

**SUPREME COURT OF NIGERIA ,**  
21ST MAY, 1999. SC. 77/1998.  
**CORAM:- S. M. A. BELGORE, M. E. OGUNDARE, U. MOHAM-**  
**MED, O. ACHIKE, U. A. KALGO, JJSC.**

MALLAM ZAKARI AHMED .....	APPELLANT
V.	
THE STATE .....	RESPONDENT

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***APPEALS** - Evidence - Reevaluation of evidence - When an appellate court would be justified in doing so.*

***CRIMINAL LAW** - Murder - Self defence - Right to - When an accused can put up the defence.*

***CRIMINAL LAW** - Manslaughter - Self defence - Right of self defence - Where the person attacked exceeds that right and kills the offender - The offence committed is manslaughter.*

***CRIMINAL PROCEDURE** - Evidence - Circumstantial evidence - Inference of the accused's guilt from circumstantial evidence - When not to draw such inference.*

***CRIMINAL PROCEDURE** - Evidence - Evaluation of evidence - Contradictions - In the prosecution's evidence on vital issues - Any doubt as to the guilt of the accused arising from such contradictions - Must be resolved in favour of the accused.*

***EVIDENCE** - Witnesses - Contradictions - In the evidence of prosecution witnesses on a material fact - Attitude of the court to such contradictions.*

**FACTS**

The appellant was arraigned at the High Court of Anambra State, sitting at the Awka Judicial Division, and charged with the offence of Murder

contrary to Section 274(1) of the Criminal Code, Cap.36, Vol.1, Laws of Anambra State of Nigeria, 1986. The case of the prosecution was that appellant came to the house of the deceased at night and knocked several times at the door of one Igala woman, Sarah Abba (alias Mama Friday). The latter refused to open the door but told the appellant to go away. A girl called Baby, who was staying in another room in the compound also told the appellant to go away. The deceased, who was Sarah Abba's landlord, came out of his room and told the appellant to go away. The appellant refused and brought out a dagger with which he stabbed the deceased. It was the shout of the deceased that attracted P.W.1 a night guard at a hotel in the vicinity. He saw the deceased holding the appellant by the shirt. P.W.2 was attracted to the scene by the cry of the deceased's wife P.W.4, P.W.1 and P.W.2 tied up the hands of the appellant, put him in a wheelbarrow and took him to the Police station. They handed over to the Police the knife they recovered from the appellant at the scene of the crime. P.W.8 a medical officer who performed the autopsy on the body of the deceased testified that the two stab wounds he found on the body of deceased caused severe bleeding which led to his death. The appellant in his defence denied ever entering the compound of the deceased. He did not know an Igala woman by name Mama Friday. The incident which led to his arrest happened on the main road where he was attacked by three people. They robbed him of N3,000.00 and a wrist watch. In trying to defend himself and his property he attacked the assailants with the knife he always carry with him being a cattle rearer, injuring one of them.

At the close of trial, the learned trial judge found the appellant guilty and sentenced him accordingly. The appellant unsuccessfully appealed to the Court of Appeal. He has now further appealed to the Supreme Court raising three issues.

**ISSUES FOR DETERMINATION**

*"1. Whether the trial court as well as the Court of Appeal evaluated the evidence tendered before it properly.*

*2. Were there material conflicts in the statements and evidence of prosecution witnesses which rendered their various pieces of evidence*

*unreliable and can the conviction of the appellant based on such unreliable evidence be sustained and upheld?*

*3. Whether the trial court as well as the Court of Appeal were right when they held that the defences of provocation, self defence, defence of property and defence of intoxication do not avail the appellant in this case".*

**HELD** (Allowing the appeal per lead judgment of **MOHAMMED JSC** **OGUNDARE** and **ACHIKE JJSC** dissenting).

***Appeals - Evidence***

1. In considering the issues formulated for the determination of this appeal I do recognize that the appraisal of oral evidence and the ascription of probative values to such evidence is the primary duty of a trial court and a Court of Appeal would only interfere with the performance of that exercise if the trial court had made imperfect or improper use of the opportunities of hearing and seeing the witnesses or has drawn wrong conclusions from accepted or proved facts which those facts do not support. If the trial judge draws mistaken conclusions from indisputable facts or wrongly arranges or presents the facts on which the foundation of the case rests, the appeal court should not abdicate its own responsibility and rubber-stamp the error, but should intervene and do what justice requires - see Y. A. Lawal v. Chief Yakubu Dawodu & Anor. (1972) A.N.L.R. 707 at 722; Fatoyinbo and Ors. v. Williams, alias Sanni and Ors. (1956) 1 F.S.C. 87 and Paul O. Omoregbe v. Ehigiator Edo SC 142/69 decided on 29th October, 1971. After going through the submissions of both counsel in their respective briefs I find it pertinent to reappraise the evidence adduced before the trial court in order to establish whether the conclusions reached by the trial court which were affirmed by the court below from the facts and evidence available before the court had established beyond reasonable doubt that the appellant was guilty of the offence charged. This being a criminal trial for the offence of murder the onus lies throughout upon the prosecution to establish the guilt of the accused beyond reasonable doubt - Ameh v. The State (1978) 6/7 SC. 27 and State v. Albert (1982) 5 SC. 6 at 8. (p. 1402 C)

***Evidence - Witnesses***

2. These contradictions lead to one vital issue, that is, doubt as to where the incident took place. If it took place on the road the appellant's version of the incident will be relevant. If it took place inside the compound of the deceased the evidence of PW4 has to be believed. The court is only entitled to rely on the evidence adduced before it and not on speculation - see Okoko v. The State (1964) 1 ALL NLR 423 and Seismograph Ltd. v. Ogbeni (1976) 4 S.C. 85. It is trite law, where there are contradictions in the evidence of prosecution witnesses on a material fact, such contradictions ought to be explained by evidence by the prosecution. In the absence of such explanation by the prosecution, the court cannot and shall not speculate on an imagined explanation for such contradictions and proceed to choose which of the prosecution witnesses to believe.

Arehia v. The State (1982) 4 S.C. 78. (p. 1407 B)

***Evidence - Circumstantial evidence***

3. As there is no direct evidence on what transpired between the appellant and the deceased before the appellant used his knife to stab (the deceased) the conviction of the appellant in my view was based on circumstantial evidence. Though circumstantial evidence is admissible in criminal cases to prove the guilt of an accused yet, such evidence must be narrowly examined by the court if only because evidence of this kind may be fabricated to cast suspicion on another. It is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference - Okoro Mariagbe v. The State (1977) 2 S.C. 89. (p. 1408 E)

***Evidence - Evaluation of evidence***

4. It is a cardinal principle in criminal proceedings that the burden of proving a fact which if proved would lead to the conviction of the accused is on the prosecution who should prove such fact beyond reasonable doubt. In criminal cases, any doubt, as to the guilt of the accused, arising from the contradictions in the prosecution's evidence of vital is-

sues must be resolved in favour of the accused - Ankwa v. The State (1969) 1 ALL NLR 133. It is abundantly clear that there is reasonable doubt in the prosecution's case. Having failed to clear this doubt I have to accept that the doubt must be resolved in favour of the appellant. The trial court was in error to convict the appellant of the offence charged based on the evidence adduced by the prosecution. (p. 1408 H)

***Criminal law - Murder***

5. Where an accused armed with a lethal weapon is attacked by another who is equally armed with a lethal weapon and during the encounter one kills the other the survivor has a right to put up a defence of self defence. (p. 1410 B)

***Criminal law - Manslaughter***

6. However, if the person attacked exceeds that right and kills the offender when in fact it was unnecessary to cause grievous harm to the attacker the offence committed is manslaughter if the intention of the accused was to do no more harm than he believed necessary in the exercise of his right. Even though there was a reckless criminality in the act of the accused he can succeed in pleading the right to self defence so long as he did not kill with a vengeful motive in the purported exercise of his right. (p. 1410 C)

**NOTABLE POINTS OF INTEREST**

**OGUNDARE JSC** (Dissenting)

*1. The guilt of the accused was proved beyond reasonable doubt*

In my respectful view the learned trial Judge adequately considered and evaluated the evidence adduced on both sides. I find no fault in his handling of this matter and upon the credible evidence before him, I agree entirely with the Court below that the guilt of the Appellant was proved beyond reasonable doubt. That the Appellant stabbed the deceased is beyond dispute. There is overwhelming evidence in support of this fact. The Appellant sought to justify the stabbing by giving an account of the circumstances leading him to doing so. The learned trial

Judge, based on the evidence of all the other witnesses as to the surrounding circumstances, was not impressed by the story of the Appellant and thus rejected it. I cannot see any justification for my interfering with his assessment of the credibility of the Appellant in this case. After all, the trial Court is in the best position to assess the credibility of the witnesses; this is trite law - Nasamu v. The State (1979) 6-9 SC. 153. I find no such contradictions, conflicts and inconsistencies in the evidence of the witnesses for the prosecution such as to render their evidence unreliable. (p. 1421 F)

