

**SUPREME COURT OF NIGERIA**  
12TH DECEMBER, 1995. SC. 46/1992  
**CORAM: - S. M. A. BELGORE, A. B. WALI,**  
**M.E. OGUNDARE**  
**E. O. OGWUEGBU, S.U. ONU, JJSC.**

EDET EFFIONG UKUT ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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**APPEALS** - Findings of fact - Of the trial court - Confirmed by the Court of Appeal - Whether erroneous.

**CRIMINAL PROCEDURE** - Statement to the police - That is unsworn - Whether the trial court should refer to it.

**EVIDENCE** - Contradiction - Alleged between unsworn statement to the police - And appellant's evidence in court - Whether borne out from the facts.

**FACTS**

The appellant, a Calabar Scout troop leader drove to a football field in company of 4 other scout members. They pounced on the brother of the deceased and when the deceased questioned why they were beating his brother, appellant blew his whistle and 4 other boys scouts surrounded the deceased and started beating him. The deceased grabbed and held one of them. Appellant then stabbed the deceased on the right hand side of the back the deceased died on the spot.

The learned trial judge found that the defence of provocation, self defence and accident did not avail the appellant, and then found him guilty of murder. Appellant's appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court raising 3 issues.

**ISSUES FOR DETERMINATION**

- (a) Whether there was proper evaluation of the legal evidence available in this matter to sustain the conviction of the appellant by the court below.
- (b) Whether the prosecution proved its case beyond reasonable doubt in the light of material contradictions and inconsistencies in the evidence of the prosecution witnesses.
- (c) Whether the concurrent findings of the court below and the lower court that the defence of self-defence was not available to the appellant, were not

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perverse having regard to the prevailing circumstances of this case.

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

***Statement to the police***

1. What the learned trial Judge did in referring briefly to these unsworn statements was done out of abundant caution to ensure that no miscarriage of justice resulted. Even the learned counsel for the accused (now appellant) did not refer to specific parts of the unsworn statements that were contradictory to the evidence adduced. The learned trial Judge should have confined himself to the sworn evidence before him. (p. 2222 A)

***Evidence - Contradiction***

2. However, in the brief filed in this court by the appellant he produced excerpts of the unsworn statements alleged to be contradictory to the evidence given by the witnesses. I have read through them and compared them with the evidence given by the witnesses in court but cannot find any material contradictions between them and the evidence. In fact the evidence given by the appellant goes to confirm the prosecution's evidence. (p. 2222 B)

***Appeals - Findings of facts***

3. Having carefully considered the evidence in relation to issues raised and canvassed in this appeal, I am satisfied that the findings of fact by the learned trial Judge and unanimously confirmed by the Court of Appeal are unimpeachable and justified. Where the entire appeal revolved around issues of fact and there was nothing from the records of the lower court and the court below to show that the findings were erroneous (as in this case) this court would dismiss the appeal. The appeal is dismissed. (p. 2225 H)

***NOTABLE POINTS OF INTEREST***

***ONUJSC***

***1. When self defence plea will arise***

On self defence, that the Appellant had in his testimony in his defence told the trial court "I was not the person who killed the deceased" clearly indicates that a successful plea of self defence was ruled out in that plea first and foremost means that the Appellant has confessed or accepted killing the deceased but is now saying that he did so in self-defence. So also is the defence of accident. (p. 2233 B)

***2. Whether the stabbing was deliberate***

As the stabbing did not occur by accident but constituted a willed, deliberate and intentional act, in my judgment, calculated to cause grievous harm. As there was no evidence of provocation it, too, must fail. As the decisions of the courts below are not shown either to be unjustified or perverse, I will be loath to interfere with their concurrent findings. (p. 2234 B)

### **REPRESENTATION**

Mrs. A Williams for the Appellant

Mrs. A. B. Ikpeme D.P.P Cross River State for the Respondent

### **CASES REFERRED TO**

Onubogu v. The State (1974) NSCC 358

Aibangbee v. The State (1988) 3 NWLR (Pt. 84) at pages 548 and 577

Duru v. The State (1993) 3 NWLR (Pt. 281) at pages 290 - 291

Enahoro v. Queen (1965) NWLR 265 at 281 - 282

Layonu v. The State (1967) 1 All NLR 198 at p. 201

Mbenu v. The State (1988) 3 NWLR (Pt. 84) 615

Nwabueze v. The State (1988) 4 NWLR (Pt. 86) 16.

Boms v. The State (1971) ANLR 335 at 338

R v. Shannon (1980) 71 CAR 192

Okoya v. Santilli (1994) 7 NWLR (Pt. 338)

Ige vs. Akoju (1994) 4 NWLR (Pt. 340) 535

Omogodo v. The State (1981) 5 S.C. 5;

Ameh v. The State (1972) 6 & 7 S.C. 27

Jules v. Ajani (1980) 5-7 S.C. 96.

### **STATUTE REFERRED TO**

Criminal Code s. 319(1)

### **LEAD JUDGMENT BY WALI JSC**

The appellant Edet Effiong Ukut was charged with the murder of Joshua Etim Inyang, contrary to Section 319(1) of the Criminal Code. At the end of the trial he was found guilty as charged and sentenced to death.

