I resolve Issue (I) against the Appellant.

ISSUE2:

The complaint was made in the Court below that the prosecution failed to call Rosemary mentioned by PW1 in his evidence and that that failure was fatal to the case for the prosecution. The court below rejected this argument. In his leading judgment Ubaezonu JCA reasoned as follows:

“The appellant has complained that the respondent did not call Rosemary or his two wives to testify. I may ask, what are they going to testify about? Neither Rosemary nor the appellant’s wives saw how the deceased met his death. Their evidence would be worthless. If however, the appellant felt that they would give useful evidence he could have called them. The prosecution is not bound to call any and every person who was present at the locus criminis. It is bound to call those witnesses who would give relevant evidence in proof of its case. Rosemary whom the appellant denied was living in his premises and who only surfaced when the appellant was arrested and charged and who is not shown to have witnessed the encounter between the appellant and the deceased is certainly not such a witness.”

I agree entirely with him.

Having regard to the evidence adduced at the trial and the findings made thereon by the learned trial Judge and affirmed by the Court below, I find no substance in this appeal and I dismiss it. I affirm the judgment of the Court below.

BELGOREJSC

I agree that this appeal lacks merit, and for reasons contained in the

judgment of my learned brother Ogundare J.S.C. which fully express my own view, I dismiss this appeal and affirm the decision of Court of Appeal.

WALI JSC

B I have had a preview of the lead judgment of my learned brother, Ogundare JSC, and I entirely agree with his reasoning and conclusion that the appeal has no merit.

C The appellant brutally matcheted the deceased to death after giving the latter a chase. There was no evidence that the deceased was carrying any weapon during the appellant's assault on him. The appellant had no defence for committing the murder as found by the learned trial judge. His decision was affirmed on appeal.

D For the reasons given in the lead judgment, I also hereby dismiss the appeal. The conviction and sentence of death of the appellant are hereby further affirmed.

E

OGWUEGBU JSC

I have had the advantage of reading in advance the draft of the judgment just delivered by my learned brother, Ogundare, J.S.C., and I agree with his reasoning and conclusions. I adopt his
F opinion as mine and hereby dismiss the appeal. I affirm the decision of the court below which confirmed the conviction and sentence of death passed on the appellant.

G

ONU JSC

I have had the privilege to read before now the judgment of my learned brother Ogundare, J.S.C just delivered. I agree with his reasoning and conclusion that this appeal is devoid of merit
H and must fail. I too dismiss it and affirm the judgment of the court below.