

SAMUEL THEOPHILUS ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

APPEALS - Concurrent findings of fact - That are not perverse or insupportable - Will not be interfered with.

**CRIMINAL PROCEDURE** - Witnesses - One credible prosecution witness if believed - Is enough to secure conviction.

**CRIMINAL LAW** - Intoxication - Murder - Where appellant alleged that he drank 2 bottles of beer according to his capacity - Defence of intoxication cannot avail him.

**CRIMINAL PROCEDURE** - Proof beyond reasonable doubt - Lapses raised by appellant to show it was not attained - Whether maintainable - In view of concurrent findings of fact.

**EVIDENCE** - Contradictions - Where the murder charge is proved beyond reasonable doubt - Other alleged contradictions are deemed immaterial.

#### FACTS

The appellant (a police sergeant) went to a beer parlour to drink the Company of his friend. As they were drinking, 3 persons engaged the deceased, Hassan Ali, in a quarrel over payment of some money the deceased owed them. It was alleged that appellant and the deceased fought during which encounter appellant stabbed him with a knife. The deceased died later as a result at the General Hospital, Lagos. Appellant was charged before the Lagos High Court for the offence of murder.

He denied the charge. The trial court convicted the appellant as charged and sentenced him to death. His appeal to the Court of Appeal was dismissed. Appellant has further appealed to the Supreme Court raising 4 issues.

#### **ISSUES FOR DETERMINATION**

1. Whether the Court of Appeal erred in law when it held that:-

“As to the materiality of the contradictions, I am of the view that the learned judge was correct in the view he held that they were not material contradictions. Apart from the question as to general credibility of witnesses, whether evidence is material or not depends on the issues in the case. In this case the issue is whether it was the appellant who had stabbed deceased.”

2. Whether the Court of Appeal erred in law in holding that the learned trial judge adequately considered the defence of the appellant. Ex, seep. 66 H

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

#### ***Concurrent findings of fact***

1. The above, conclusions being the culmination of concurrent findings of facts by the two courts below and which, in my judgment, are not manifestly perverse, or insupportable not have occasioned a miscarriage of justice do not warrant to be interfered with. Be it noted that P.W.4 and P.W.7 neither having been shown to be accomplices nor tainted witnesses, indeed competent witnesses against the Appellant. (p. 71 F)

#### ***Criminal procedure - Witnesses***

2. In the instant case, the prosecution called all material witnesses to establish its case. In doing so, it is not bound to call a host of them; one credible mess, if believed is enough. The right of the prosecution to call the witnesses it decides to prove its case, it has been held, is not a mere privilege but a prerogative. (p. 72 G)

#### ***Evidence - Contradictions***

3. In the case in hand, the prosecution proved its case beyond reasonable doubt. In view of my conclusions above, I regard all other manner of alleged contradictions complained of by the Appellant as immaterial and not worthy of further pursuit on appeal in so far as the singular issue in this case is whether it was the Appellant who had stabbed the deceased - a matter which the trial court had no difficulty in resolving against the Appellant and the court below upheld same. (p. 73 A)

#### ***Insanity - Murder***

4. In the instant case, the Appellant having in his defence said inter alia that:

“.....I had only two bottles of beer on the day in question. This is my capacity”

could not be said to be drunk on the night in question since he did not exceed his limit or capacity and section 29 of the Criminal Code cannot have afforded him refuge. Indeed, the learned trial judge *suo motu* considered the defence of provocation and accident and found them unavailable to the appellant, more particularly that he did not adduce credible and positive evidence to support them. (p. 75 D)

### ***Proof beyond reasonable doubt***

5. As regards these two issues whose consideration overlap issues 1 and 2 and wherein the pith of the appellant's grouse consists, inter alia, of the prosecution's failure to call Sgt. Makurdi as a material witness; failure to call the two soldiers at Dodan Barracks; failure of police to investigate the entire case properly in the face of a defence suggestion that the eye-witnesses (P.W.4 and P.W.7) are accomplices and failure to give a finger prim evidence on the knife (exhibit 3) as well as evidence of blood on it - lapses which rendered proof beyond reasonable doubt unattainable, these having been carefully considered and resolved by the trial court in its judgment and which as transpired the court below affirmed, I find no reason whatsoever to disturb the concurrent findings of fact of the two lower courts that have not been demonstrably shown to be perverse. (p. 75 G)