Briefly, the facts of the case as presented by the prosecutor are as follows:-

On the fateful day, that is 21st April, 1985, the appellant, a troop leader of the 6th Calabar Scout troop, in company of four (4) other boys Scout, drove to Idang Primary School football field in a Subaru car. It was about 5.20 p.m. at the time they reached their destination and the appel-

lant was driving the car. At the time, P.W.2, Francis Eyo Nsa was at the play ground and watching football. He saw the five boys scout alighted from the car and walked straight into the field. On their sight, another boy called Emmanuel, who was also there watching football, took to his heels and the boys scout pursued him. When they could not catch up with him, B they came back to the field, held Effiong Etim Inyang whom they alleged to have alerted Emmanuel of their approach and started beating him with cable wires, telling him to produce Emmanuel. P.W.2 rescued Effiong from them. It was at that time that the deceased, who is Effiong's brother came to the scene and asked the accused and his mates why they were beating C his brother. The accused blew his whistle and the 4 other boy scouts surrounded the deceased and started beating him. The deceased grabbed and held one of them. The accused used the pen knife he was holding in stabbing the deceased with it on the right hand side of the back. The deceased died on the spot from the stab wounds.

D Before convicting the accused the learned trial Judge considered the defences of provocation, self defence and accident and found that none of them was available to the accused. The learned trial Judge thereafter sentenced the accused to death by hanging.

The accused's appeal to the Court of Appeal was also dismissed E for want of merit. He has now further appealed to this court.

Henceforth the accused and the prosecution will be referred to as the appellant and the respondent respectively in this appeal.

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

F In the appellant's brief three issues were formulated and these are:-

*"(a) Whether there was proper evaluation of the legal evidence available in this matter to sustain the conviction of the appellant by the court below.*

*(b) Whether the prosecution proved its case beyond reasonable G doubt in the light of material contradictions and inconsistencies in the evidence of the prosecution witnesses.*

*(c) Whether the concurrent findings of the court below and the lower court that the defence of self-defence was not available to the appellant, were not perverse having regard to the prevailing circumstances of this H case."*

In the respondent's brief the following three issues were also raised for determination by this court:-

*"1. Whether there was sufficient evidence in law to warrant or sustain conviction of the appellant by both the trial court and the appeal*

*court, and if so whether there was proper evaluation of such evidence.*

*2. Whether the prosecution proved its case beyond reasonable doubt as required by law.*

*3. Whether it was proper for the trial and Appeal Courts to reject the defence of accident, self-defence and provocation put up by the defence in the circumstances of this case."*

B

The three issues raised by the respondent are covered by the appellant's three issues, and since all the issues largely involve consideration of facts in this case, I shall take and deal with them together.

On Issues (a) and (b) it was the submissions of learned counsel for the appellant that the failure by the learned trial court to adequately consider and evaluate the evidence produced by the prosecution and the defence, led him to the conclusion that the appellant was guilty of unlawfully murdering the deceased. He contended that the trial court used inadmissible evidence namely the statements made to the police by P.W.2, P.W.3 and P.W.5 which were unsworn and neither tendered nor accepted in evidence at the trial. Learned counsel also examined the evidence of P.W.2, P.W.3 and P.W.5 and submitted that their evidence contained material contradictions to which the learned trial Judge failed to advert his mind. Learned counsel cited and relied in support, on the cases of Onuhogu v. The State (1974) NSCC 358 at pp. 365-366; (1974) 9 SC 1; Aibangbee v. The State (1988) 3 NWLR (Pt.84) 548 at pages 290-291; Enahoro v. Queen (1965) NMLR 265 at 281-282; Layonu v. The State (1967) 1 All NLR 198 at p. 201; Mbenu v. The State (1988) 3 NWLR (Pt.84) 615; and Nwabueze v. The State (1988) 4 NWLR (Pt.86) 16.

D

On issue (c) which dealt with self-defence, it was the submission of learned counsel for the appellant that the appellant was violently attacked by the gathering at the play ground and was more keen on looking for the means of escaping rather than to get engaged in fighting anyone. Learned counsel further submitted that had the learned trial Judge properly considered and appraised the evidence given by the appellant, the sequence of events he narrated in that evidence would have been more probable and acceptable given the circumstances in which D.W.2 and D.W.3 were mercilessly beaten. It was the contention of learned counsel that the appellant had discharged the burden of proving self-defence as required by law. He cited and relied in support on the decisions in Boms v. The State (1971) 1 All NLR 334 at 338 and R. v. Shannon (1980) 71 CAR 192. This court was urged to allow the appeal quash the conviction and sentence imposed on the appellant and set him free.

G

H

In answer to the submissions on issues (a) and (b) learned counsel for the respondent submitted that there were no major and material contradictions in the evidence of P.W.2, P.W.3 and P.W.5. Learned counsel contended that the reference by the learned trial Judge to the unsworn statements made to the police by P.W.2, P.W.3 and P.W.5 did not in any way affect the prosecution's case since there were no contradictions between their individual statements under reference and their respective sworn evidence. He said the learned trial Judge referred to the statements only in attempting to point out the consistency in the evidence of the prosecution witnesses. He also submitted that the learned trial Judge duly evaluated the evidence adduced before him as required by law and came to the right conclusion that it was the appellant that brutally murdered the deceased without any justification.