## 2. *How to establish the defence of intoxication*

It is clear from the above that intoxication per se is not a defence. To be a defence, it must be shown by the defendant that the intoxication was not self-induced or that the extent of it rendered him at the time of the act or omission insane temporarily or otherwise, that is, that he did not know what he was doing. See Imo v. The State (1991) 11 SCNJ 137 at 160. The presumption in law is that a person intends the natural consequences of his act; it is for a defendant to rebut this presumption. If intoxication is put forward as a defence, it must be such that would rebut this presumption. See R v. Owarey 5 WACA 66 at 67. See also Egbe Nkanu v. The State (1980) 3-4 SC.1 where this Court, per Obaseki JSC. reviewed in extenso the law as regards the defence of intoxication. The burden of course is on the defendant to prove, on preponderance of evidence, facts that will establish this defence because the law presumes that every person is sane. It can hardly be said that the pieces of evidence as highlighted above are sufficient to discharge this burden. (p. 1423 B)

## **ACHIKE JSC** (Dissenting)

3. *Interference with concurrent findings in the present case is unjustified*  
Suffice it for me to recapitulate what I stated earlier, and excuse my being repetitive, if only for the sake of emphasis, namely; that the appraisal of oral evidence and the ascription of probative values to such evidence is the exclusive preserve of the trial court. Where, as in this case, the oral evidence of the principal witnesses for the prosecution (I

think PW1, PW2 and PW4) and that of the Appellant himself turned on the credibility of these witnesses, who were examined and cross-examined before the trial Judge, and the same Judge had the singular advantage of also seeing and hearing these witnesses, the findings by the trial Judge, based on the evidence placed before him cannot be impugned by B an appellate court. It is make no difference that the appellate court embarked on the exercise of reappraisal of the evidence before the court whereby it eventually substituted its own views of the evidence for those of the court of trial. I must finally state in this regard that an appellate C court should not and would not interfere with the verdict of the trial Judge or the court below unless such verdict is shown to be perverse or is not the result of a proper appraisal of the evidence. See Folorunsho v. Adeyemi (1975) NMLR 128, Chief Victor Woluchem & Ors v. Chief Simon Gudi & Ors (1981) 5 SC. 319 Nasiru v. C.O.P. (1980) 1-2 SC. 94. D In conclusion, I am to say that I find that no circumstances exist to warrant a reappraisal or evaluation of the evidence placed before the trial court which was carefully and painstakingly done by the court of trial which would justify interference with the findings made by the trial Judge E and confirmed by the Court of Appeal. (p. 1431 B)

#### 4. Defence of property

It must be emphasized that where a person puts up a defence of his F property, the law allows him the use of reasonable force in defence of the said property provided no harm is inflicted on the person whom the property is being protected. It follows that the force employed as well as the nature of the object (i.e. weapon) used by the Appellant must not be out G of proportion with the way the Appellant employed to defend the said property otherwise this defence will not avail him. As earlier stated, this defence was completely disbelieved and rejected by the trial Judge based on the abominably appalling and inconsistent evidence tendered by the Appellant in this regard. In the result, I myself, I am unable to hold from H the evidence on the record and the concurrent findings in this regard made by the two lower courts that any valid defence of property can avail the appellant. There is no evidence that the deceased attempted to

dispossess or in fact did disposes the Appellant of any of his properties i.e. his money or his wristwatch. As far as the Appellant is concerned, the reason for stabbing the deceased, as earlier noted, was that he abused him. (p. 1433 C)

B

### 5. Defence of Provocation

It may then be asked, what is provocation? Unfortunately, the Anambra Criminal Code of 1989 does not define what constitutes the term provocation but merely attempts to explain it while providing an explanation in distinguishing between murder and manslaughter. Section 273 of the Criminal Code of Anambra State, 1986 states as follows:

C

*" When a person who unlawfully kills another in circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion cause by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only."*

D

The important element of what constitutes provocation leading to the death of another must be shown to have been done "in the heat of passion cause by sudden provocation, and before there is time for his passion to cool." (p. 1434 C)

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### 6. Defence of self-defence

I must emphasize that the defence of self-defence for homicide committed while acting in self-defence is not at large. It is mandatory in a charge of murder preferred against the Appellant and who pleads self-defence to establish that the nature of attack by the deceased was such as to cause a reasonable apprehension of death or grievous bodily harm. No doubt, the test of reasonableness of Appellant's apprehension of death or grievous harm must be assessed objectively and the Appellant must further show that he could not otherwise have preserved himself from death or grievous harm that loomed from the deceased's attack. It is clear from the above that the plea of self-defence is not open to an abnormally nervous or excitable person because the defence is predicated on the reasonableness of the apprehension of death or grievous harm. See R v

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H



Onyeamaizu (1958) NR NLR 93. In the case in hand, there is no scintilla of evidence either that the deceased was armed with any object or that he inflicted any blow or injury on the Appellant. Rather, and on the ipse dixit of the Appellant, all that the Appellant placed reliance on for his dastardly act of stabbing the deceased, as far as the record can bear out, is that the deceased abused the Appellant. In the circumstance, I find it extremely difficult to imagine how a person can justifiably plead self-defence for fatally stabbing another person by reason of the abuse of the assailant by the deceased who, on the overwhelming evidence on record, was not armed with any weapon whatsoever. To uphold such a defence will lead to anarchy. Accordingly, I reject Appellant's defence of self-defence. (p. 1437 A)

*7. Contradictions in the evidence of the prosecution is not vital in the instant case*

This resolution of the seeming contradiction as to the locus in quo and finding of fact made in respect thereof is manifestly supported by evidence and cannot be said to be perverse. Any further debate on this issue cannot be said to be in good faith because that finding was never made a ground of appeal. In the light of the above resolution with respect to the actual scene of the incident, I hold that there is no such contradictions or inconsistencies in the evidence of the witnesses for the prosecution as alleged by the defence that would render the prosecution's case unreliable. (p. 1440 G)

**KALGO JSC**

*8. How caution statement ought to be recorded.*

In my view, a caution statement to be reliable must be recorded in the language of the accused and then translated into the language of the court. If it becomes necessary to record it into the English by automatic or direct translation from the language spoken by the accused, then it must be done in the first person singular and not in the form of a reported speech. See Queen v Sapele & Ors (1957) 2 F.S.C. 24. (p. 1455 F)

**REPRESENTATION**

Chief Chidube Ezebilo, G.N. Orji, with him, for the Appellant.

Ada Unobagha (Miss). DPP., Anambra State, for the Respondent.

**CASES REFERRED TO**

B Y. A. Lawal v. Dawodu (1972) A.N.L.R. 707 at 722

Omoregbe v. Ehigiator Edo SC 142/69

Ameh v. The State (1978) 6/7 SC. 27

State v. Albert (1982) 5 SC. 6 at 8

C Okoko v. The State (1964) 1 ALL NLR 423

Seismograph Ltd. v. Ogbeni (1976) 4 S.C. 85

Mariagbe v. The State (1977) 2 S.C. 89

Ankwa v. The State (1969) 1 ALL NLR 133

D Nasamu v. The State (1979) 6-9 SC. 153

Imo v. The State (1991) 11 SCNJ 137 at 160

R v. Owarey 5 WACA 66 at 67

Balogun v Agboola (1974) 1 All NLR (Pt. 11) 66 at 73

E Okoye v Kpajie (1972) 6 SC 176

**LEAD JUDGMENT BY MOHAMMED JSC**

F Mallam Zakari Ahmed was convicted by the High Court of Anambra State, sitting at Awka, of the offence of murder, contrary to section 274 (1) of the Criminal Code, Cap 36, Vol. 1, Laws of Anambra State of Nigeria, 1986.

G The facts of the case given by the prosecution are in the following narrative: The appellant came to the house of the deceased at night and went straight to the door of the room where one Igala woman, Sarah Abba, was leaving. He knocked at the door several times. Sarah Abba, who was also called Mama Friday in the locality, refused to open the door. She told him to go away because she had already gone to bed. But H the appellant continued to knock at the door. A girl called Baby, who was staying in another room in the compound also told the appellant to go away.

The deceased, Mr. Osuagwu Obudike, who was Sarah Abba's

landlord, came out of his room and told the appellant to go away. The appellant refused and brought out a dagger and stabbed the deceased with it. The deceased shouted in Ibo language "Ogbuomuo" meaning "He has killed me". Sunday Okafor, PW.1 heard some noise and came out of Raymond Hotel's premises where he was working as a night-guard. He saw the deceased holding the appellant by the shirt. Another person, Bello Aminu, testified as PW2 and told the trial court that he came out of his house when he heard a woman crying. The woman crying was PW. 4, the wife of the deceased. PW1 and PW.2 tied up the hands of the appellant, put him in a wheel-barrow and took him to the police station. They handed over to the police the knife they recovered from the appellant at the scene of the crime.

A medical practitioner, Dr. Nathaniel Sunday Oraegbunam, performed an autopsy on the body of the deceased. He gave evidence as PW.8. The doctor told the trial court that from the pathological findings the two stab wounds seen on the body of Osugwu Obudike caused severe bleeding which led to his death. The appellant made two statements to the police investigators, Exhibits B and C and testified in court for his own defence.