### REPRESENTATION

F A. A. Waziri for the Appellant

O. M. Ayeni (Mrs.) A-G of Lagos State with her C.E.

Uweja (Miss) Assistant D.P.P. for the Respondent

### CASES REFERRED TO

The State v. Dominic Okolo (1974) 4 U1LR. 568

Enahoro v. The Queen (1965) N.M.L.R. 265 at page 282

R. v. Golder (1960) 1 W.L.R. 1169 at 1172

Joshua v. The Queen (1964) All N.L.R.1

Jizurumba v. The State (1976) 3 S.C. 89

Balogun v. Labiran (1988) 3 NWLR (Part 80) 66 at 77

Chiwendu v. Mbamali (1980) 3-4 S.C.32

Duyile v. Ogunbanyo (1989) 1 NWLR (Part 72) 601 at 610

Alli v. The State (1988) 1 NWLR (Part 68) 1 at 20

Alonge v. IGP (1959) 4 FSC 203

Igbo v. The State (1975) 1 All NLR 70

Yeboah v. The Queen (1953) 14 W.A.C.A. 484

Ikemson v. The State (1989) 3 NWLR (Part 110) 455 at 479

Attorney-General of Northern Ireland v. Gallagher (1963) A.C. 349

Inyang v. The State (1973) 1 NWLR 22

### STATUTES REFERRED TO

Criminal Code ss. 319(1), 29(1)

Evidence Act Cap 112 LFN, 1990 ss. 177, 27(2), 209

Criminal Procedure Act s. 245

### LEAD JUDGMENT BY ONU JSC

The appellant, Samuel Theophilus, formerly a police driver attached to the Force Headquarters, the Nigeria Police, Lagos was arraigned before A.O. Silva, J. sitting at the High Court of Lagos State holden at the Lagos Judicial Division on a one-count information for the murder of one Hassan Ali on the 13th day of December, 1983 contrary to Section 319(1) of the Criminal Code, Cap. 31, Laws of Lagos State, 1973.

The facts of the case which appear not to be in dispute are that on 13th December, 1983 the appellant who was a Sergeant in the Nigeria Police Force and employed as a driver attached to the Force Headquarters, Nigeria Police Force, Moloney, Lagos went to Ajeniya Street, Obalende, Lagos in company of his friend, one Sergeant Isa Makurdi to drink beer at a beer parlour. As the appellant and his friend sat down and were drinking, three persons came and went to where Hassan Ali, the deceased was sitting and engaged in a quarrel with him over payment of some money the deceased owed them. It was then alleged that the appellant and the deceased fought and that during the encounter, the appellant drew a knife from his pocket and stabbed the deceased who later died as a result at the General Hospital, Lagos.

Seven witnesses in all were called by the prosecution, two of whom (P.W.4 - one Hausa Ntasiri and PW 7 - one Saliu Yusuf) gave eye-witness accounts of what transpired at the scene of crime on the fateful day. At the close of the case for the prosecution, the defence made a no-case submission which was peremptorily overruled.

The appellant who had, on arrest made a statement to the police, gave evidence alone on oath in his defence denying either stabbing the deceased or bearing responsibility for the act which resulted in the deceased's death. It was claimed that there was general confusion at the

beer parlour and as a result the appellant ran towards Dodan Barracks to report the incident but was pursued by two persons he later identified as P.W. 4 and P.W. 7. These two persons, it was stated, were indeed two of the three persons that quarrelled and fought with the deceased; were arrested along with him (appellant) by soldiers on guard duty at Dodan Barracks Quarters Guard; detained at the military cell until the following day (14/12/83) and after the three of them that were detained together were taken to the Onikan Police Station by the soldiers, the police commenced investigation which culminated in the appellant alone being charged for the offence of murder.

C The learned trial Judge in a considered judgment convicted and sentenced the appellant to death on 15th December, 1989.

The appellant being dissatisfied with the said judgment appealed to the Court of Appeal, Lagos Division which dismissed his appeal. The appellant being aggrieved with that decision, has further appealed to this court on five original and later with leave four additional grounds of appeal, numbered 6 to 9.

D The appellant subsequently filed a brief of argument which, on 10th of October, 1995 (the date the case was fixed for hearing) was served on the respondent.

The motion filed at the instance of the respondent for enlargement of time within which to file its brief and to deem same as duly filed and served dated 18th September, 1995 being rendered superfluous, was withdrawn by the Honourable Attorney-General for the state and it was accordingly struck out. With both appellant's and respondent's briefs being before us and the appeal therefore ripe for hearing, the appeal proceeded F there and then to hearing.

