

**SUPREME COURT OF NIGERIA**  
16TH MAY, 1997. SC 46/1996  
**CORAM:- S. M. A. BELGORE, I. L. KUTIGI M. E. OGUNDARE,**  
**S. U. ONU, A. I. IGUH, JJSC.**

FRANKLIN BRAIDE ..... ACCUSED/AP-  
PELLANT  
V.  
THE STATE ..... RESPON-  
DENT

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***EVIDENCE*** - Witnesses - Misconstruing the evidence of a prosecution witness - Trial judge misconstrued the evidence of PW5.

***CRIMINAL LAW*** - Self defence - Force used by the appellant in self defence - Whether appellant believed on reasonable grounds - That use of that force was the only way remain alive.

***MURDER*** - Self defence - Where the deceased was the aggressor - Who used dangerous weapon in fighting the appellant - Appellant's act of stabbing the deceased - Is in self defence.

**FACTS**

Before the Warri High Court, the appellant and another were charged with conspiracy to murder and murder of one Ezekiel Olugbo (deceased), by stabbing him to death during a fight between them. The accused persons did not deny the fight. Their case is that the deceased who held broken bottles during the fight ran into the knife then held by the appellant, when the deceased tried to use the broken bottles.

The trial judge who discharged and acquitted the other accused on both counts, found the appellant guilty of murder. Appellant's appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court raising 2 issues.

**ISSUES FOR DETERMINATION**

1. Whether the learned Justices of the Court of Appeal were right to have affirmed that the lower court properly evaluated the evidence before it and before arriving at the guilty of the Appellant.

2. Whether the learned justices of the Court of Appeal were right when they affirmed the judgment of the learned trial judge to the effect that

*the Appellant is not entitled to the benefit of the defence of self-defence as provided in Section 287 of the Criminal Code, Laws of Bendel State, 1976.*

**HELD** (Unanimously allowing the appeal per lead judgment of KUTIGI JSC)  
**Misconstruing the evidence of a witness**

1. The learned trial judge was therefore certainly wrong when he said the witness (P.W.5) did not say that the deceased was holding a bottle during the fight and that he saw the bottle only after the deceased had fallen on the ground. Undoubtedly he (the deceased) was holding something which P.W.5 did not recognize immediately the fight started but which was recognized by him (P.W. 5) as a bottle when he (the deceased) fell down. It was therefore mere speculation on the part of the learned trial judge when he concluded as above that the bottle was already lying on the ground and that the deceased did not bring it there. That was clearly not borne out by the evidence of the witness. It is pertinent also to note that the evidence of P.W5 which the learned trial judge rejected in parts or misconstrued was consistent with the testimonies of the Appellant and his co-accused who was discharged and acquitted of the same offence. (p. 1065 D)

**Self defence - Where the deceased was the aggressor**

2. I think in the circumstances, the deceased was easily the aggressor and not the appellant as found by the trial high court. Equally too, the act of stabbing the deceased could not be said to be a deliberate act by the appellant. It was common ground that there was a fight and that both sides were armed respectively with a bottle and a knife. Both arms (bottle and knife) are doubtlessly potentially dangerous weapons. There was therefore in my view, no need for either of them to have waited first to be hit or struck or injured or about to be hit or struck or injured before acting in self-defence, so long as either side reasonably believed that his life or body was in imminent danger of attack from the other side as in this case. (p. 1066 G)

**Force used by the appellant in self defence**

3. The conclusion I have reached therefore is that the evidence before the trial high court established in my respectful opinion that the appellant believed on reasonable grounds, that he could not preserve himself from death or grievous bodily harm otherwise than by using such force as he did. I must add that reasonable grounds for such belief may exist even though they are founded on a genuine mistake of fact. I therefore resolve the two issues against the respondents. The appeal therefore succeeds and it is hereby allowed. (p. 1067 A)