The learned trial judge after considering all the evidence adduced before him, convicted the appellant as charged and sentenced him to death. Dissatisfied with the conviction and sentence the appellant appealed to the Court of Appeal. The Court below considered the issues canvassed before it and dismissed the appeal. Armed with 4 grounds of appeal, the appellant finally came before this court contesting the conviction and sentence passed on him by the trial court which was affirmed by the court below.

The following three issues have been identified by learned counsel for the appellant, Chief Chibube Ezebilo, for the determination of this appeal:

*"1. Whether the trial court as well as the Court of Appeal evaluated the evidence tendered before it properly.*

*2. Were there material conflicts in the statements and evidence of prosecution witnesses which rendered their various pieces of evidence*

*unreliable and can the conviction of the appellant based on such unreliable evidence be sustained and upheld?*

3. *Whether the trial court as well as the Court of Appeal were right when they held that the defences of provocation, self defence, defence of property and defence of intoxication do not avail the appellant in this case".*

For the respondent the two issues raised are; whether the defence of provocation, self defence, defence of property and intoxication avail the appellant and secondly, whether the respondent had proved its case beyond reasonable doubt taking into consideration all the surrounding facts of the case.

**In considering the issues formulated for the determination of this appeal I do recognize that the appraisal of oral evidence and the ascription of probative values to such evidence is the primary duty of a trial court and a Court of Appeal would only interfere with the performance of that exercise if the trial court had made imperfect or improper use of the opportunities of hearing and seeing the witnesses or has drawn wrong conclusions from accepted or proved facts which those facts do not support. If the trial judge draws mistaken conclusions from indisputable facts or wrongly arranges or presents the facts on which the foundation of the case rests, the appeal court should not abdicate its own responsibility and rubber-stamp the error, but should intervene and do what justice requires - see Y. A. Lawal v. Chief Yakubu Dawodu & Anor. (1972) A.N.L.R. 707 at 722; Fatoyinbo and Ors. v. Williams, alias Sanni and Ors. (1956) 1 F.S.C. 87 and Paul O. Omoregbe v. Ehigiator Edo SC 142/69 decided on 29th October, 1971.**

Chief Ezebilo for the appellant submitted in the Appellant's Brief that when the learned trial judge was considering the defence of self defence, defence of property and provocation raised by the appellant in his defence he disbelieved and rejected the evidence of the appellant in court and statements made by the appellant to the police in Exhibits B and C with regards to what actually happened on the night of the incident. Learned counsel further submitted that pieces of evidence given by the

appellant in court such as "I took out my knife and waived it to defend myself" and appellant's statement to the police Exhibit B where he said "I forced myself to matchet one of the people who attached me with knife while they collected my money and wrist watch" and in Exhibit C where the appellant said "They beat me and one of them hit me on the head while one cut me with knife on the head because of that I used dagger to defend myself" were disbelieved and rejected by the trial judge. B

**After going through the submissions of both counsel in their respective briefs I find it pertinent to reappraise the evidence adduced before the trial court in order to establish whether the conclusions reached by the trial court which were affirmed by the court below from the facts and evidence available before the court had established beyond reasonable doubt that the appellant was guilty of the offence charged. This being a criminal trial for the offence of murder the onus lies throughout upon the prosecution to establish the guilt of the accused beyond reasonable doubt - Ameh v. The State (1978) 6/7 SC. 27 and State v. Albert (1982) 5 SC. 6 at 8.** C D

The case against the appellant is hinged on the evidence of PW1, PW2 and PW4. The appellant was consistent in the statements he made to the police and the evidence he gave in his defence that he was waylaid along the road by three people, robbed of N3,000.00 and a wrist watch and beaten up by his attackers. The appellant stated further in his evidence and said: E F

*"Before they beat me up I had a knife with me. I had a knife with me because as we control the herd of cattle any one about to die we kill it inorder to sell it. As they were beating me they injured me in the eye and blood was rushing out so I took out the knife and waved it to defend myself. I was saying thief, thief, thief and people were coming out but they started beating me as I held one of the three people who waylaid me by his shirt. I did not enter any man's house. What happened was along the main road. I did not know the people who carried me to the Police Station. I was unconscious when I was taken to the Police Station. It was about 4 a.m. that I asked one Policeman Sgt. Adamu what brought me here and he told me that some people brought me here with a barrow.* G H

*What I now have on was not what I was wearing on that day. This one was bought for me while I was in prison yard. I do not know any Igala woman in my life".*

His defence therefore is simple. He did not enter the compound of the deceased. The incident which led to his arrest happened on the road. He did not know an Igala woman by name Mama Friday. He was attacked by three people on the road and robbed of N3,000.00 and a wrist watch. In trying to defend himself and his property he attacked the assailants with his knife injuring one of them.

The key witness for the prosecution is the wife of the deceased who gave evidence as PW4. The relevant part of her testimony reads thus:

*"About 2 and half years ago in our house as we went to sleep at night. At about 2 a.m. that night as I was praying I heard a voice asking who is that? Who is that? It was a night watchman by name Sunday the PW1 who was asking who is that. I then heard a knock on the door of Mama Friday an Igala woman. The woman told the person knocking to go away. Also a girl called Baby asked the man who was knocking to go away. I heard shout saying he has killed me, he has killed me. I ran out and saw my saw my husband and I asked what was the matter. He told me that a hausaman has stabbed him. I saw Sunday PW1 holding a hausa man and I saw another hausa man also holding the same man. My husband told me that the hausa man who stabbed him was the one held on the ground by the two men. I will know the hausa man who stabbed my husband if I meet the man. The man is the dock that is the accused is the hausa man who stabbed my husband. The second hausa man who also held the accused had given evidence in this court. I do not know his name. When I saw that my husband was stabbed I shouted and some people helped me to carry him to the hospital. I left my husband in the care of the doctor and when and (sic) reported to the police. The police followed me to my house and saw that what I said was true. The Police carried the accused in the barrow and took him to the Police Station. When I heard the shout and ran out I saw that my husband was stabbed seriously. Mama Friday and the girl I mentioned were all living in our*

*compound. They were living in different rooms. The house where Mama Friday and Baby lived is owned by my husband. Baby is a young lady, a teenager. Mama Friday has packed out of our compound. Baby has also packed out."*

It is pertinent to contrast the testimony of PW4 with the evidence given by PW1 and PW2. PW1 explained to the court how his attention was attracted to the scene where he met the appellant and the deceased holding each other. He said as follows:

*"I work at Raymond Hotel Amikwo Awka. On 20/9/91 I came to work at 6 p.m. at Raymond's Hotel Awka. In the night between the hours 12.00 midnight a.m. 1.00 a.m. I heard some noise. I took my torch-light to see what was happening I heard someone shouting in Igbo "Ogbuomuo" (He has killed me) I opened the gate and came out. I saw a man holding another by the shirt. One of them was trying to run away. As I came out a hausaman living nearby also came out and we held the man trying to run away. It was the accused that was trying to run away. It was one Osuagwu that was holding the accused at the time we arrived at the scene. This Osuagwu is now dead".*

PW2 on his part told the trial court what he did when he heard a woman crying, in the following testimony:

*"On 21st September, 1991 I was in my house. I heard a woman crying I ran out to the gate. I saw two persons on the ground and one person standing. The person standing is Sunday. I know him as Sunday, the watchnight. He was PW1. I asked the accused person what the matter was and he told me "the deceased abused me and I stabbed him". We later took the deceased to the hospital. I saw the dagger covered with blood and later we went to the hospital. At that time the dagger was on the ground. When I came to the scene I saw the accused we tied the hands and put him into a wheel-barrow".*

During the cross examination of PW2 he said that when he came out he saw the deceased and PW1 outside the compound of the deceased. He was emphatic that it was on the road. Now, it is abundantly clear going through the testimonies of PW1 and PW2 on how the incident happened that their evidence was inconsistent with the testimony of

PW4. From her testimony it is clear that PW4 was not living in the same room with her husband in the night of the incident. She said that she was praying when she heard a voice saying "Who is that? Who is that? Later she identified Sunday (PW1) to be the person saying, "who is that? She said she then heard a knock on the door of Mama Friday, the Igala woman. By the evidence given by PW4 Sunday (PW1) cam into the compound of the deceased and said "who is that?" before the appellant was heard knocking at the door of the Igala woman. Sunday however told the trial court that he heard a noise and took his torchlight to see what was happening. He then heard someone shouting in Ibo language "Ogbuomuo" (He has killed me). The contradiction between the evidence of PW4 and PW1 is vital because by the evidence of PW4 Sunday was already in the house before the appellant began to knock at the door of Mama Friday. If her evidence is to be believed what was Sunday doing in the house before the appellant began to knock at the door of Mama Friday?