On issue (c) which dealt with the plea of self defence, learned counsel submitted that both the trial court and the Court of Appeal dealt thoroughly with it, including the plea of accident and rightly found that these two defences, considering the evidence adduced, did not avail the appellant it was the contention of learned counsel that learned counsel for the appellant's submission that the appellant acted in self-defence, is not borne out by the evidence. He finally urged this court to affirm the conviction and sentence and dismiss the appeal.

I shall deal with issues (a), (b) and (c) together as argued by learned counsel. I have painstakingly read through the prosecution's evidence particularly that of P.W.2, P.W.3 and P.W.5 and I am unable to see any material contradictions in their evidence. P.W.2 gave account of what he saw happened. He said:-

*"I saw five boys scout who alighted from a Subaru Car No. CR 9864H. When they came to the field a boy called Emmanuel who was also watching football ran away on seeing the boys scout. The boys scout pursued him. When they could not get him, they returned to the field. They then held (Effiong Etim Inyang) who.....The five began beating him with cable wires..... At this juncture I moved in. It was one of the five with scars that commenced beating the deceased. I then rescued Offiong from them. Then the older brother - the deceased came from the big field within the school premises. He asked the Patrol Leader - the accused why he was beating his brother. His reply was to ask Joshua why he should ask him such a question. The Patrol Leader that is the accused blew his whistle and the other five surrounded the deceased. They started beating him. As they were beating the deceased he grabbed and held one of the scouts, then the patrol leader - the deceased (sic) used*

*the dagger he was holding and stabbed the deceased at the right hand side of the back. The deceased was not facing the accused..... We succeeded in taking two of the scouts to Mbukpa Police Station. It was there I saw the accused and I identified him to the police who arrested him. The deceased died on the spot."*

P.W.3 narrated thus in his evidence:-.

*"I saw five boys scout emerging from the car. As soon as that happened one Emmanuel ran out of the field. The five scouts pursued him. They could not hold him. So they came back and held me. The one with a mark in his cheek was the one who first held me and said I was the person who made the boy to escape. I then told him that I was not the one. Before I could conclude my statement, they began to flog me with their ropes. My brother then came in and asked what was happening. As he was asking, the scouts leader blew up a whistle. The scouts then surrounded my brother and began beating him with ropes and cable wires. The troop leader then brought out a dagger and stabbed my brother - the deceased on his back. My brother fell down. Blood exuded from his nose and mouth which caused his death. People then tried to separate them from my brother. I then went to call my mother and we went to the Police Station."*

On his part, P.W. 5 testified as follows:-

*"On 21st April, 1985 we were playing football in Apostolic Church Street along Idang Street - it is the same as Idang Primary School. Someone told me that a group of boys were beating up my brother. I ran down there in the company of my younger brother. Before I got there my late younger brother was dead. He was Joshua Etim Inyang. We were playing football together. On reaching there I saw when one of the scout boys stabbed my brother at the back. My younger brother fell. I picked him up. He was bleeding from his nose and mouth. The accused who stabbed him ran away immediately. I shouted that the accused had stabbed somebody. I asked my younger brother and other players to look for a taxi with which I conveyed him to the Police Station. I then took him to Ikpeme Clinic. The Doctor did not admit him on the ground that he was already dead. This is the jack knife with which my brother was stabbed. I did not see the accused with any other thing. I did not ask why he was stabbed. There was no time for that. I saw the accused at the Police Station and I identified him to the Policeman on duty as the person who stabbed my younger brother."*

These witnesses were rigorously cross-examined on the evidence they gave. They were not shaken on what they said, nor was the evidence contradicted or discredited.

On the issue of contradictions between the witnesses' evidence and their respective unsworn statements to the police it was learned coun-

sel for the appellant who crossed examined the witnesses on the unsworn statements but failed to put them in evidence. What the learned trial Judge did in referring briefly to these unsworn statements was done out of abundant caution to ensure that no miscarriage of justice resulted. Even the learned counsel for the accused (now appellant) did not refer to specific  
B parts of the unsworn statements that were contradictory to the evidence adduced. The learned trial Judge should have confined himself to the sworn evidence before him.

However, in the brief filed in this court by the appellant he produced excerpts of the unsworn statements alleged to be contradictory to  
C the evidence given by the witnesses. I have read through them and compared them with the evidence given by the witnesses in court but cannot find any material contradictions between them and the evidence. In fact the evidence given by the appellant goes to confirm the prosecution's evidence. On stabbing the deceased, he said:-

D *"When I used the knife to free myself, I did not know that someone had died I made two statements to the police."*

In Exhibit 3, the appellant admitted being at the scene of the incident though he denied stabbing anyone. He said:-

*"Then I waited for sometime but they did not returned I therefore  
E come out of the car. I entered the field. There I see many people who held the scout boys and started beating them with their hands and some were using free rods. As I move in the people waited to hold me then I ran away and I rushed to the Police Station Mbukpa Calabar to lay the report. I said to the Police that people are beating up my boys and that they should help  
F to rescue them for me. As I was reporting the matter to the station I see two of the scouts boys held down to the police station who were seriously beaten up. This twine yard with the jack knife in it are my own. Also one Ekong (m) carried along with him one scout knife. I do not notice well whether other people also carry along with them scout knife. I did not stab anybody.  
G And am not the person who stab that boy who has dead.*