The appellant submitted four issues for our determination. As the respondent also submitted four issues which I consider to be subsumed in the appellant's. I will set out and adopt those of the appellant for my consideration of this appeal albeit that they are, in my view, inelegantly formulated, as follows:-

G 1. Whether the Court of Appeal erred in law when it held that:-  
 "As to the materiality of the contradictions, I am of the view that the learned Judge was correct in the view he held that they were not material contradictions. Apart from the decision as to general credibility of witnesses, whether evidence is material or not depends on the issues in the case. In this case the issue is whether it was the appellant who had H stabbed the deceased."

2. Whether the Court of Appeal erred in law in holding that the

learned trial Judge adequately considered the defence of the appellant.

3. Whether the Court of Appeal erred in law when, after stating

the observation of the learned trial Judge that:-

"According to the accused's defence it was only Sgt. Isa Makurdi who eventually got to the scene of the incident with him. Thereafter, there B is nothing said about any part taken by Sgt. Makurdi in the events that happened at the scene. The prosecution has the discretion to call evidence which they consider enough to prove their case. I do not see that their failure to call Sgt. Makurdi would affect their case. I am satisfied that the Police carried out proper and sufficient investigation into the incident." C

It stated that:-

"Both as regards the fact and the law this passage cannot be faulted."

4. Whether the Court of Appeal erred in law when it held that the trial Judge:- D

"Considered ..... possible defences of provocation, intoxication, self-defence and accident and held that none of those defences could avail the appellant."

I will now consider the issues in their order of sequence as follows:-  
 Issue 1: E

The appellant strenuously submitted both in his brief and orally that the contradictions and inconsistencies in the evidence of P.W. 4 and P.W. 7 are material contradictions showing, inter alia, that these witnesses have a purpose of their own to serve by pinning responsibility for murder they may have committed on the appellant. It is the appellant's argument F that P.Ws 4 and 7 are not independent witnesses but friends who spent the night before their statements to the police in one cell together at Dodan Barracks after being arrested and detained on suspicion of committing the offence. It is further contended that these witnesses knew the deceased and the appellant were friends and that they often drank together at the G beer parlour, where according to P.W. 7, the incident happened. They went there, it is maintained, to demand for money that the deceased owed them which he (deceased) could not pay. They fought with the deceased and appellant intervened on behalf of the deceased. Quite significantly, it is contended, although according to P.W. 7 there were a lot of people at the scene of the incident. only P.W. 4 and P.W. 7 pursued the appellant to Dodan Barracks where he ran to escape the fighting and report the incident although, on their own admissions in their evidence. H neither of them attempted to separate the appellant and the deceased in the fighting that led to the deceased being stabbed by the appellant. P.W.

4, it is further argued, sat within hearing distance of the appellant and the deceased during the alleged fighting, adding that on his evidence, it appears that no words at all were uttered by either the appellant and the deceased throughout to provide a clue as to the cause.

B Appellant, after analysing and dissecting the evidence of P.W.4 and P.W.7 and demonstrating how each of their previous statements to the police which he fingered from the record, is inconsistent with their evidence in court, further sought to show how these two alleged eye-witnesses testimonies and those of other prosecution witnesses e.g. P.W. 2 and P.W. 5 were inconsistent inter se. After pinpointing P.W. 7's contradiction of himself and the materiality of such contradictions, it is submitted that such cases as The State v. Dominic Okolo (1974) 4 UILR 568; (1974)2 SC 3, is authority for the proposition that P.W. 4 and P.W. 7 had their own purpose to serve, hence their evidence should be viewed with caution in that they were at the scene of the alleged crime and were also drinking when the confusion broke out while someone who had not been properly identified, stabbed the deceased. It is further contended that inspite of the above submission which ought to have been upheld, the learned trial Judge however concluded that the inconsistencies were immaterial, adding that in coming to that conclusion, he did not consider at all or sufficiently, the evidence of the appellant in his defence but relied wholly and entirely on part of the prosecution evidence up to the alleged stabbing and wrongly disregarded the rest of the evidence in the case, particularly the appellant's defence. It is therefore appellant's further submission that there is no basis in law for the imposition of a cut-off point in the prosecution evidence leading to a complete disregard of the defence case in considering the materiality of an admitted contradiction and that the learned trial Judge was wrong in doing so. If the learned trial Judge had considered the whole evidence in the case, it is maintained, particularly the appellant's defence however weak or frivolous vide Otti v. Police (1956) NRNL 1, he would have seen that the denial by the appellant of stabbing the deceased taints P.W. 4 and P.W. 7 with suspicion as possible perpetrators of the murder. The court below, it is therefore submitted, erred in law in affirming the decision of the learned trial Judge on the question of materiality of the contradictions as expressed at the beginning of the argument of the issue under consideration. It is further contended that the court having correctly stated that whether evidence is material or not, wrongly held that only one issue is raised in this case: "Whether it was the appellant who had stabbed the deceased." In so holding, it is submitted, the court below fell into the same error as the learned trial Judge by basing its decision on the prosecution's case only without

having any regard to the appellant's defence. The case of Enahoro v. The Queen (1965) NMLR 265 at page 282 for the view that a likelihood of or a miscarriage of justice had resulted from contradictions in the evidence of P.W.4 and P. W. 7 amounting to their substantial disparagement, was called in aid.