Turning to the evidence of PW2, he said he heard a woman crying and he came out of his house. When he reached the scene he saw two persons on the ground and one person (Sunday) standing. Let me go back to the testimony of Sunday. He said when he came he saw the deceased holding the appellant by the shirt and that the appellant was trying to run away. Here the evidence of Sunday and PW2 do not agree. The descriptions of what happened at the scene as given by these two witnesses are in conflict. Both PW1 and PW2 told the trial court that the incident happened on the road near the house of the deceased. But PW4 in answer to a question during cross-examination said,

*"No. Sunday and the other hausaman were holding the accused near our gate but inside our compound".*

When asked again whether it would surprise her to hear that Sunday told the trial court that the scene of the incident was on the road and not inside the compound she replied;

*"Sunday cannot say so. My husband was stabbed inside the compound".*

Another contradiction which to me is minor is where PW4 said that she reported the matter to the police. The police followed her to the



house and when they saw what she reported was true they (police) carried the appellant in a wheelbarrow and took him to the police station. PW1 and PW2 however, told the trial court that they took the appellant in a wheelbarrow to the police station.

**These contradictions lead to one vital issue, that is, doubt as to where the incident took place. If it took place on the road the appellant's version of the incident will be relevant. If it took place inside the compound of the deceased the evidence of PW4 has to be believed. The court is only entitled to rely on the evidence adduced before it and not on speculation - see Okoko v. The State (1964) 1 ALL NLR 423 and Seismograph Ltd. v. Ogbeni (1976) 4 S.C. 85.**

**It is trite law, where there are contradictions in the evidence of prosecution witnesses on a material fact, such contradictions ought to be explained by evidence by the prosecution. In the absence of such explanation by the prosecution, the court cannot and shall not speculate on an imagined explanation for such contradictions and proceed to choose which of the prosecution witnesses to believe. Arehia v. The State (1982) 4 S.C. 78.**

The vital witness who could have given evidence to clear the doubt on whether the appellant entered the compound of the deceased or not was Mama Friday (Sarah Abba). She was interviewed by the police twice during investigation and she made two inconsistent statements to the police. In a criminal trial evidence which would help the defence in the trial of an accused should be produced by the prosecution. The testimony of Mama Friday may establish whether the appellant knew her before the incident and whether he came into the compound and knocked at her door. Without such evidence the learned trial judge was wrong to make the following finding in his judgment:

*"Evidence showed that it was the knocking by the accused at the woman's door late at night in the compound of the deceased that accused (sic) the deceased to come out of his room. The refusal of Mama Friday to open her door for the accused afforded the accused an opportunity to vent the anger caused by his disappointment on the deceased by stabbing him".*

There is no evidence to support this finding. It is mere assumption. There is no evidence adduced to show that the deceased came out of his room when he heard the appellant knocking at Mama Friday's door. His wife PW4 did not say so. Her evidence is clear and she said she was in her room praying when she heard her husband shouting "he has killed me". The evidence of PW4 saying that the appellant knocked at the door of Mama Friday is not reliable because she did not see the appellant knocking at the door of Mama Friday. She said she heard it and there are other rooms in the compound. The knocking could be on any other door. One girl, Baby, was living in one of them. Even this girl was not called by the prosecution to say what she saw during the incident. Her testimony may confirm whether the appellant entered the compound as has been alleged by PW4. The whereabouts of the deceased before the appellant came knocking at the door of Mama Friday is questionable. His wife, PW4, did not say that he was with her in the same room when the knocking started. Where then was he before his voice was heard saying "Ogbuomuo" meaning "he has killed me"?

Since no prosecuting witness saw what happened at the time the appellant used his knife to stab the deceased it will be mere speculation to say that because Mama Friday refused to open the door to the appellant he vent his anger on the deceased and stabbed him. **As there is no direct evidence on what transpired between the appellant and the deceased before the appellant used his knife to stab (the deceased) the conviction of the appellant in my view was based on circumstantial evidence. Though circumstantial evidence is admissible in criminal cases to prove the guilt of an accused yet, such evidence must be narrowly examined by the court if only because evidence of this kind may be fabricated to cast suspicion on another. It is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference -** Okoro Mariagbe v. The State (1977) 2 S.C. 89.

It is a cardinal principle in criminal proceedings that the burden of proving a fact which if proved would lead to the conviction

**tion of the accused is on the prosecution who should prove such fact beyond reasonable doubt. In criminal cases, any doubt, as to the guilt of the accused, arising from the contradictions in the prosecution's evidence of vital issues must be resolved in favour of the accused - Ankwa v. The State (1969) 1 ALL NLR 133.**

It is relevant to ask, "what really happened which made the deceased to struggle with the appellant during which they fell on the ground and the appellant used his knife and stabbed the deceased? Where was the deceased before the appellant came into the compound and began to knock at the door of Mama Friday as alleged? What is to be believed? Was it the version given by the prosecution, the veracity of which could not be ascertained due to contradictions in the evidence of prosecution witnesses or the story of the appellant that he was waylaid along the road by three people who robbed him of N3,000.00 and a wrist watch? The evidence of PW1 and PW2 which the trial court believed is inconclusive to establish that the appellant stabbed the deceased simply because the deceased told him to get out of his compound since Mama Friday had refused to open her door for him to enter. The deceased who was alive for many hours after he received the injuries did not state to anybody how and why the appellant stabbed him. In the testimony of PW2, he said that when he asked the appellant why he (the appellant) stabbed the deceased, the appellant said it was because the deceased abused him. This evidence without more is not enough to sustain a conviction for murder.

The Court of Appeal fell into similar errors. It believed a story which is not supported by direct evidence. The Court below did not even consider the inconsistencies in the testimonies of prosecution witnesses. **It is abundantly clear that there is reasonable doubt in the prosecution's case. Having failed to clear this doubt I have to accept that the doubt must be resolved in favour of the appellant. The trial court was in error to convict the appellant of the offence charged based on the evidence adduced by the prosecution.** I have not touched the defence of intoxication because I agree that the two courts below are right in rejecting it.

I therefore accept the version given by the appellant on how the incident happened. The appellant is entitled to the right to plead the defence of self defence, provocation and the defence of property. This appeal therefore succeeds in part. The conviction and sentence passed by the trial court and affirmed by Court of Appeal are set aside. It is my view however, looking at the facts of this case, that the appellant had exceeded the right of private defence. **Where an accused armed with a lethal weapon is attacked by another who is equally armed with a lethal weapon and during the encounter one kills the other the survivor has a right to put up a defence of self defence. However, if the person attacked exceeds that right and kills the offender when in fact it was unnecessary to cause grievous harm to the attacker the offence committed is manslaughter if the intention of the accused was to do no more harm than he believed necessary in the exercise of his right. Even though there was a reckless criminality in the act of the accused he can succeed in pleading the right to self defence so long as he did not kill with a vengeful motive in the purported exercise of his right.**

The appellant made two separate statements to the police during the investigation and testified for his defence. He was consistent in all the statements he made that he was going along the road when he was waylaid by three people. He was robbed in the process of N3,000.00 and a wrist-watch. He said he used his knife and stabbed one of his attackers on the shoulder. There is no evidence to show that the deceased was armed when he struggled with the appellant. I therefore find the appellant not guilty of murder but guilty of manslaughter and I convict him accordingly.

I have considered the seriousness of the allegation against the appellant, the circumstances which led him to stab the deceased and the fact that the deceased died within 24 hours of the injuries he received before passing sentence for the offence of manslaughter of which I have convicted him. I therefore sentence the appellant to serve a prison term of ten years. The sentence is to commence from the date of his conviction at the High Court.

**BELGORE JSC**

What is remarkable in this case is that nobody was an eye-witness of the stabbing except the accused person. The nearest to an eye-witness is PW4., the wife of the deceased, but she got to the scene only after the stabbing. Just like PW4, PW1, PW2 and PW3 arrived at the scene after the stabbing. Some of the witnesses assumed the accused person was drunk on that night, but there was no proof of drunkenness and the accused, now appellant, has not pleaded drunkenness. There was no fence round the premises of the deceased at the time of the incident and the confrontation leading to the stabbing of the deceased actually took place on the road outside the house. B C

There was a story of an Igala call girl in the premises that the appellant was alleged to have visited or tried to visit without success. This Sarah Abba, the Igala lady, who featured prominently as a potentially important witness was unfortunately not called to testify in Court, even though she might have made some useful statement to the police. The trial court was therefore left with the testimony of the appellant as the only eye-witness of what led to the stabbing. He made statements to the police and has been very consistent all along. Whatever any other witness would testify to as to the stabbing is hearsay, not circumstantial evidence. Post-stabbing appearance of PW1, PW2, PW3 and PW4 at the scene is certainly admissible, but their evidence as to the stabbing itself is hearsay. The appellant, who claimed to be a cattle trader, alleged that his proceeds from sale of cattle and his wrist-watch were snatched by the deceased and others who violently attacked him and this led him into using his dagger. Dagger, according to him, is a necessary weapon to cattle dealers in case a sick cow would have to be slaughtered. His use of the dagger, according to him, was in this case a matter of self-defence against attackers who came to snatch his money and wrist-watch. D E F G

In a situation where only the evidence of the accused person as to the actual stabbing is the only eye-witness account, he is either believed or there is no other evidence to believe. Our law is that prosecution in a criminal case must prove beyond reasonable doubt the guilt of the accused person. In the absence of no other evidence than that of the H

accused as to what led to the stabbing, and that evidence is not admission of guilt but a legitimate defence of his person and property, the prosecution's case has not been proved to the standard evidentially necessary. It is in the light of this that I agree with Mohammed, JSC., in his  
B lead judgment which I had privilege of having read in advance, that I find the conviction of the appellant has not been supported by evidence or circumstance.