## **NOTABLE POINTS OF INTEREST**

### **OGUNDARE JSC**

#### *1. Case of appellant is that of accident rather than self defence*

His case, therefore, postulates one of accident rather than of self-defence. A defence of self-defence pre-supposes that the accused person unlawfully assaulted the other person in the course of preserving himself from death or grievous harm. That is not the case here. Right from the beginning and all along the Appellant maintained that the injury to the deceased was caused when the latter ran into the knife he (the Appellant) was swinging and not that he voluntarily stabbed the deceased. (p. 1068 A)

#### *2. When a concurrent decision is held to be perverse*

The Court below, regrettably, fell into the same error as the learned trial judge. In my respectful view, and with profound respect to their lordships of the two Courts below, their concurrent finding as to the guilt of the Appellant is perverse. (p. 1068 F)

### **REPRESENTATION**

L. O. Akhidenor for the Appellant

C. O. Emifoniye - Assistant Chief Legal Officer, (Ministry of Justice, Asaba) for the Respondent.

### **CASES REFERRED TO**

Njoku v. The State (1993) 8 KLR 60

Duru v. The State (1993) 3 KLR 35

Queen v. Jibowu (1961) All NLR 627

Stephen v. The State (1986) 5 NWLR (PT. 46) 978

Chukwu v. The State (1992) 1 NWLR (PT. 217) 255

Ozaki v. The State (1990) 1 NWLR (Part 124) 92 at page 108 (E-F)

Adelumola v. The State (1988) 1 NWLR (Part 73) 683; (1988) 3 SCNJ. 68

Oghor v. The State (1991) 3 NWLR (Part 139) 484

### **STATUTE REFERRED TO**

Criminal Code ss. 319(1), 516, 287

### **LEAD JUDGMENT BY KUTIGI JSC**

In the High Court of Justice Warri the Appellant and one other person

were charged with the offences of conspiracy to murder and murder contrary to sections 516 & 319(1) of the Criminal Code respectively. They pleaded not guilty.

During the trial the prosecution called seven witnesses while each of the accused persons

B gave evidence in his own defence but called no witnesses.

The case for the prosecution is simply that the accused persons conspired together and murdered one Ezekiel Olugbo, the deceased, by stabbing him to death with a knife during a fight or struggle between them. The accused persons did not deny that they fought with the deceased but stated that the deceased ran into the knife then held by the Appellant when he, the deceased, C tried to use the broken bottles he had held all along on the Appellant.

At the conclusion of the trial, the learned trial judge reviewed the evidence for the prosecution and considered the defences raised by each of the accused persons. The Appellant was found not guilty of conspiracy but guilty of murder and sentenced to death. The other accused person was discharged D and acquitted of both counts of conspiracy and murder.

Aggrieved by the decision of the High Court, the Appellant appealed to the Court of Appeal holden at Benin-City. The Appellant formulated two issues for resolution in that court thus -

E *“(a) Did the lower court properly evaluate the evidence before it before arriving at the guilt of the Appellant?”*

*“(b) Was the lower court right in rejecting the defence of self-defence put up by the Appellant?”*

The Court of Appeal considered these issues and came to the conclusion that the trial court properly evaluated the evidence led before it and F that its findings of facts were supported by evidence. It also resolved that the defence of self-defence put up by the Appellant was rightly rejected by the trial court too. The appeal was accordingly dismissed.

Further aggrieved by the decision of the Court of Appeal, the Appellant has now appealed to this Court. The parties filed and exchanged briefs of argument which were adopted and relied upon at the hearing of the appeal.

G Mr Akhidenor, learned counsel for the appellant has in his brief submitted three issues for determination in the appeal. These are really two issues because while issue (1) complains about the evaluation of evidence, both issues (2) & (3) deal with the statutory defence of self-defence. The issues before this Court now are these -

H *1. Whether the learned Justices of the Court of Appeal were right to have affirmed that the lower court properly evaluated the evidence before it and before arriving at the guilty of the Appellant.*

2. *Whether the learned justices of the Court of Appeal were right when they affirmed the judgment of the learned trial judge to the effect that the Appellant is not entitled to the benefit of the defence of self-defence as provided in Section 287 of the Criminal Code, Laws of Bendel State, 1976.*