With regard to the law applicable to the evidence of a witness B contradicted by an earlier or previous statement, appellant relied on R. v. Golder (1960) 1 WLR 1169 at 1172 as approved by this court in Ukpong v. The Queen (1961) SCNLR 53 and Joshua v. The Queen (1964) All NLR 1

Finally, it is submitted that whether there is a glaring inconsistency and what bearing the alleged inconsistency can possibly have on the overall facts of the case must depend upon the trial Judge's consideration of the appellant's defence no matter how weak, or even frivolous and 8 whether or not the trial Judge believed such defence or took the view that the accused was lying vide Jizurumba v. The State (1976) 3 SC 89. D

I will first of all deal with the evidence of P.W. 4 and P.W. 7 said to be contradictory. P.W. 4 testified on oath at the trial inter alia thus:

"He again started to run towards Dodan Barracks. When he got to the gate I caught up with him and pushed him inside the barracks. With the help of some men the accused was held with the knife still in his hands. I told the men what accused had done. The men took the knife from the accused. They asked me what I want them to do. I told them to help get the accused to the police station. E

They said they cannot take the accused to the police station. They then took the accused to "quarter guard" where he was detained till the following day. On the following day the RSM Dodan Barracks arranged for the accused to be taken to the Police Station." F

Under cross-examination P.W. 4 deposed as follows:-

"I was never detained in the army guard room on the day of the incident. Yusuf was also not detained in the guard room. It is not true that I made a statement under caution to the police on this incident. It is not true that I made a statement to the police that Yusuf and I were detained in another cell in the Army Barracks." (Underlining is mine for emphasis). G

"I did not personally separate the accused and Hassan Ali when they were fighting .. H

I am a Margi from Gongola State, Hassan Ali (the deceased) is a Kanuri man from Borno State. I know Yusuf (PW 7). He is not a Kanuri man. He is a Hausa man. The accused person comes from Gongola State. He comes from a place near Wubi (sic)".

Further cross-examined P.W. 4 said:

"We were all outside the beer parlour at Ajeniya Street at the time of the incident. There is Street light at Ajeniya Street, Obalende but it was not put on, on the night of the incident.. There were three of us sitting down

B on a bench. When the fight started we got up.

Yusuf drinks beer. The accused drank beer on the night in question with Hassan Ali....."

P.W. 7 when examined in chief said, among others, as follows:

"On the day of the incident involving the accused person I went to a C shop owned by a woman at Ajeniya Street, Obalende to get a bottle of Fanta. The woman's name is Iya Samson. Her shop is at Ajeniya Street, Obalende. I do not know the number of the shop. While I was at Iya Samson's shop I saw the accused person and the deceased sitting down at Kayode's shop on the side of the road facing Iya Samson's shop. I saw the accused person hit the deceased who fell inside the gutter. I do not know what caused the quarrel between them. Before the deceased got up from the gutter I saw the accused D person putting his hand in his pocket from where he brought out a knife.

As the deceased got up, the accused stabbed him on the chest with the knife and the deceased fell down again on the ground. On seeing the deceased fall down, the accused took to his heels. One other Hausaman and I pursued the accused person.

E ..... As he got up there (Army Barracks) he threw away the knife in his hand into a disused polling booth.

The other man spoke to the people at the Army Barracks that the accused had a knife which he had thrown into the polling booth. The accused was arrested by the soldiers and he was detained in a guard room. We were F later taken to Onikan Police Station where I made a statement to the police. The other man and I were released by the police after our statements.

..... There were a lot of people both at the shop where I went to get fanta and at the shop on the other side of the road where the accused and the deceased had been. I cannot say that I know any of those people in particular. I only know the other man called Hausa .

G ..... I did not have a good look at the knife."

Under cross-examination, P.W. 7 said inter alia as follows:-

"The incident happened at about 1 a.m." There was no street light at the time of the incident but the shops had light.. I do not understand Hausa Language. The other man. Hausa, spoke in Hausa Language that the accused had a knife. Only two of us pursued the accused person. I did not try to separate the deceased and the accused person."