I therefore also allow the appeal and set aside the decision of the  
C Court of Appeal which upheld the conviction and sentence of the appellant. I enter instead a verdict of guilty of manslaughter as held by Mohammed, JSC., with ten years sentence from the date of conviction.

D **OGUNDARE JSC (Dissenting)**

The Appellant, Mallam Zakari Ahmed at the High Court of Anambra State in the Awka Judicial Division, stood charged with the offence of murder in that he on 22nd of September 1991 at Awka murdered Osuagwu Obudike and thereby committed an offence contrary to  
E section 274 (1) of the Criminal Code. Cap. 36 Laws of Anambra State of Nigeria. On his being arraigned, he pleaded 'not guilty' to the charge. At the trial, the prosecution called 9 witnesses in proof of the charge. The  
F Appellant gave evidence in his own defence and rested his case. After addresses by learned counsel for the defence and the prosecution, the learned trial Judge, in a reserved judgment, found the charge proved beyond reasonable doubt and convicted the Appellant of the offence of murder as charged; he sentenced him to death.

G Being dissatisfied with the judgment, the Appellant appealed unsuccessfully to the Court of Appeal. He has further appealed to this Court upon four grounds of appeal which without their particulars, read:

"Ground One

H *The judges of Court of Appeal erred in law and came to a wrong decision which occasioned gross miscarriage of justice when they affirmed the judgment and sentence of death passed on the Appellant in this case by the trial Court despite the fact that the judgment of the trial*

*Court is unreasonable and cannot be supported having regard to evidence*

Ground Two:

*The learned Justices of the Court of Appeal erred in law and came to a wrong decision when they held that the defence of provocation does not avail the Appellant.*

Ground Three:

*The learned Justices of the Court of Appeal erred in law and came to a wrong decision when they held that the judgment of the trial Judge was not perverse irrespective of the fact that the learned trial Judge believed the evidence of the prosecution witnesses inspite of the material contradictions and lapses apparent in the said evidence.*

Ground Four:

*The learned Justices of the Court of Appeal erred in law and came to a wrong decision when they held that the defence of intoxication, self defence and defence of property cannot avail the Appellant.*"  
In his written brief of argument filed by his learned counsel he has set out three issues as calling for determination in this appeal, to wit:

*"1. Whether the trial court as well as the Court of Appeal evaluated the evidence tendered before it properly.*

*2. Were there material conflicts in the statements and evidence of prosecution witnesses which rendered their various pieces of evidence unreliable and can the conviction of the Appellant based on such unreliable evidence be sustained and upheld?*

*3. Whether the trial court as well as the Court of Appeal were right when they held that the defence of provocation, self defence, defence of property and defence of intoxication do not avail the Appellant in this case."*

The Respondent, in its brief filed by the learned Director of Public Prosecutions (Anambra State) compressed these issues into two, that is to say:

*"(i) Whether the defences of provocation, self defence, property and intoxication do avail the Appellant.*

*(ii) Whether the Respondent had proved its case beyond reason-*

*able doubt taking into consideration all the surrounding facts of the case."*

No doubt, questions (1) and (2) in the Appellant's brief raise the same issues as in Respondent's question (2) and shall therefore, be taken together.

Before going into the issues raised in the briefs and oral arguments of learned counsel at the hearing of the appeal, I need set out, at this stage, the facts. On the night of the incident that led to the death of the deceased Osuagwu, PW1 Sunday Okafor who was a nightguard at an hotel nearby heard someone shouting in Igbo "Ogbuomuo" that is, "he has killed me". He went to the scene where the shouting was coming from and saw a man holding another by the shirt. The one being held was trying to run away. A Hausa man called Umoru also came out from his own house at that very time and was at the scene. PW1 and Umoru held on to the man who was trying to run away. Osuagwu was the one who was holding on to the man who was trying to run away and the man who was trying to run away was the Appellant. Osuagwu was covered in blood. Both PW1 and Umoru recovered a dagger from the Appellant. The dagger was covered in blood. When the wife of Osuagwu came out of the house, both PW1 and Umoru advised her to go for the police. The wife of the deceased went for the police who later came to the scene by which time a crowd had gathered. Osuagwu was taken to a private hospital whilst the Appellant was arrested. PW1 and Umoru handed over the dagger they recovered from the Appellant to the police. The dagger was tendered in evidence at the trial. Bello Aminu gave evidence as PW2. He was the person PW1 referred to as Umaru. PW'2 attention was drawn to the scene that night by a cry of a woman. On getting to the scene he found the Appellant, the deceased and PW1 who had arrived there before him. PW2 question the Appellant as to what happened. The Appellant replied that "the deceased abused me and I stabbed him." PW2 testified that he was an injury on the deceased. He also testified that both he and PW1 tied the Appellant and took him in a wheelbarrow to the Police Station. PW2 knew the Appellant long before the day of the incident. According to him when the dagger was collected from the ac-



cused it was covered with blood stains. The Appellant was later taken to the Police Station.

The woman whose cry attracted PW2 to the scene was the deceased's wife, Janet Obudike who gave evidence as PW4. She testified that about 2.00 a.m. on the night of the incident, someone knocked at the door of the room of Mama Friday an Igala woman. A girl who heard the knock asked who was that. Almost about the same time she heard a voice saying "he has killed me". She ran out and saw her husband holding on to an Hausa man. She inquired from the husband what the matter was and the husband, that is the deceased, told her that an Hausaman stabbed him. He saw two men holding the Hausaman on the ground and the deceased told her that the Hausaman being held on the ground was the one who stabbed him. Mama Friday and the girl who asked who was there were living as tenants in the deceased's compound.

Police investigated the case. In the course of their investigation the Appellant made voluntary statements to them which were tendered in evidence.

The medical officer who performed a post-mortem examination on the corpse of the deceased also testified at the trial. He described the two stab wounds on the body of the deceased and opined that the stab wounds caused the death of the deceased. He also opined that the stab wounds could have been caused by a sharp metal such as a knife.

The Appellant, in his statements to the police (Exhibits B and C) admitted stabbing someone. At the trial, he gave an account of the circumstances leading to his stabbing the person. He said he was going along the road in the night of the day of the incident when he was accosted by three persons who asked him where he was going. The three persons beat him up, took the sum of money he was having with him at the time (N3,000.00) and his wristwatch. He held on to one of the three persons and started shouting "thief," "thief". He said he was injured on the wrist, his finger and on one of his eyes. He denied going into any man's house or knocking at any man's door. As a result of the beating he had from the three persons, he became unconscious and regained consciousness only at the Police Station. He said he was not treated for the

injuries he sustained. In his evidence at the trial he did not admit stabbing anybody.

The learned trial Judge found the evidence of PW1 and PW2 to be straightforward and unbiased and from the evidence of these two witnesses and that of the doctor PW8 and performed the postmortem examination, found that the Appellant caused the injuries received by the deceased and which led to his death. In effect, he found that it was the act of the Appellant that caused the death of the deceased. He also found that the Appellant was in a drunken state that night. He rejected the story of the Appellant that he was waylaid on the road by three persons and found:

*"From the evidence before me I find as a fact that the accused came to the premises of the deceased very late at night and was knocking at a woman's door when the deceased came out from his own room. It was then that accused used his dagger and stabbed the deceased severely from which the deceased died."*

The learned trial Judge also rejected the evidence of the Appellant that he had a sum of N3,000.00 on him that day. He found, after a review of the evidence, that the appellant knew what he was doing at the time of the incident.

On appeal to the Court of Appeal Ubaezonu, JCA who delivered the lead judgment (with which the other Justices agree) found:

*"Although the appellant alleged that he was wounded with a matchet but the evidence of PW 1 PW2 who came to the scene at the time of the fight does not support this nor was the evidence believed by the trial Judge. On the words of the appellant, he stabbed the deceased because the deceased abused him. I am unable to visualize by what stretch of imagination a defence of self defence can avail the appellant in the circumstances of this case. I am of the view that the lower court rightly rejected the defence of self-defence."*

On the defence of provocation, the learned Justice observed:

*"The appellant's story was that he was waylaid by three persons who attacked him. If this story were true and believed by the court the defence of provocation or self defence may avail the appellant. But this*

story was rejected by the court as untrue. The court was right in disbelieving the evidence of the appellant in view of the evidence of PW1 and PW2 and the surrounding circumstances."