The issues were argued together. The portion of judgment of the High Court which was confirmed by the Court of Appeal and subject of attack B now appears on pages 97 -98 of the record. It reads -

*"However, I hold that the stabbing of the deceased by the first accused (meaning appellant) was deliberate act having regard to the injury inflicted. See the evidence of P.W.1 the doctor who performed the post mortem examination. The stabbing was not accidental, it was also not a defensive act but an act C of aggressor. With respect to the issue of broken bottles, I hold that the story of the accused persons is made up and I do not believe the accused persons on the point. The only witness who said he saw a bottle is P.W.5 who said he did not see any bottle with the deceased when the deceased was fighting with first accused; but when he got to the scene and after the deceased had fallen, D he saw a bottle on the ground. He did not say he saw a broken bottle either. It is not unlikely in my view that the bottle may have been lying there and not brought there by the deceased. I am aware of the relationship that existed between the deceased P.W.2, P.W.3 and P.W.4. I watched the demeanour of these witnesses when they testified on oath and I accepted with caution the E parts of their evidence which I believe after I have duly warned myself."*

He had on page 96 of the record observed -

*"From the decision of Mbenu (supra) I have no doubt in my mind that P.W.3 and P.W.4 are tainted witnesses, they being blood relations of the deceased. Their evidence should be treated with caution."* F

Mr. Akhidenor submitted that the learned trial judge relied on the evidence of P.Ws 3, 4, 5, & 7 to find that appellant was an aggressor and that the stabbing was not accidental. He said the findings were not supported by the evidence because -

(a) Both P.Ws 3 & 4 clearly gave evidence that the deceased came G home to change his trousers and shirt and that they knew he was going for a fight.

(b) The deceased had no business demanding money on behalf of one Stephen who had paid some to the girl Rita, nor to molest Rita.

(c) The evidence of P.W.5 which was misunderstood by the learned H trial judge showed that the deceased was armed with a bottle during the fight or struggle with the appellant.

He said the learned trial judge misdirected himself when he found that the deceased was not armed with a bottle while attacking the appellant

and that if the deceased fought the appellant with such a lethal weapon as a bottle, the appellant was entitled to defend himself the way he did with a knife. He said the defensive act is not disproportionate to the threatened attack from the deceased and that section 287 of the Criminal Code avails the appellant. That the appellant believed on reasonable grounds that he could not preserve himself from death or grievous bodily harm otherwise than by using such force as he did.

It was further submitted that since P.Ws 1 & 2 were not eye witnesses; and P.Ws 3 & 4 were tainted witnesses and that the evidence of P.Ws 5 & 7 differ in material particulars as to whether the deceased was armed or not; the case of the prosecution cannot be said to have been proved beyond reasonable doubt. The following cases were cited in support -

AINA v. R 14 WACA 31.

NJOKU v. THE STATE (1993) 6 NWLR (Pt. 299) 272

DURU v. THE STATE (1993) 3 NWLR (Pt. 281) 283

The Court was asked to allow the appeal and to acquit and discharge the appellant.

The Respondent in its brief submitted that the evaluation of evidence by the lower courts was proper as the essential ingredients of the offence of murder were all proved. It was also submitted that the evidence of P.W.5 and that of the accused persons did not establish the defence of self-defence in favour of the appellant especially when the accused persons were both disbelieved. That even if this Court holds that the appellant was not the aggressor, the totality of available evidence did not show that appellant's life, body or property was in imminent danger of attack by the deceased, neither did it show that the stabbing of the deceased was reasonable and justifiable in the circumstances. Counsel said the defence of self defence was adequately considered by the lower courts and rightly rejected and that a miscarriage of justice has not been occasioned in any way. The following cases were cited -

R v. OLAGUNJU (1961) All NLR 21.

BARIDAM v. THE STATE (1994) 14 LRCN 163

CHUKWU v. THE STATE (1992) 1 NWLR (PT. 217) 255 at 264 -

265.

We were asked to dismiss the appeal.