*I do not know the person who stabbed him to death."*

While in Exhibit 4 he said thus:

*"As I went in to the school compound I saw great number of people gathering even I thought that different people were fighting. When I  
H went down there to ask what was happening I saw the two boys scout on the ground this people still beating those two scout Etim Edet Asuquo and Okon Basseff Effiong seriously with weapons there I went in to separate, then from there they round me in started beaten me seriously using 'weapons on me and some of them holding the scarf and the rope was on my*



*neck, they would have killed me from there I remove the rope attach with pen knife thrown around myself to scare them away from there one of them who coming to beat me fell in that knife, but I was not know whether the knife had wound him or not because they were very many and I ran to nearest police station at Mbukpa for complain about the matter."*

The learned trial Judge after meticulously considering the evidence adduced by both the prosecution and the evidence, made the following findings:-

*"In the instant case, P.W.1 Mr. Theadeus Udoh testified he carried out physical examination of the corpse of the deceased. He said there was a stabbed (sic) wound 1 c.m. in width and 6 c.m. in depth. He said the wound had gone into the lungs thereby leading to a situation the medical man called phemothoraz.....He summarised his opinion that the death of the deceased was caused by stabbing.....Thus, from the testimonies of P.W.1 and other witnesses it seems to me that whichever way one looks at it, one would find that it was the act of the stabbing that killed the deceased."*

XX

*"The prosecution says it was the accused who killed the deceased.*

*The accused said it was not him. On this vital issue, therefore, one is thrown back, consequently, on the testimonies of the prosecution witnesses P.W. 2, P.W. 3 and P.W. 5. Each of them gave an eye witnesses account of the incident. They said not only in their statements to the Police but also in Court that the accused stabbed the deceased with pen knife. These testimonies were never controverted. As a matter of fact, the accused in his defence said he used the knife to extricate himself and did not know that someone had died. I am therefore satisfied that it was the accused and no other who killed the deceased. He inflicted injuries on the deceased from which he died."*

XX

*"I am not in agreement with his submission. This is so because there is the evidence which I accept that the deceased, did not go into the field until at a later stage. I also believe that the crowd was not involved in any fight and that the fight took place after the deceased had been stabbed and the crowd pounced on the scouts. It was therefore never the other way round. The accused was not reacting with a knife because anyone in the crowd or the deceased held a knife. He had no justification whatsoever for what he did."*

The learned trial Judge considered all other defences that could be available to the appellant to wit - provocation self defence and accident

and rejected them.

The Court of Appeal, before affirming the findings made by the learned trial Judge considered the evidence and the submissions of learned counsel on the issues raised before court and came to the following conclusions:-

B *"In the evaluation of evidence, the trial Judge observed that from the eye witness accounts of P.W. 2, P.W. 3 and P.W. 5, there was no doubt that the appellant had stabbed the deceased. That himself had not been too forth coming on the point. He agreed that he swung round his pen knife in a crowd to make good his escape. In his evidence in court he said that he did not know that someone had died but in Exhibit 4 he agreed that some-*  
C *one "coming to beat me fell in that knife but I was not to know whether the knife had wound him or not..."*

In his judgment at page 79 of the record, the trial Judge said:

*"Having said that the cause of death has been conclusively established, the next important question remains to be answered and that is,*  
D *who killed the deceased. The prosecution says it was the accused who killed the deceased. The accused said that it was not him. On this vital issue therefore, one is thrown back consequently on the testimonies of the prosecution witnesses P.W.2, P.W. 3 and P.W.5. Each of them gave an eye*  
E *witness account of the incident. They said not only in their statements to the police but also in court that the accused stabbed the deceased with pen*  
F *knife. These testimonies were never controverted. As a matter of fact, the accused in his defence said that he used the knife to extricate himself and did not know that someone had died. I am therefore satisfied that it was the accused and no other person killed the deceased. He inflicted injuries*  
F *on the deceased from which he died.*

*There was abundant evidence before the trial Judge upon which he could have made the above findings of fact. The finding is neither unjustified nor perverse and I ought not to disturb them. See: Osayeme v. State (1966) NMLR 388: Ozigho v. C.O.P (1976) 2 SC 67."*

G The Court of Appeal also considered the issues of provocation self defence and accident and rejected them.

The Court of Appeal observed as thus:-

*"On the evidence available, I do not think that a defence of provocation was available to the appellant."*  
H *XXX*  
*On the evidence of the appellant himself he had swung round a pen knife in a crowd so that he could escape. It ought to be known to him that swinging round a pen knife in a crowd could at least cause a grievous bodily harm to anybody struck by the pen knife. Since the appellant did so to escape from*

*the crowd, it seems clear that he clearly had his will accompanying his act. In other words he intended to cause some harm to some person."*

XX

*It may well be that the appellant did not intend the death of the deceased but he at least intended to cause a grievous bodily harm. That would still make the offence committed a murder under Section 319 of the Criminal Code. I think that a defence of accident under Section 24 of the Criminal Code was not available to the appellant."*

XX

PW. 3 said in his evidence under cross-examination that the fight continued after the deceased was stabbed. This piece of evidence would on a first look appear to suggest that there had been a fight on before the stabbing. But when this evidence in cross-examination is related to his earlier evidence in cross-examination the picture is clear. He said at page 36:

*"When I was being beaten the players stopped playing. But when my brother was stabbed then they came in to separate the people from my brother.*

*The scout boys used their ropes on the players. They were trying to defend themselves. The fighting continued after my brother was stabbed."*

What PW.3 said in the passage reproduced above is that the players came in to separate the boys scouts from the deceased after the deceased had been stabbed.