H Of all the alleged inconsistent accounts that were highlighted during the appellant's trial such as P.W.4 denying being detained with P.W. 7 in a

guard room other than the "quarter guard" where the appellant was detained at Dodan Barracks before being taken to the Onikan Police Station, of P.W, 4 saying that P.W. 7 is a Hausa man whereas P.W. 7 said he does not understand Hausa: of P.W. 4 denying ever making a statement under caution to the police as did P.W. 7 before both of them were released by the police on 14th December, 1983 and the difference in the number of B persons who pursued the appellant to Dodan Barracks, to mention but a few, the learned trial Judge disposed of them in the following words in his judgment:-

"Mrs. Ogunlami for the prosecution urged me to hold that the contradictions highlighted by accused's counsel are minor contradictions. C I am in agreement with this submission. The alleged stabbing with a knife by the accused took place in full view of two eye-witnesses (P.W. 4 and 7). My considered opinion is that inconsistent accounts of what happened after the stabbing cannot be anything else but immaterial inconsistencies. Particularly, differences in the account of the number of persons who pur- D sued the accused to Dodan Barracks after the stabbing; whether or not the knife was recovered from the accused's possession or from where he threw it; whether or not the knife was or was not a heavy object; whether or not P.W. 4 and P.W. 7 were detained along with the accused person at Dodan Barrack's cell until the following day are all immaterial contradiction." E

With the above findings of fact by the trial court after a thorough evaluation and appraisal of the evidence adduced before it, it is little wonder that the court below arrived at the justifiable and unimpeachable conclusion which now forms the fulcrum upon which rotates the gravamen of appellant's grouse in the issue now under consideration, to wit:- F

"As to the materiality of the contradictions, I am of the view that the learned Judge was correct in the view he held that they were not material contradictions. Apart from the question as to general credibility of witnesses, whether evidence is material or not depends on the issues in the case. In this case the issue is whether it was the appellant who had G stabbed the deceased."

The above conclusions being the culmination of concurrent findings of facts by the two courts below and which, in my judgment, are not manifestly perverse, or insupportable nor have occasioned a miscarriage of justice, do not warrant to be interfered with. See: Bologun v. Labiran H (1988) 3 NWLR (Pt.80) 66 at 77; Mogo Chinwendu v. Mbanegbo Mbamali (1980) 3-4 SC 32; Etowa Enang v. Ikor Adu (1981) 11-12 SC 25; Duyile v. Ogunbayo & Sons (1989) 1 NWLR (Pt.72) 601 at 610 and Ajeigbe v. Odedina (1989) 1 NWLR (Pt. 72) 584 at 600.

Be it noted that P.W. 4 and P.W. 7 neither having been shown to be accomplices nor tainted witnesses are indeed competent witnesses against the appellant. Consequently, their evidence needs no corroboration. See: Section 177 of the Evidence Act and the cases of Christopher Okosi v. The State (1989) 2 NWLR (Pt.100) 642; The State v. Okolo (1974) 2 SC B 73 at 82; Ishola v. The State (1978) 9/10 SC 81 at 91, 100. Nor further still, have these witnesses, in my judgment, in any way been shown to have other personal interests to serve. Indeed, as this court (Per Karibi-Whyte, J.S.C.) had occasion, inter alia, to point out in Stephen Oteki v. A.G. Bendel State (1986) 4 SC 224 at 250; 1986) 2 NWLR (Pt. 24) 648.

C “The fact that the witness had other personal interests to serve is by itself not sufficient to reject such evidence. The effect of such interests is to place the trial Judge at his guard to warn himself as to the veracity of the evidence....”

D In the instant case, all P.W.4 and P.W. 7 did was to assist in apprehending the appellant and should it be suggested that their evidence should be corroborated, which is not conceded, there was abundance of such corroboration in the evidence of P.W. 6, consultant physician Humphrey Sunday Ahimire, who tendered the certified copy of the post mortem examination report (Exhibit 5) prepared by Doctor Owodunni on 19/12/83, the latter who had since left Government service on retirement E as well as the knife used by the appellant (Exhibit 3). The evidence of P.W. 6 in examination in chief in this regard and the ensuing cross-examination, are illuminating. Said he, consistent with the prosecution’s case:

F “.....Dr. Owodunni found that the deceased had a sutured area on the chest measuring 7cm. He also found that there were fractured ribs - 2nd and 3rd on the right. The right upper lobe of the lung was ruptured and there was a pint of blood in the peritoneum (the lining of the abdomen). The myocardium (i.e. the heart muscle) was pale. Dr. Owodunni certified the cause of death to be fractured ribs, ruptured lung and acute blood loss. The findings were consistent with a blow to the chest by a sharp and heavy object.”