As stated above the prosecution called seven witnesses to prove its case. Out of these witnesses only P.Ws 3, 4, 6 & 7 were alleged to be eye witnesses. Also as stated above the learned trial judge held that both P.Ws 3 & 4 being blood relations of the deceased were tainted witnesses and therefore decided to treat their evidence with caution. He consequently accepted parts of their evidence and rejected others. P.W.7 also said in evidence that

he is a personal friend of the deceased's father. His evidence too was treated with caution. In short, the vital issue for decision in this appeal is whether as contended by the learned counsel for the appellant, the deceased was armed with a bottle during the fight or struggle with the Appellant. I shall proceed to examine immediately the testimony of P.W.5, the only independent eye witness in the case. B

P.W.5 (stanley Tamile) testifying on page 41 of the record said in part -

*"When I got there I saw the 1st Accused (meaning appellant) fighting. I saw 1st Accused holding a knife. I also saw Victor (meaning the deceased) holding an object but I cannot now remember what he was holding. I also saw that they were pushing each other. As Victor was moving back there was a drum behind him. He ran and hit the drum. When he fell down I noticed that he was holding a bottle. Then the 1st accused fell on him. The next I heard was he has stabbed me. At this junction everybody around started to run away."* C

According to this witness therefore it is clear that the deceased was armed all along with a bottle. **The learned trial judge was therefore certainly wrong when he said the witness (P.W.5) did not say that the deceased was holding a bottle during the fight and that he saw the bottle only after the deceased had fallen on the ground. Undoubtedly he (the deceased) was holding something which P.W.5 did not recognize immediately the fight started but which was recognized by him (P.W. 5) as a bottle when he (the deceased) fell down. It was therefore mere speculation on the part of the learned trial judge when he concluded as above that the bottle was already lying on the ground and that the deceased did not bring it there. That was clearly not borne out by the evidence of the witness. It is pertinent also to note that the evidence of P.W.5 which the learned trial judge rejected in parts or misconstrued was consistent with the testimonies of the Appellant and his co-accused who was discharged and acquitted of the same offence.** D E F G

Now, Section 287 of the Criminal Code reads -

*"When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults him with such violence as to cause reasonable apprehension of death or grievous harm and to induce him to believe, on reasonable grounds, that it is necessary for his preservation from death or grievous harm to use force in self-defence, he is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous harm."* H

*This protection does not extend to a case in which the person using*

*force. Which causes death or grievous harm first began the assault with intent to kill or to do grievous harm to some person, nor to a case in which the person using force which causes death or grievous harm endeavoured to kill or to do grievous harm to some person before the necessity of so preserving himself arose; nor in either case unless before such necessity arose, the person*  
 B *using such force declined further conflict and quitted it or retreated from it as far as was practicable."*

The question now is whether in the circumstances of the case as a whole, the learned trial judge having rightly and properly found that there was a fight or struggle between the appellant and the deceased on the fateful  
 C day, and having regard to the evidence of P.W.5 in particular to the effect that the deceased was armed with a bottle during the struggle or fight, the appellant could not avail himself of the defence of self-defence as provided under section 287 of the Criminal Code above.

The learned trial judge agreed with the evidence of appellant and the co-accused that it was during the fight that the co-accused who saw the  
 D deceased dangerously armed with a bottle picked his (co-accused) pen knife and threw it to the appellant who then picked it up and used it to defend himself. Both P.Ws 3 & 4 also gave evidence of how the deceased hurriedly came home to change his shirt and trousers which made them to suspect that he (the deceased) was holding for a fight. And that just as they traced him, they  
 E found him actually engaged in a fight with the appellant. Again, the evidence shows that because the deceased was armed with a bottle, the co-accused tried to separate the two from fighting by using a wooden plank to keep them apart and it was when he fail in this attempt and saw danger coming that he threw his pen knife to the appellant who then picked it up.

F At the trial it was appellant's evidence that he was first involved in an initial fight with the deceased in which he knocked down the deceased and pressed him down. And that following shouts by onlookers, he released him and left for his house. But the deceased followed him again. He came behind him holding a bottle in his hand and attacked him. A fight or struggle then followed. In defence he pulled out a pen knife from the bundle of keys  
 G he had picked up at the scene and waived it from side to side to ward off the deceased. The deceased in the process hit himself against the pen knife and was injured.