PW.2 earlier in his evidence had said in his evidence-in-chief at Page 31 of the record:-

*"After the stabbing of the deceased the players in the field started to beat up the scout boys."*

It is in this light that one had to understand the evidence of PW.5 in cross-examination when he said:

*"I know that some scout boys were taken to the Police Station unconscious."*

The position then, as made clear in the evidence is that the crowd reacted violently to the boys scouts only after the appellant had stabbed the deceased. In other words, there had not been a situation in which the appellant was being beaten which necessitated the use by the appellant of the pen-knife in self defence."

Having carefully considered the evidence in relation to issues raised and canvassed in this appeal, I am satisfied that the findings of fact by the learned trial Judge and unanimously confirmed by the Court of Appeal are unimpeachable and justified.

Where the entire appeal revolved around issues of fact and there

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was nothing from the records of the lower court and the court below to show that the findings were erroneous (as in this case) this court would dismiss the appeal. See: *Adio & Anor v. The State* (1986) 2 NWLR (Pt. 24) 581 at 589 and *Onyejekwe v. The State* (1992) 4 SCR (Pt.1) 19. (1992) 3 NWLR (Pt. 230) 444.

B The appeal is dismissed. The judgment of the trial court which was affirmed by the Court of Appeal is hereby further affirmed.

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### ***BELGORE JSC***

C It has been held time without number that the appellate court will not disturb any findings of fact of the lower court unless under certain conditions, a fortiori, if such findings are concurrent in the two courts below. Unless such findings are at variance with the law governing certain situations. *Okoya v. Santilli* (1994) 4 NWLR (Pt. 338) 256 or if such findings are based on inadmissible evidence. *Ige v. Akoju* (1994) 4 NWLR (Pt. 340) 535; *Nwaebonyi v. State* (1994) 5 NWLR (Pt. 343) 138; *Ogunsina v. Ogunleye* (1994) 5 NWLR (Pt.346) 625; *Elf (Nigeria) Ltd. v. Sillo* (1994) 6 NWLR (Pt. 350) 258; *Hausa v. State* (1994) 6 NWLR (Pt. 350) 281; *Baridan v. State* (1994) 1 NWLR (Pt. 320) 250 appellate court will not interfere. Otherwise there will be gross injustice, if an appellate court having no opportunity to see and hear the witnesses, will interfere with findings of fact of the trial court that had the peculiar opportunity of hearing and seeing the witnesses testify.

F I therefore agree with the judgment of my learned brother, Wali, J.S.C. that this appeal has no merit. I also, for the reasons advanced in that judgment and for the above reasons see no merit in the appeal and I dismiss it and hereby affirm the judgment of Court of Appeal which upheld the conviction and sentence of trial court.

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### ***OGUNDARE JSC***

H I have had the privilege of reading in advance the judgment of my learned brother, Wali, J.S.C. I agree with his conclusion and the reasons leading thereto which I hereby adopt as mine. I too dismiss the appeal and affirm the judgment of the court below.

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### ***OGWUEGBU JSC***

I have had the privilege of a preview in draft of the lead judgment just delivered by my learned brother, Wali, J.S.C. and I am in complete

agreement with his reasoning and conclusion. The prosecution proved its case beyond reasonable doubt. I am satisfied that the appellant must have intended the natural and probable consequences of his act when he stabbed the deceased with the pen knife.

This being an appeal against two concurrent findings of two lower courts, the appellant is faced with a great task. He has not shown that those findings were wrong or perverse. See: Overseas Construction Co. Nig. Ltd. v. Creek Enterprises Nig. Ltd. (1985) 3 NWLR (Pt. 13) 407; Enang v. Adu (1981) 11-12 SC 25 at 42; Okagbue v. Romaine (1982) 5 SC 133 at 170-171 and Lokoyi v. Olojo; (1983) 2 SCNLR 127; (1983) 8 SC 61 at 68-73 are supported by evidence. There being no miscarriage of justice, this court will not interfere.

The appeal is accordingly dismissed by me. The judgment and sentence of the court of trial and the judgment of the court below are upheld and affirmed.

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### **ONU JSC**

Having had the privilege of a preview of the judgment of my learned brother Wali, J.S.C. just read, I am of the identical view that this appeal lacks merit and ought to be dismissed.

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I wish, however, to add a few words of mine as follows:-

I do not deem it necessary to restate the facts of this case which have admirably been set out in the judgment of my learned brother. Suffice it to say, that in a well considered judgment, the trial court convicted and sentenced the appellant to death. On appeal to the Court of Appeal, Enugu Division (hereinafter referred to as the court below) his conviction as well as the death sentence passed on him were affirmed.