He added:

*"the act which caused death must be done 'in the heat of passion caused by sudden provocation'. I find nothing from the evidence before the lower court anything done or said by the deceased or by any person which could provoke the appellant into doing the dastardly act of stabbing the deceased."*

On the defence of property raised, the learned Justice of Appeal observed as follows:

*"The appellant has raised the defence of property in this appeal. The property being defended is N3,000.00 allegedly given to him by one Alhaji, and also a wristwatch. This defence is closely tied up with the story of having been waylaid by three persons. The appellant's story was rightly disbelieved by the trial court. The appellant could not take the police to Alhaji Abaraka whom he said gave him the money. A defence of property cannot exist if there is no property to defend. In any case, the story of the appellant that he was attacked by three persons was not believed by the trial court."*

The learned Justice of Appeal next considered the defence of intoxication raised on behalf of the Appellant. He referred to the evidence of PW2 and concluded:

*"This piece of evidence was evidence of what happened at the scene of the stabbing shortly after the commission of the act that caused the death of the deceased. From the above, the appellant knew what he did. Or, to put it in the language of the Criminal Code under consideration, it cannot be said that the appellant 'did not know what he was doing'. Again, it cannot be said that he was insane by reason of intoxication at the time of the act. ...."*

*In this case, the appellant neither set up nor proved the defence of intoxication. It has however to be considered in view of the evidence before the court. I am of the view that having regard to the evidence, the defence of intoxication does not avail the appellant."*

ISSUES (1) & (2):

The main plank upon which learned counsel for the Appellant rested his submissions is that the learned trial Judge applied double standard in his consideration of the case for the prosecution on the one hand and that for the defence on the other hand. It is also submitted, that there were material conflicts and inconsistencies in the submissions and evidence of prosecution witnesses which rendered their various pieces of evidence unreliable. Mention is made of PW1 and PW2 who testified to the effect that the incident which led to the death of the deceased happened on the road and this, according to learned counsel for the Appellant, confirmed the Appellant's story that he was waylaid on the road on the night of the incident, while PW4 testified to the effect that the incident happened inside the deceased's compound. It is counsel's submission that this was not a minor discrepancy but a material conflict.

I think I should dispose of this seeming contradiction at this stage. This is the evidence of PW4:

*"It is about my husband. He was killed by somebody. About 2 and half years ago in our house as we went to sleep at night. At about 2.00a.m. that night as I was praying I heard a voice asking who is that? who is that? It was a night watchman by name Sunday the PW1 who was asking who is that. I then heard a knock on the door of Mama Friday an Igala woman. The woman told the person knocking to go away. Also a girl called baby asked the man who was knocking to go away. I heard shout saying he has killed me, he has killed me. I ran out and saw my husband and I asked what was the matter. He told me that a Hausaman has stabbed him. I saw Sunday PW1 holding a Hausaman and I saw another Hausaman also holding the same man."*

Cross-examined, the witness answered:

*"I ran out of my room that I opened the door and came out to the passage and saw my husband holding on to the pillar of the passage. I asked my husband what the matter was. He told me he was stabbed by a Hausaman."*

To further questions, she answered:

*"No. Sunday and the other Hausaman were holding the accused*

*near our gate but inside the compound."*

To a question: *"Will it not surprise you to hear that that Sunday PW1 told this court that the scene of the incident was on the road but not inside the compound?"*

She answered: *"Sunday cannot say so. My husband was stabbed inside the compound."* B

What was Sunday's evidence? The witness, PW1, stated thus:

*"I am a night guardman (watching). I work at Raymond Hotel Amikwo Awka. On 20/9/91 I came to work at 6.00 p.m at Raymond's Hotel Awka. In the night between the hours 12.00 midnight a.m. and 1.00 a.m. I heard some noise. I took my torchlight to see what was happening. I heard someone shouting in Igbo 'Ogbuomuo' (he has killed me). I opened the gate and came out. I saw a man holding another by the shirt. One of them was trying to run away. As I came out a Hausaman living nearby also came out and we held the man trying to run away. It was the accused that was trying to run away. It was one Osuagwu that was holding the accused at the time we arrived at the scene. This Osuagwu is now dead. When I came out at the initial time I saw that blood covered Osuagwu's body. When the hausaman who came out from his house and I came to the two people struggling we recovered a dagger from the accused. The dagger in question was covered with blood."* C D E

This witness was never asked nor did he testify as to where the incident took place. PW2, Bello Aminu, in his own evidence testified thus: F

*"On 21st September, 1991 I was in my house. I heard a woman crying I ran out to the gate. I saw two persons on the ground and one person standing. The person standing is Sunday. I know him as Sunday, the Watchnight. He was PW1. I asked the accused person what the matter was and he told me 'the deceased abused me and I stabbed him'. We later took the deceased to the hospital. I saw the dagger covered with blood and latter we went to the hospital. At that time the dagger was on the ground. When I came to the scene I saw the accused we tied the hands and put him into a wheel-barrow."* G H

Cross-examined, the witness testified thus:

*"When I came out, I saw the deceased and PW1 outside the*

*deceased's compound, it was on the road."*

PW5, one of the police officers who investigated the case testified that he visited the scene of the crime with PW4 and the Appellant. He was shown where the deceased was when he shouted "Ogbuolamuo" According to the witness, "that was right inside the verandah of the deceased". Now to a question by learned counsel for the Appellant this witness explained:

*"A road passes in front of the compound there was no fence but now there is a fence put up after the incident."*

Dealing with the seeming contradiction as to where the incident took place, the learned trial Judge had this to say:

*"Whether the incident happened inside the premises of the deceased or on the road makes little or no difference in this particular case. This is because the evidence of PW5, Police Inspector Charles Onuoha, which I believe to be true, shows that a road passes in front of the compound of the deceased. The witness said that there was no fence then but now there is a fence put up after the incident. In my view, this explains the reason for the apparent contradiction. See the case of Asuquo Williams v. The State (1975) 5 ECSLR. 576. I accept the evidence of PW5 that as of the date of the incident there was no fence separating the compound of the deceased from the road. There is no doubt in my mind that the incident happened in front of the deceased's house and that accused came to the house late at night."*

I think the learned trial Judge is right. For the reasons given by him in his judgment for rejecting the story of the Appellant that he was attacked by three persons that night and that the imaginary persons took away from him a sum of N3,000.00 and his wristwatch, I am not prepared to say that he was wrong. The evidence of PW1 and PW2 strongly support the learned trial Judge in his view that the Appellant's story was not to be believed. In any event, the trial Judge saw the Appellant testified and was in a stronger position to determine his credibility.

Another instance of material conflict in evidence relied on in the Appellant's Brief relates to a statement made by PW4 to the police in which, it was alleged, she did not mention that the Appellant came knock-

ing on the door of the deceased or any person, at night. My short answer to this is that that statement was never tendered in evidence nor was PW4 ever confronted with such a statement so as to enable her explain it off. I cannot see how this can be of any help to the Appellant. The same answer goes to the third instance of conflict highlighted in the Brief, that B is, alleged conflict or inconsistency in the statement of PW4 made to the police on 30/9/94. That statement too was never tendered in evidence nor was she confronted with it at the trial.

The last instance of conflict is in the evidence of PW1 on the C hand where he stated that when he and PW2 were holding the Appellant the wife of the deceased came out of the house and he and PW2 asked her to go and call the police who later came and took the Appellant to the Police Station. As against this evidence is the evidence of PW2 who D testified that PW1 and himself after trying the Appellant, put him in a wheelbarrow took him to the Police Station where he was arrested. I fail to see such material contradiction in the evidence of these witnesses that could whittle down the quality of the case for the prosecution. Whether the Appellant was taken in a wheelbarrow to the Police Station where he E was arrested by the police, a fact which the Appellant admitted in his evidence when he said he was so told by the police, or that he was arrested at the scene by the police whom PW4 the wife of the deceased had earlier reported to, would be of no moment to the act of killing of the F deceased by the Appellant. PW7 stated in evidence that a report was made to the police by the PW4.

In my respectful view the learned trial Judge adequately considered and evaluated the evidence adduced on both sides. I find no fault in G his handling of this matter and upon the credible evidence before him, I agree entirely with the Court below that the guilt of the Appellant was proved beyond reasonable doubt. That the Appellant stabbed the deceased is beyond dispute. There is overwhelming evidence in support of H this fact. The Appellant sought to justify the stabbing by giving an account of the circumstances leading him to doing so. The learned trial Judge, based on the evidence of all the other witnesses as to the surrounding circumstances, was not impressed by the story of the Appel-

lant and thus rejected it. I cannot see any justification for my interfering with his assessment of the credibility of the Appellant in this case. After all, the trial Court is in the best position to assess the credibility of the witnesses; this is trite law - Nasamu v. The State (1979) 6-9 SC. 153. I find no such contradictions, conflicts and inconsistencies in the evidence of the witnesses for the prosecution such as to render their evidence unreliable. I, therefore, resolve Issues (1) and (2) against the Appellant. ISSUE (3):

The defence of provocation and self defence and defence of property raised by the Appellant are based on his story to the trial Court. That story having been rejected by the learned trial Judge as being unreliable and untruthful, to my mind, put an end to all those defences. I agree entirely with the Courts below in the reasons given by them for rejecting those defences. As regards the defence of intoxication, I must point out that this defence was never raised by the Appellant; it was the learned trial Judge who considered it in the light of some pieces of evidence adduced by the prosecution. What are those pieces of evidence? PW2, in his testimony, said "when I came out I saw the deceased on the ground and the accused was lying down with him. We were able to tie the accused because at that time he was drunk. .... The accused was their (sic) talking without control." PW7, in his own testimony under cross-examination said: "He (that is the Appellant) was drunk". (Words in bracket are mine). The Appellant in his own evidence testified thus:

*"I was unconscious when I was taken to the Police Station. It was about 4.00 a.m. that I asked one Policeman Sgt. Adamu what brought me here and he told me that some people brought me here with a barrow."*

These are the pieces of evidence on which the learned counsel for the Appellant has urged us to hold that the Appellant did not know what he was doing at the time he committed the offence for which he was convicted. Learned counsel further submitted that from the said evidence we should hold that the Appellant was out of control of his mind and was temporarily insane. Section 19(2) of the Criminal Code of Anambra State provides:

*"(2) Intoxication shall be a defence to any criminal charge if by*



*reason thereof the person charged 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 -*

*(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or*

*(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission."*

It is clear from the above that intoxication per se is not a defence. To be a defence, it must be shown by the defendant that the intoxication was not self-induced or that the extent of it rendered him at the time of the act or omission insane temporarily or otherwise, that is, that he did not know what he was doing. See Imo v. The State (1991) 11 SCNJ 137 at 160 where Nnaemaka-Agu JSC observed:

*"For the defence of intoxication to be available to an accused person as a defence he must prove on a preponderance of evidence that at the time of the act or omission that is called in question, he was in such a state that he did not know that such an act or omission was wrong or did not know what he was doing. Furthermore, he has to prove either that the state of intoxication was not self induced or was caused without his consent by the malicious or negligent act of another person (section 29 (2) (a) or that the extent of intoxication was so high that he was insane, temporarily or otherwise at the time of the act or omission (section 29 (2) (b))."*

The presumption in law is that a person intends the natural consequences of his act; it is for a defendant to rebut this presumption. If intoxication is put forward as a defence, it must be such that would rebut this presumption. See R v. Owarey 5 WACA 66 at 67 where the West African Court of Appeal stated the law thus:

*"Evidence of drunkenness 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 also Egbe Nkanu v. The State (1980) 3-4 SC.1 where this Court, per

Obaseki JSC. reviewed in extenso the law as regards the defence of intoxication.

The burden of course is on the defendant to prove, on preponderance of evidence, facts that will establish this defence because the law presumes that every person is sane. It can hardly be said that the pieces of evidence as highlighted above are sufficient to discharge this burden. The learned trial Judge, in my respectful view, was right when he said:

*"From the facts of this case, can it be said that accused did not know what he was doing at the time he stabbed the deceased? To answer the question, let us bear in mind the following pieces of evidence. Accused stabbed the deceased and was trying to run away but was prevented from doing so by PW1 and PW2 who held the accused and tied him up and took him in a wheel barrow to the Police Station. From the accused's statement to the Police, Exh.B, accused said he forced himself 'to matchet' one of the people who he, accused, said attacked him. Again in his evidence in court accused said he took out a knife and waved it to defend himself. Also in the accused's statement, Exh. C accused said: 'I was shouting at them 'thief', 'thief', then I removed my dagger and used it on him, even if he dies he is a thief he had already removed my money and was about running away with it because of that I used dagger'*

*The above pieces of evidence proved beyond reasonable doubt that accused knew what he was doing at the time of the incident. This being the case, the defence of intoxication under Section 19(2) of the Criminal Code will not avail the accused."*

Equally so, the Court below is right when it held that the defence of intoxication did not avail the Appellant in this case.

In the light of all that I am satisfied that the two Court below were right in rejecting the various defence raised on behalf of the Appellant in this case. There is, furthermore, no justification, in my respectful view, for reducing the offence of murder for which the Appellant was charged to the lesser offence of manslaughter as pleaded by learned counsel for the Appellant in his oral address before us. I resolve Issue (3) against him.

Finally, the three issues raised in this case having been resolved against the Appellant, I dismiss this appeal and affirm the judgment of the Court below.

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B

**ACHIKE JSC (Dissenting)**

Mallam Zakari Ahmed was arraigned at the High Court of Anambra, sitting at the Awka Judicial Division presided over by Ezeani, J., and charged with the offence of murder of one Osuagwu Obudike, contrary to section 274(1) of the Criminal Code, Cap 36, Vol.1, Laws of Anambra State of Nigeria, 1986. After due trial at which the prosecution fielded nine witnesses, the accused called no witness but testified in his own defence and addresses by learned counsel for the defence and the prosecution, the learned trial Judge, in a reserved judgment found that the prosecution had proved their case to the hilt thereupon convicted the accused as charged and sentenced him accordingly to death. C D

The facts of this case are fairly straightforward. The prosecution's version was that in the early hours of 22/9/91, which was the day of the incident culminating on the death of the deceased, one Sunday Okafor, a nightguard at a hotel within close range of the locus in quo, and who testified as PW1, heard someone shouting in Ibo, namely, "Ogbuomuo" which translated in English language, reads, "He has killed me". PW1 went towards the direction from which the shouting emanated and saw a man holding another man by his shirt as the one who was about running away. At this point in time, one Bello Aminu who also testified as PW2 came out of his house to the scene. PW2 was attracted to the scene by a cry of a woman who later testified as PW4. PW1 and PW2 held the man who was attempting to run away. The man trying to run away was Mallam Zakari Ahmed, the accused/Appellant while the person holding to his clothes was Osuagwu Obudike, the deceased. Both PW1 PW 2 also succeeded in recovering a dagger covered with blood from Zakari while the deceased was covered in blood. PW2 questioned the appellant as regards the incident and he replied that "the deceased abused me and I stabbed him." E F G H

PW4, Janet Obudike was the deceased's wife. In her narration, she testified that at about 2.00 a.m. of the night of the incident, she heard somebody knocking at the door of the room occupied by an Igala woman, Sarah Abah, alias Mama Friday. Simultaneously, she heard another voice  
B of a person saying "he has killed me," and on running out of her room to the scene, she saw her husband holding on to an Hausa man. Inquiring from her husband what was wrong, he told her that the Hausa man stabbed him. She saw the two men, i.e PW1 and PW2, holding the  
C appellant on the ground and the deceased told her that the appellant was the person who stabbed him.

There was evidence that PW1 and PW2 tied the hands of the appellant, put him in a wheel-barrow and took him to the police station. There, they handed the appellant to the Police along with the dagger they  
D recovered from him at the scene of the crime.

A medical officer who performed the autopsy examination on the body of the deceased testified as PW8. He told the court that the two stab wounds he found on the body of the deceased, in his opinion, caused  
E the death of the deceased, and the said wounds could have been caused by a sharp metal such as a knife.

The Appellant volunteered two statements to the police which were tendered in evidence as Exhibits B and C wherein he admitted stabbing someone. And at the trial, he gave evidence in his defence and  
F narrated the circumstances leading to the stabbing incident that on the night of the incident, he was walking along the road when he was attacked by three persons which included the deceased. His attackers took away from him the sum of N3000.00 and his wrist-watch. At that point  
G in time he shouted "thief", "thief" and was injured on his wrist, his finger and one of his eyes. He flatly denied going to anyone's house talkless knocking at anyone's door. He also said that during the beating he tried to defend himself by waving his dagger in the air to scar away his attackers  
H and he further said that the dagger might have injured the deceased. He also said that consequent to the beating by the three persons he became unconscious and never regained consciousness until about 4 a.m. that morning at the Police Station.

From the evidence placed before the learned trial Judge, and relying particularly on the evidence of 'PW1 and PW2' whose evidence he believed as well as that of PW8, the doctor with regard to the cause of death and accordingly found that the deceased died as a result of injuries inflicted on him by the appellant on the night of the incident. And as earlier stated, the learned trial Judge found the appellant guilty as charged and sentenced him accordingly. On appeal to the Court of Appeal, the conviction and sentence passed on the appellant were confirmed. Still dissatisfied, the appellant has further appealed to this Court, relying on four grounds of appeal. C

Chief Chidube Ezebilio, learned counsel for the appellant, formulated three issues for determination, namely,

" 1. *Whether the trial court as well as the Court of Appeal evaluated the evidence tendered before it properly.* D

2. *Were there material conflicts in the statements and evidence of prosecution witnesses which rendered their various pieces of evidence unreliable and can the conviction of the Appellant based on such unreliable evidence be sustained and upheld?* E

3. *Whether the trial court as well as the Court of Appeal were right when they held that the defence of provocation, self defence, defence of property and defence of intoxication do not avail the Appellant in this case.*" F

For the Respondent, Ms Ada Unobagha, learned Director of Public Prosecutions (DPP) identified the following two issues for determination:

" (i) *Whether the defence of provocation, self defence, property and intoxication do avail the Appellant.* G

(ii) *Whether the Respondent had proved its case beyond reasonable doubt taking into consideration all the surrounding facts of the case.*"

I wish to preface the consideration of this appeal by stating certain principles which are trite so that they will be clearly borne in mind for the proper appreciation of the conclusions that would be reached herein. First, it is primarily a duty of the trial before it by the exclusive H

reason of the fact that it is the trial court that had the singular opportunity to observe and hear the witnesses while they testified in court. An appellate court is denied this opportunity and consequently, as a rule of practice it would not disturb the findings of fact of a trial Judge unless the trial Judge has misdirected himself or has failed to take advantage of having seen or heard the witness. And where the trial court had evaluated the evidence and appraised the facts an appellate court cannot go over such exercise and substitute its own findings for that of the trial court. Secondly, it is the duty of the trial court to endeavour to make a resolution of a conflict of evidence placed before it, more so that an appellate court cannot make any findings in such a situation. See Balogun & Ors v Agboola (1974) 1 All NLR (Pt. 11) 66 at 73, Akinloye v Eyiola (1968) NMLR 92 and Okoye v Kpajie (1972) 6 SC 176. Thirdly, this Court will not disturb concurrent findings of fact by the courts below unless there is a substantial error apparent on the record of proceedings. See Ibodo v Enarofia (1980) 5/7 SC 42.