**I think in the circumstances, the deceased was easily the aggressor and not the appellant as found by the trial high court. Equally too, the act of stabbing the deceased could not be said to be a deliberate act  
 H by the appellant. It was common ground that there was a fight and that both sides were armed respectively with a bottle and a knife. Both arms**

(bottle and knife) are doubtlessly potentially dangerous weapons. There was therefore in my view, no need for either of them to have waited first to be hit or struck or injured or about to be hit or struck or injured before acting in self-defence, so long as either side reasonably believed that his life or body was in imminent danger of attack from the other side as in this case.

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The conclusion I have reached therefore is that the evidence before the trial high court established in my respectful opinion that the appellant believed on reasonable grounds, that he could not preserve himself from death or grievous bodily harm otherwise than by using such force as he did. (See QUEEN v. JIBOWU (1961) All NLR 627; STEPHEN v. THE STATE (1986) 5 NWLR (PT. 46) 978; CHUKWU v. THE STATE (1992) 1 NWLR (PT. 217) 255). I must add that reasonable grounds for such belief may exist even though they are founded on a genuine mistake of fact (see R v. COLIN CHISAN 47 CAR 130 R v. WESTON 14 Cox's CC 346).

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I therefore resolve the two issues against the respondents. The appeal therefore succeeds and it is hereby allowed. The judgments of the lower courts are hereby set aside. The appellant is found not guilty of the offence of murder. He is accordingly discharged and acquitted.

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### BELGORE JSC

In this matter now on appeal, there has been lack of dispassionate consideration of the accused persons evidence in defence. There is uncontradicted evidence of self-defence which is enough to raise doubt. There was a fight, entirely provoked by the deceased, and if the accused person (appellant) did not defend himself as he did he might have sustained grievous hurt or might even have died. It is clear, as in the judgment of my learned brother Kutigi JSC, that this is a case of lawful self-defence. I agree that this appeal has merit. I also allow it and set aside the judgment of the Court of Appeal which upheld the decision of the trial Court. I enter a verdict of discharge and acquittal for that of conviction and sentence of death.

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### OGUNDARE JSC

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I have had the advantage of a preview of the judgment of my learned brother Kutigi JSC, just read. While I agree with him that this appeal succeeds, I however, have a few comments to make.

Going through the statement made by the Appellant to the police

Exhibit 'A' and his evidence in court, it would appear that his defence was one of accident. His learned counsel appears to have misconceived the defence set up by the appellant for both in his briefs in the court below and in this Court, emphasis was on self-defence. But the true position, in my respectful view, is that the Appellant never at any time admitted stabbing the deceased; his case was that the deceased accidentally ran into the knife he was holding. He admitted holding a knife during the course of the fight he had with the deceased but that he did so to ward off an attack by the deceased who held broken bottles. His case, therefore, postulates one of accident rather than of self-defence. A defence of self-defence pre-supposes that the accused person unlawfully assaulted the other person in the course of preserving himself from death or grievous harm. That is not the case here. Right from the beginning and all along the Appellant maintained that the injury to the deceased was caused when the latter ran into the knife he (the Appellant) was swinging and not that he voluntarily stabbed the deceased. In Exhibit 'A', he stated:

*"I started swinging the aside (sic) from right to left to keep him from me but he attacked me and mistakenly the knife hit him in the breast."*  
(Underlining is mine)

And in his evidence at the trial, he deposed:

*"I started swinging my hands from left to right to prevent the deceased from reaching me. While I was swinging my hand, the deceased ran into it and I hit him on the chest."*

I agree entirely with my learned brother that the learned trial judge completely misconceived the evidence before him and misdirected himself on a number of issues highlighted by my learned brother in his lead judgment. No doubt, if he had properly directed himself on the evidence he would have accepted the version of the defence as to the sequence of the events that day and in consequence would have upheld the defence of accident put forward by the Appellant. The Court below, regrettably, fell into the same error as the learned trial judge. In my respectful view, and with profound respect to their lordships of the two Courts below, their concurrent finding as to the guilt of the Appellant is perverse.