The appellant has further appealed to this court where the three questions (distilled from original and additional grounds), all of which are similar to and overlap the three proffered on respondent's behalf and submitted for our determination, are:

(a) Whether there was proper evaluation of the legal evidence available in this matter to sustain the conviction of the appellant by the court below.

(b) Whether the prosecution proved its case beyond reasonable doubt in the light of material contradictions and inconsistencies in the evidence of the prosecution witnesses.

(c) Whether the concurrent findings of the court below and the lower court that the defence of self-defence was not available to the appellant, were not perverse having regard to the prevailing circumstances of this

At the hearing of this appeal on 19th September, 1995, after the respondent's application for extension of time to file her brief and to deem same as duly served was duly granted, the case went to hearing. Learned counsel for the appellant, Mrs. A. Williams, after adopting appellant's brief, argued both the first and second issues together and then the third issue separately, by submitting as follows:

***Issues (a) and (b).***

The contentions in these issues argued together are that it is the duty of the trial court to evaluate the evidence on both sides and appraise same properly and adequately especially where, as in this case, there are divergent evidence produced at the trial by the prosecution as against the defence. In particular, she contended, the trial Judge in evaluating the evidence adduced by the prosecution witnesses, should only consider evidence available before him and not extraneous matters. After referring us to various extracts in the trial court's judgment and that of the court below, learned counsel argued how the statements of P.W.2 and P.W.3 and P.W.5 were never tendered in the trial court. Questioned by court as to whose duty it was to tender those extra-judicial statements, learned counsel who side-tracked the question asserted that there were albeit material contradictions. Learned counsel after delving into individual testimonies of these prosecution witnesses, submitted that it was clear that -

(1) There are contradictions in the statement and testimony of P.W.2 on the issue of what happened at the scene of the incident up till the time P.W.3 was allegedly rescued and up to the time the deceased arrived at the scene.

(2) The statement of P.W.3 at page 6 of the record concerning what happened when the scouts were allegedly beating him, up to the time he was rescued and up till the arrival of the deceased is inconsistent with his testimony at page 35 on the same issue and also the testimony of P.W.2 on the same subject.

(3) P.W.5's statement at page 6 of the record on the issue of how the deceased was stabbed is contradictory of his testimony at page 38 since he said the deceased was dead before he got to the scene.

Learned counsel for the appellant further contended that it is trite law that where, as in this case concerning P.W.2, P.W.3 and P.W.5, a witness has made a statement before trial which is inconsistent with his testimony in court and he gives no cogent reason for same, the court should be slow to act on the evidence of such a witness. She cited in support of the proposition the case of Onubogu v. The State (1974) 9 NSCC 358 at pages 365-366.; (1974) 9 S.C. 1 at page 20. This is the moreso, she argued, that

P.W.5 could not be considered as an eye-witness to the murder coupled with the fact that the evidence of P.W.2 and P.W.3 on the events at the scene immediately before the arrival of the deceased is crucial towards establishing whether:

- (a) there was a crowd including football players at the scene;
- (b) the football match was disrupted;
- (c) there was fighting before the deceased was stabbed.

B

From the foregoing, she submitted, it is improper for the court below to have accepted the findings of the lower court which believed the evidence of these witnesses who had given two different statements which are irreconcilable and conflicting accounts of the same situation.

C

In respect of the requirement on the part of the prosecution to prove the charge of murder; that the death of the deceased in the instant case directly resulted from the act of the appellant and that the killing was neither justified nor excused by law, can be gleaned firstly, from the evidence of P.W.2 - an eye witness, part of which is that:-

D

*"The accused used the dagger he was holding and stabbed the deceased at the right hand side of the back. The deceased was not facing the accused."*

Secondly, the above piece of evidence was essentially corroborated by the evidence of P.W.3 who deposed in examination in chief as an eye witness, inter alia, as follows:-

E

*"The troop leader then brought out a dagger and stabbed my brother - the deceased on his back. My brother fell down. Blood exuded from his nose and mouth which caused his death."*

Thirdly, part of the eye-witness account of P.W.5, who came upon the crime as it was being perpetrated and which corroborated that of P.W.2 and P.W.3 in all material particulars, goes like this:

F

*"On reaching there I saw when one of the scout boys stabbed my brother at the back. My younger brother fell. I picked him up. The accused who stabbed him ran away immediately."*

G

Nothing was said or done to impeach the credit of particularly this witness or those who testified before him. Moreover, confirmatory of the above pieces of evidence of P.W.2, P.W.3 and P.W.5 alluded to above, is the evidence of P.W.1, the medical doctor who although he admitted under cross-examination not being qualified with a fellowship in Pathology to enable him carry out autopsy of the type involved in the instant case, nevertheless opined in examination in chief as follows:-

H

*"On physical examination of the body of the deceased I found a stab wound on the back (right side) of the deceased.....I surmised in my opinion that death was caused by stabbing..... The*

*object that was used had force applied to it. It was applied with a definite force. It must have been a sharp instrument."*

The appellant made three statements to the police. In Exhibit 3 made on 21st April, 1985 he denied stabbing the deceased. In Exhibit 4 made on 25th July, 1985, the appellant stated inter alia-