G Elaborating under cross-examination. this witness said:  
“A heavy and sharp object” which I mentioned earlier on could be a knife.”

H In the instant case, the prosecution called all material witnesses to establish its case. In doing so, it is not bound to call a host of them, one credible witness, if believed is enough. See Section 179 (1) Evidence Act, Cap. 112 Laws of the Federation, 1990. See: also Ali v. The State (1988) 1 NWLR (Pt. 68) 1 at 20; Alonge v. I.G.P. (1959) SCNLR 516; (1959) 4 FSC 203; Anthony Igbo v. The State (1975) 1 All NLR 70 and Yeboah v.

The Queen (1953) 14 WACA 484. The right of the prosecution to call the witnesses it decides to prove its case, it has been held, is not a mere privilege but a prerogative.

See: Akpan v. The State (1991) 3 NWLR (Pt.182) 646; Opayemi v. The State (1985) 2 NWLR (Pt.5) 101 at 107 and R. v. Adebajo 2 WACA 315. In the case in hand, the prosecution proved its case beyond reasonable doubt. See B Section 138(1) Evidence Act Cap. 112. In view of my conclusions above, I regard all other manner of alleged contradictions complained of by the appellant as immaterial and not worthy of further pursuit on appeal in so far as the singular issue in this case is whether it was the appellant who had stabbed the deceased - a matter which the trial court had no difficulty in resolving against C the appellant and the court below upheld same. When it is known that the offence took place on 13th December, 1983 and the witnesses (P.W. 4 and P.W. 7) were testifying on 30th March, 1987 and 19th November, 1987 respectively, one would appreciate that the difference in accounts by these witnesses is natural. See; Ikemson v. The State (1989) 3 NWLR (Pt.110) 455 at 479.

D On P.W. 4 and P.W. 7’s previous statements being inconsistent with their evidence, it is pertinent to point out that as these statements were never admitted in evidence nor were they admissible except as proofs of evidence for the procurement of leave to proffer an information, it is necessary to advert to the relevant principle of Evidence Law which applies to the admission of such statements in general. Former statements of any person whether or not he is a E 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 Subramaniam v. Public Prosecutor (1956) 1 WLR 965 and R. v. Maclean (1968) 52 Cr. App. R. 80. However, there are exceptions to the rule in criminal proceedings which are both statutory and at F common law. Section 27(2) of the Evidence Act Cap. 112 (ibid) constitutes one of such statutory exceptions since it renders a confession relevant against the maker and thereby makes it admissible in the proceedings. See: also Musa Umaru Kasa v. The State (1994) 5 NWLR (Pt.344) 269 at 286 and Hausa v. The State (1994) 6 NWLR (Pt.344) 281. In the instant case, the previous statements allegedly made by the P.W.4 and P.W. 7 being no parts G of the record except as proofs of evidence for the purpose of seeking leave of the trial Judge to prosecute the case, cannot, in my judgment, be used to contradict the evidence of the witnesses given on oath at the trial, moreso that learned defence counsel did not confront P.W. 4 and P.W. 7 with these earlier inconsistent statements pursuant to section 209 of the Evidence Act, Cap. 112 H Laws of the Federation of Nigeria 1990. Furthermore, the inconsistency rule as stated in Saka Oladejo (supra) has been overruled by this Court’s decision in Egboghonome v. The State (1993) 7 NWLR (Pt. 306) 383 which in effect decides, inter alia, that an accused person may not be convicted albeit that

his extra-judicial statement contradicts his evidence in court.

This issue is thus answered in the negative.

Issue No.2

The complaint in this issue is whether the court below erred in law in holding that the learned trial Judge adequately considered the defence of the appellant. The argument proffered by learned counsel for the appellant both in his brief and orally in this respect has been adopted as overlapping that put forward in issue I hereinbefore, the appellant referred us to several excerpts in his defence evidence and submitted that this evidence of circumstances in which P.W. 7 or P.W. 4 or another person not before the court, might have been responsible for the stabbing is material to his defence. The learned trial Judge, it is argued, made no reference whatsoever to them, thus failing to consider same in breach of a duty to do so vide section 245 of the Criminal Procedure Act. The case of *R. v. Nwaugoagwu & Anor* (1962) 1 All NLR 294 and Black's Law Dictionary Fifth Edition at page 278, 2nd column, were called in aid. Had the learned trial Judge considered the evidence among others and drawn the necessary inferences favourable to the appellant, it is further contended, he would have discharged and acquitted the appellant. After we were referred to conclusions reached by the learned trial Judge where he misdirected himself on appellant's evidence and where in the record he failed to draw reasonable inferences favourable to the appellant, we were urged to discharge and acquit him.