I have no hesitation whatsoever in setting aside the decision of the Courts below. I allow this appeal, set aside the judgment of the Court below and enter an order discharging and acquitting the Appellant of the charge of murder levied against him.

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ONU JSC

I find myself in complete agreement with the views expressed by

my learned brother Kutigi, JSC in his leading judgment he has just delivered. The appeal is meritorious and ought to succeed.

I only wish to add the following few words of mine in expatiation in regard to the plead of accident put forward by the appellant albeit indirectly as opposed to a positive assertion by him in his extra-judicial statement (Exhibit 'A') and in his defence evidence in Court which the learned trial judge, B in my respectful view, misconceived and the Court of Appeal mistakenly perpetuated. It has been stated by this Court in Ozaki v. The State (1990) 1 NWLR (Part.124) 92 at page 108 (E-F) (per Obaseki, J.S.C.) that

*"..... it is settled law there is no burden of proof imposed on an accused to establish an issue affording justification or excuse at common law such as accident, self defence or alibi as an answer to the charge."* C

Thus, as was also decided by this court in Ukwunneyi v. The State (1989) 4 NWLR.131 at 144-145, where an accused puts up a defence of accident, the onus is not on him to prove such defence but on the prosecution to disprove it. Therefore, when in his statement (Exhibit 'A'), the appellant said inter alia that D

*"..... I started swinging the (sic) aside from right to left to keep him from me but he attacked me and mistakenly the knife hit him in the breast" and in his testimony in the trial court he said among other things, as follows:-*

*"..... I saw the deceased with two bottles in his hands, the bottles he broke with his hands; and started pursuing (sic) us with the broken portions in his hands ..... At this point in time the deceased was still holding the two broken bottles I started swinging my hands from left to right to prevent the deceased who ran into it and I hit him on the chest."* E

this, in my opinion, constituted a defence of accident. Not being, in my view, a willed, deliberate act on the part of the appellant to cause the deceased F grievous hurt or death, the defence is not thereby negated. See section 24 of the Criminal Code. See also Adelumola v. The State (1988) 1 NWLR (Part 73) 683; (1988) 3 SCNJ.68. If it is borne in mind that the defence of accident, like all other defences, presupposes that the accused physically committed the offence but should be acquitted because it was an accidental act, I have G no hesitation in fitting what happened in the instant case into that category of acts which ought therefore to benefit from what the law looks upon it as the correct thing to do in the circumstances - an acquittal. See the cases of Chukwu v. The State (1992) 1 NWLR (Part 217) 255; Daniels v. The State (1991) 8 NWLR (Part 212) 715; Nwodo v. The State (1991) 4 NWLR (part H 185) 341 and Ogho v. The State (1991) 3 NWLR (Part 139) 484.

I cannot help but disturb the concurrent decisions by the two courts below for reason of the defence of accident raised but which was not disproved by the prosecution in order to secure the conviction they wrongly entered and

confirmed respectively.

For the above reasons and those elaborately articulated in the judgment of my learned brother Kutigi, J.S.C. I too allow the appeal, return a verdict of not guilty and discharge and acquit the appellant accordingly.

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**IGUH JSC**

I have had the privilege of reading in draft, the leading judgment just delivered by my learned brother, Kutigi, J.S.C. and I agree entirely that this appeal is meritorious and should be allowed.

Upon a careful consideration of the overwhelming evidence before the Court, it is irresistible to hold that the knife injury sustained by the deceased was clearly accidental, arising directly from the appellant’s defensive act or posture as he tried to ward off the attack of the deceased on him with broken bottles. With the greatest respect to the two Courts below, their finding to the contrary is clearly perverse and quite unacceptable.

Consequently, I, too, allow this appeal, set aside the judgment of the Court below and in substitution thereof, acquit, and discharge the appellant

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