- B *"..... then from there they round me in and started beating me seriously using weapons on me and some of them holding the scarf and the rope that was on my neck, they would have kill me from there I remove the rope attach with pen knife thrown around myself to scare them away, from there one of them when coming to beat me fell in that knife,*  
 C *but I was not to know whether the knife had wound him or not because they were very many and I ran to nearest police station."*

In his testimony in court which cannot be said to be an outright denial, the appellant said among others, that,

- "..... Despite that, those surrounded me were still beating me.*  
 D *Since there was no means I could escape, I brought out a first aid knife When there was an opportunity for me to escape I did so. I ran to the police station where I laid a complaint. "*

Under cross-examination, appellant said:

- "While I was swinging the pen knife there was room for me to run out."*  
 E With the totality of the above body of evidence in place, the learned trial Judge's finding that the stabbing of the deceased was intentional; that the nature of the injury inflicted could cause and did cause the death of the deceased judging by the severity of the wound, left no doubt to be resolved in appellant's favour. The prosecution had therefore adduced sufficient  
 F evidence, in my view, and proved its case beyond reasonable doubt. See Phillip Omogodo v. The State (1981) 5 S.C. 5; Paul Ameh v. The State (1972) 6 & 7 S.C. 27 and Jules v. Ajani (1980) 5-7 S.C. 96.

- The court below was therefore justified in upholding the learned trial Judge's decision that there was proof beyond reasonable doubt. See  
 G Asariyu v. The State (1987) 4 NWLR (Pt.67) 709; Okoko v. The State (1964) 1 All NLR 424 and The Queen v. Onatomiwa (1964) NMLR 4.

- Having thus held, I cannot see the merit in the defence contention that PW.2, PW.3 and PW.5 contradicted themselves in their testimonies or disparaged themselves individually thereby. Contradictions, if there were  
 H any in the instant case, are so trivial that the trial court in my view, was obliged to ignore them. See: Atana v. A.-G., Bendel State (1988) 2 NWLR (Pt.75) 201; Akpuenya v. The State (1976) 11 S.C. 269 at 276. It is trite law that in the face of contradictions, a trial court is justified to treat a case as unreliable. See Ameh v. The State (supra) and Kalu v. The State (1988)



4 NWLR (Pt.90) 503. But see *Enahoro v. The Queen* (1965) NMLR 265. Had P.W.2, P.W.5 given conflicting or contradictory evidence, their credit ought to have been impeached through cross-examination. See *Akpapuna v. Obi Nzekwa II* (1983) 7 S.C. 1; (1983) 2 SCNLR 125; *R. v. Akanni* (1960) 5 F.S.C. 120 and *R. v. Ukpang* (1961) 1 All NLR 25; (1961) 1 SCNLR 53 it being trite that a witness can be treated as unreliable when his evidence is materially contradicted with his former statements. See *Joshua v. The Queen* (1964) 1 All NLR 1. None of P.W.2, P.W.3 and P.W.5 has been so adjudged in the instant case and the acceptance of their evidence, in my judgment, has occasioned no miscarriage of justice. The point therefore raised by learned counsel for the defence in her brief as well as in oral argument that the statements made by these witnesses ought to have been tendered in court has, in my opinion, no legal authority to back it. Indeed, in one of its most recent decisions in *Musa Umaru Kasa v. The State* (1994) 5 NWLR (Pt.344) 269, this court (per Uwais, J.S.C.) stated the principles which apply to the admission of a statement in general to be as follows:-

*“At common law, it is fundamental rule of evidence that hearsay evidence is inadmissible (See Section 77 of the Evidence Act Cap. 112). Former statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender the statement as evidence of the truth of the matters asserted in them. See the Privy Council decision in Subramanian v. Public Prosecutor (1965) 1 WLR 965 at 969 and R. v. Mclean (1968) 2 Cr. App. R. 80”*

When, for instance, P.W.2 and P.W.3 were respectively asked by the defence counsel during cross examination whether what they said in their statements to the police was all they told the trial court, each replied in the affirmative. There the matter ended without the learned counsel for the defence invoking the purport of section 208 of the Evidence Act (ibid). That section stipulates that-

*“If a witness upon cross-examination as to a former statement made by him relative to the subject matter of the trial, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statement.”*

The trial court referred to the above prosecution witnesses' statements to the police only in an attempt to point out the consistency in their evidence right from the start that it was the appellant who stabbed the deceased.

Quite apart from the uncontroverted evidence adduced by the pros-

ecution through her witnesses, part of which I have reproduced above, the evidence of the prosecution witnesses after being tested under cross-examination irresistibly pointed to the fact as also exemplified hereinbefore, that the act of stabbing the deceased by the appellant caused the deceased's death and if not meant by the appellant to kill the deceased, was at least, meant to cause him grievous bodily harm. Thus, the cause of death, with or without the medical evidence of P.W.1, which the defence sought to disparage, was proved beyond reasonable doubt. See *Tonari v. The State* (1965) NMLR 163 where Ademola, CJN, at page 164 of the report said:

*"It was argued before the learned trial Judge that cause of death was not proved. We are in agreement with his views that in cases of this nature where a man was attacked with a lethal weapon and died on the spot, it is hardly necessary to prove the cause of death; it can properly be inferred that the wound inflicted caused death."*

*See also Lori v. The State (1980) 8-11 S.C. 81; Kato Dan Adamu v. Kano N.A. (1956) SCNLR 65; (1956) 1 F.S.C. 25 and Essien v. The State (1984) 1 SCNLR 1 (1984) 3 S.C. 14 at 18.*

There was therefore ample justification, in my judgment, for all the findings of facts based on the evidence of the prosecution witnesses which the trial court believed and which the court below affirmed.