In considering the argument put forward on behalf of the appellant here, it is pertinent to point out that in his defence he denied either fighting with the deceased or stabbing him. He testified as to how two men arrived at the scene of the incident to demand for the payment of their money from the deceased and started beating him when he could not pay what he was owing them. That when he (appellant) pleaded on the deceased's behalf, one of the men struck him with a broken bottle. He then took to his heels while the beating of the deceased by the men continued.

Relying on the case of *Akpankere Apishe v. The State* (1971) 1 All NLR 50 which enjoins the court to consider all the defences arising from the evidence before the court, the trial court, it is pointed out, considered the fact that there was evidence of drinking and fighting on the fateful night, namely 13/12/83 and that there was no evidence to suggest that either the deceased or the appellant was drunk. The principle of law, it is contended, is that "prima facie, intoxication is not a defence if it is self-induced it being that section 29(1) of the Criminal Code clearly provides that except in certain cases, intoxication shall not constitute a defence to any criminal charge, while section 29(2) of the Criminal Code specifies such cases where intoxication shall be a defence

"if the accused person at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and the state of intoxication was caused without his consent by the malicious or negligent act of another person or that by reason of the intoxication he was temporarily insane at the time of such act or omission." See *R. v. Nwaugoagwu* (supra) per Araka, J. (as he then was). See also *B Attorney-General of Northern Ireland v. Gallagher* (1963) AC 349; *Inyang v. The State* (1973) 1 NMLR 22 and *Okunu v. The State* (1977) 3 SC 151 at 161. Indeed, as Karibi-Whyte, J.S.C. had occasion to stress in *John Imo v. The State* (1991) 9 NWLR (Pt. 2(3)) at page 27:

"The law is well settled in favour of the presumption of sanity of the appellant. See S.27 Criminal Code. Hence, where appellant is claiming to be insane the onus is on him to establish that fact. See: S. 140(3)(c) of the Evidence Act. Similarly, the burden is on the accused to prove the defence of intoxication which also is a question of fact. See: *Nkanu v. The State* (1980) 3-4 SC 1."

In the instant case, the appellant having in his defence said inter alia that:

"...I had only two bottles of beer on the day in question. This is my capacity"

could not be said to be drunk on the night in question since he did not exceed his limit or capacity and section 29 of the Criminal Code cannot have afforded him refuge. Indeed, the learned trial Judge suo motu considered the defence of provocation and accident and found them unavailable to the appellant, more particularly that he did not adduce credible and positive evidence to support them. The learned trial Judge, who saw, heard and observed the demeanour of witnesses including the appellant, finally concluded by saying:

"I am satisfied and I find that the accused person stabbed the deceased with the knife Exhibit 3 on the chest and caused his death and that none of the known defences of provocation, self defence, or accident can avail him."

Issue 2 is answered in the negative.

Issues 3 and 4:

As regards these two issues whose consideration overlap issues 1 and 2 and wherein the pith of the appellant's grouse consists, inter alia, of the prosecution's failure to call Sgt. Makurdi as a material witness; failure to call the soldiers at Dodan Barracks; failure of police to investigate the entire case properly in the face of a defence suggestion that the eye-witnesses (P.W. 4 and P.W. 7) are accomplices and failure to give a finger print

evidence on the knife (Exhibit 3) as well as evidence of blood on it lapses which rendered proof beyond reasonable doubt unattainable, these having been carefully considered and resolved by the trial court in its judgment and which as transpired the court below affirmed, I find no reason whatsoever to disturb the concurrent findings of fact of the two lower courts B that have not been demonstrably shown to be perverse. See: *Incar Ltd. v. Adegboye* (1985) 2 NWLR (Pt.8) 453; *Misir (Nig.) Ltd. v. Ibrahim* (1974) 5 SC 55; *Okpulo v. The State* (1990) 7 NWLR (Pt.164) 581; *Bozin v. The State* (1985) 2 NWLR (Pt. 8) 465 at 473 and *Ekpata v. Queen* (1957) SCNLR 5; Nor has it been shown that there is likely to result a miscarriage of justice thereby. See: *Akpunya v. The State* (1976) 11 SC 269; *Opayemi v. The State* (1985) 2 NWLR (Pt.5) 101; *John Aposi The State* (1971) 1 NMLR 315; *Anyanwu v. The State* (1986) 2 NWLR (Pt.43) 612 and *Enahoro v. The Queen*