On evaluation of evidence, it cannot be seriously contested in my view, that the learned trial Judge duly and fully evaluated the evidence adduced before him both of the prosecution and the defence as required by the law before arriving at the conclusion that he did. In endorsing the trial court's evaluation of evidence, the court below had the following to say:

*"In the evaluation of the evidence, the trial Judge observed that from the eye witness accounts of P.W.2, P.W.3 and P.W.5, there was no doubt that the appellant had stabbed the deceased. The appellant himself had been too forthcoming.....He agreed that he swung round his pen knife in a crowd to make good his escape ..... In Exhibit 4 he agreed that someone "coming to beat me fell in that knife but I was not to know whether the knife had wounded him or not."*

Besides, the learned trial Judge after duly evaluating the evidence of the appellant including his two retracted extrajudicial statements which he regarded as mutually unreliable, rightly, in my view, convicted him thereon. See *Eghoghonome v. The State* (1993) 7 NWLR (Pt.306) 383. Issues (a) and (b) are accordingly answered in the affirmative.

### **Issue (C)**

Coming to the third issue (issue C) which asks whether the concurrent findings of the court below and the lower court's that the defence of self-defence was not available to the appellant, were not perverse having regard

to the prevailing circumstances of this case, it is enough to say here that both the trial court and the court below considered the pleas of accident and self defence pleaded by the appellant and found from the evidence and circumstances thereof, they could not avail him. The learned trial Judge even went further to consider provocation which appellant never directly pleaded and rightly found that it could not also avail him. B

On self defence, that the appellant had in his testimony in his defence told the trial court *"I was not the person who killed the deceased"* clearly indicates that a successful plea of self defence was ruled out in that that plea first and foremost means that the appellant has confessed or accepted killing the deceased but is now saying that he did so in self-defence. So also C is the defence of accident. See R. v. Knock (1877) 14Cox CC 1 at 2; Adeyinka Albert Laoye v. The State (1985) 2 NWLR (Pt.10) 832 at 833.

On the appellant's contention on page 16 of his brief wherein he maintains that evidence led by him established that he was not initially present at the scene of crime but only arrived thereat to see a big fight going D on, it will suffice for an answer what the court below said in this respect. It held inter alia:

*"It is only when evidence is credible and accepted as such by the trial Judge that the evidence concerned can be considered as raising a defence. When the evidence is rejected as incredible, no defence can be E founded on it."*

The court below went on to illustrate what it meant as follows:-

*"The evidence of the appellant which the trial Judge considered and rightly rejected could not in the circumstances be the foundation for a defence of self defence. That defence must therefore fail."* F

Moreover, the Criminal Law and Procedure of the Southern States of Nigeria by T. Akinola Aguda Third Edition in paragraph 1670 at page 737, provides inter alia:

*"the defence is only available if the person who claims to have exercised the right had reasonable grounds for believing that the only way G to protect himself from death or grievous harm was to kill his assailant."*

The same cannot be said to hold good in the instant case where the deceased was shown to be backing and not facing the appellant when the latter inflicted the fatal stab wound. It is in this regard that I make bold to distinguish the case of Borns v. The State (1971) 1 ANLR 335 at 338 from H the present case. In that case, there was no denial at all in the commission of the offence charged and on appeal this court held that the trial Judge did not make specific finding of fact on whether he believed accused could avail herself of the plea of self defence, unlike in the case in hand where the

defence was considered by the trial court as well as the court below, which made a definite finding of fact thereon. Indeed, in the Born's Case (supra) this court rather than setting the decision aside sent it back for retrial. In the instant case, the appellant rather than running away as a means of avoiding a fight, escaped after stabbing the deceased and thus depicted as the aggressor through and through; also that he knew or for saw the consequences of his act. It would appear that the appellant had abandoned the defence of accident since it, as well as provocation, were not pursued by his counsel. I endorse the views expressed thereon by the court below as being of no avail to the appellant. As the stabbing did not occur by accident but constituted a willed, deliberate and intentional act, it was, in my judgment, calculated to cause grievous harm. See *Adelumola v. The State* (1988) 1 NWLR (Pt. 73) 683; (1988) SCNJ 68. As there was no evidence of provocation, it too must fail. As the decisions of the courts below are not shown either to be unjustified or perverse, I will be loath to interfere with their concurrent findings. See: *Osayeme v. The State* (1966) NMLR 388 and *Ozigho v. C.O.P* (1976) 2 SC 67. My answer to issue (c) is rendered in the affirmative.

For the reasons given and the fuller ones contained in the judgment of my learned brother Wali, J.S.C. with which I had earlier expressed my concurrence, I too, will dismiss this appeal and affirm the conviction and sentence passed on the appellant by the Court below.

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