To exemplify that proper and sufficient investigation into the entire case had been made, the court below unequivocally affirmed the learned trial Judge's decision in the following words:

"Both as regards the fact and the law, this passage cannot be faulted. I do not think, also, that failure to call as witnesses soldiers who arrested the appellant and two others at Dodan Barracks constitutes any flaw in the prosecution's case or can be any ground for holding that the learned E judge did not consider the defence of the appellant."

Issues 3 and 4 taken together are also accordingly answered in the negative.

In the result, this appeal lacks merit and it is accordingly dismissed by me. The conviction and sentence passed on the appellant by the court F below are hereby affirmed.

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UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Onu, J.S.C. I entirely agree with the judgment. This appeal is devoid of merit. It accordingly fails and it is hereby dismissed. G The decision of the Court of Appeal is therefore affirmed.

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OGUNDARE JSC

I have read in draft the judgment of my learned brother Onu, J.S.C. just delivered. I agree with him that this appeal is lacking in merit. I H too dismiss it and affirm the conviction of the appellant for murder and the sentence of death passed on him.

MOHAMMED JSC

I have had a preview of the judgment just delivered by my learned brother, Onu, J.S.C. and I agree with him that this appeal has failed. I have nothing more to add. For the reasons given in the lead judgment, which I adopt as mine. I hereby dismiss the appeal and agree that the B Court of Appeal is right in affirming the conviction and sentence passed by the trial High Court.

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IGUH JSC

I have had the privilege of reading in draft the lead judgment just delivered by my learned brother, Onu, J.S.C. and I agree with him that this appeal is devoid of merit and ought to be dismissed.

On the facts found by the trial court and affirmed by the court below, both the deceased and the appellant had fought in the vicinity of D a beer parlour and were duly separated. The deceased was sitting on a chair when the appellant from the blues again attacked him and gave him a massive fist blow on the chest. The deceased, following the blow, fell into a gutter but the appellant nonetheless pulled out a knife from his pocket, stabbed him on the chest with it and took to his heels. He was E immediately pursued and arrested. The deceased died as a result of the said stab injury.

The appellant denied fighting with the deceased or stabbing him but his evidence on these points were rejected by both courts below.

A few minor discrepancies in the evidence of the prosecution F were raked up by learned counsel for the appellant and this court was urged to give benefit of the doubt thereupon to the appellant and to hold that the prosecution had failed to establish its cases as required by law.

The point cannot be over-emphasized that it is not every trifling inconsistency in the evidence of the prosecution witnesses that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit therefrom. See: *Okonji v. The State* (1987) 1 NWLR (Pt.52) 659; *The State v. Aibangbee* (1988) 3 NWLR (Pt.84) 548; *Wankey v. The State* (1993) 5 NWLR (Pt. 295) 542 at page 552; *Azu v. The State* (1993) 6 NWLR (Pt.299) 303 at page 316 etc etc.

The learned trial Judge gave extensive consideration to the alleged contradictions in the evidence of the prosecution witnesses and

came to the

firm conclusion that they were totally irrelevant to the main issue before the court. The court below affirmed this view and I find no reason whatever to interfere with the said finding which, in my view, cannot be faulted. The main issue was whether or not it was the appellant who stabbed the deceased to death and this issue was rightly answered in the affirmative.

All defences available to the appellant were duly considered by both the trial court and the court below and were rejected and I endorse their views thereupon. Of importance is the defence of intoxication as the appellant claimed that he had consumed two bottles of beer that night. He did not however claim that he was thereby drunk as, according to him, two bottles of beer were his normal limit of consumption. But, this notwithstanding, it must be stressed that evidence of intoxication falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his acts. See: *R. v. Hansen Owarey* 5 WACA 66; *The State v. Njoku Obia* (1974) 4 ECSLR 67; *Chutuwa v. The Queen* 14 WACA 590; *R. v. McCarthy* (1954) 2 QB 105 etc. Accordingly no defence of intoxication is available to the appellant in the present case as the incapacity in the appellant to form the intent necessary to constitute the offence of murder for which he was charged was not established by him.

I see no substance in this appeal which I, too dismiss. The conviction and sentence passed on the appellant by the trial court and affirmed by the court below are hereby further affirmed.