The narrations of the prosecution's case and that of the defence are somewhat divergent because while the prosecution highlights the knocking at the door of the room occupied by the Igala woman, consequent to which the deceased came out of his room from his building occupied by the Igala woman, on the one hand, the accused presents a moving story of being waylaid by three persons who attacked him, robbed him of his wristwatch and money which precipitated the encounter with his attackers and the injuries sustained by the deceased that would have been occasioned by his dagger he had in his hand. To this end, the learned trial Judge completely rejected Appellant's story of having been waylaid on the road by three persons, one of which was the deceased and proceeded to make the following finding in the course of his judgment:

*"From the evidence before me I find as a fact that the accused came to the premises of the deceased very late at night and was knocking at a woman's door when the deceased came out from his own room. It was then that accused used his dagger and stabbed the deceased severely from which the deceased died."*

It is convenient at this stage to state that I had the opportunity of perusing the two main judgments prepared by my learned brothers, Ogundare and Mohammed JJSC. To the extent I agree or disagree with their reasoning or conclusions will be manifest in this judgment. From the above finding of fact which is amply supported by evidence before B the court, the fact of the death of the deceased arising from his fatal stabbing by the appellant is no longer in doubt. It is also pertinent to state that not only was this finding, but indeed, other findings made by the trial court were confirmed by the learned Justices of the Court of Appeal. C Nevertheless, undaunted by these concurrent findings of fact, the learned Appellant's counsel, Chief Chidube Ezebilo, under his Issue No.1 for Determination wandered "whether the trial court as well as the Court of Appeal evaluated the evidence tendered before it properly." Counsel's D submission in this regard spans just a full page of the brief. Counsel's submission under this issue is very brief; permit me to quote it in full:

*"Whether the trial court as well as Court of Appeal evaluated the evidence tendered before it properly.*

*When the learned trial Judge was considering the defence of self E defence, defence of property and provocation raised by the Appellant in his defence he disbelieved and rejected the evidence of Appellant in court and statements made by the Appellant to the police in Exh. B and C with regards to what actually happened on the night of the incident. Pieces of F evidence of the Appellant in court such as "I took out my knife and waived it to defend myself" and Appellant statement to the police Exh. B where the Appellant said "I forced myself to matchet one of the people who attacked me with knife while they collected my money and wrist G watch" and in Exh. C where the Appellant said "They beat me and one of them hit me on the head while one cut me with knife on the hand because of that I used dagger to defend myself" were disbelieved and rejected by the trial Judge as an after thought in his judgment, whereas the learned trial Judge relied very heavily on these pieces of evidence to come to the H conclusion that the Appellant although drunk knew what he was doing on the night of the incident to hold that the defence of intoxication under section 19(2) b of the Criminal Code of Anambra State of Nigeria 1986*

does not avail the Appellant.

The question can then be asked whether this is not a case of double standard, a case of contradiction? Can a trial Judge approbate and reprobate by disbelieving and rejecting one set of evidence in one defence in a criminal trial and turned round later to rely heavily on the same set of evidence in another defence in the same case in the same criminal trial all in a bid to convict the accused person by all means?

I shall without hesitation submit with respect on behalf of the Appellant that this is a clear case of double standard, a case of contradiction, a case of reprobating and approbating by the learned trial Judge with regards to evaluation of evidence which the Court of Appeal failed to address before affirming the conviction and sentence of the Appellant despite the fact that the Appellant raised it as an and argued it as Issued No. 5 in his brief in that court. See the case of ONUCHUKWU VS THE STATE (1998) 4 NWLR 576 (PT. 547) where the Supreme Court had strongly deprecated and condemned the case of doubt standard and contradiction with regards to evaluation of evidence by the court below and went ahead to re-evaluate the evidence before by the court below and went ahead to re-evaluate the evidence before the court which resulted in the discharge and acquittal of the Appellants in that case."

It is clear from the above that the Appellant had two versions of the facts leading to the stabbing of the deceased as shown in his extrajudicial statements to the Police which were admitted in evidence as Exhibit B and C. Additionally, I would add that the learned counsel did not call to mind the evidence of PW2 who was unhesitatingly believed by the learned trial Judge. This witness inter alia testified that on coming to the scene of the incident:

"I asked the accused person what the matter was and he told me the deceased abused me and I stabbed him."

Obviously, the above excerpt of PW2's evidence gives an eye-witness account of his brief verbal exchanges with the Appellant and explains the quandary in which any sensible tribunal would view the evidence of the Appellant. It was against this practical dilemma that the learned trial Judge disbelieved and rejected Appellant's evidence. It is equally impor-



tant to observe that against the background of concurrent findings of fact that my learned brother, Mohammed, JSC stated that as "I find it pertinent to reappraise the evidence adduced before the trial court in order to establish whether the conclusions reached by the trial court which were affirmed by the court below from the facts and evidence available B before the court had established beyond reasonable doubt that the appellant was guilty of the offence charged."

Suffice it for me to recapitulate what I stated earlier, and excuse my being repetitive, if only for the sake of emphasis, namely; that the appraisal of oral evidence and the ascription of probative values to such evidence is the exclusive preserve of the trial court. Where, as in this case, the oral evidence of the principal witnesses for the prosecution (I think PW1, PW2 and PW4) and that of the Appellant himself turned on the credibility of these witnesses, who were examined and cross-examined before the trial Judge, and the same Judge had the singular advantage of also seeing and hearing these witnesses, the findings by the trial Judge, based on the evidence placed before him cannot be impugned by an appellate court. It is make no difference that the appellate court embarked on the exercise of reappraisal of the evidence before the court whereby it eventually substituted its own views of the evidence for those of the court of trial. I must finally state in this regard that an appellate court should not and would not interfere with the verdict of the trial Judge or the court below unless such verdict is shown to be perverse or is not the result of a proper appraisal of the evidence. See Folorunsho v. Adeyemi (1975) NMLR 128, Chief Victor Woluchem & Ors v. Chief Simon Gudi & Ors (1981) 5 SC. 319 Nasiru v. C.O.P. (1980) 1-2 SC. 94. F

In conclusion, I am to say that I find that no circumstances exist to warrant a reappraisal or evaluation of the evidence placed before the trial court which was carefully and painstakingly done by the court of trial which would justify interference with the findings made by the trial Judge and confirmed by the Court of Appeal. H

Now the learned trial Judge having found that the deceased died from the injuries inflicted on him by the Appellant as confirmed by the evidence of PW8, the medical doctor, then it follows, in the absence of

extenuating circumstance, such as would justify the infliction of such fatal injury with a lethal object - in this case, a dagger - the Appellant is undoubtedly guilty of murder. Where, however, any of the following defences are available to the appellant, to wit, provocation, self-defence, defence of property and defence of intoxication, the unlawful killing may be reduced to manslaughter. We shall now examine these defences seriatim that are open to the Appellant which were considered by the two lower courts.

### Defence of Property

It is important to bear in mind that after a careful evaluation of the evidence placed before him and ascription of probative values to such evidence, the learned trial Judge disbelieved the evidence of the Appellant on the evidence of defence of property, namely the theft of his wrist-watch and money in the sum of N3000. The learned trial Judge found the Appellant's account in this regard to be unsatisfactory and inconsistent and accordingly disbelieved him. First, let us look at the inconsistent story narrated by the appellant regarding the sum of N3000 and the way the learned trial Judge evaluated the evidence in respect thereof before making his finding:

*"At his trial accused said he got the money from Mohammed Wal-da-hab and was going to give it to his brother who lives in Alhaji Musa's house. In Exh. B accused said he collected the money from his master, Alhaji Abaraka. In his statement, Exh. C, accused said he collected the sum of N3,000.00 from the house of Alhaji Meeme at Housa quarters, Amenyi. PW5, Police Inspector Onuoha testified that at the time of arrest accused told him that accused's master by name Musa gave him the sum of N3,000.00. Witness testified that he found the story a false one because he asked accused to take him to his master Musa and accused told him that he, accused, could not trace the master's house or the business place of the master. I find as a fact that the accused is not telling a true story. I do not believe that accused had any money or watch on him at the time. I therefore hold that the defence of property does not avail accused."*

In the leading judgment of the Court of appeal per Ubaezonu,

JCA, to which Niki Tobi and Akpabio, JJCA concurred, this is his Lordship's conclusion:

*" The appellant has raised the defence of property in this appeal. The property being defendant is N3,000.00 allegedly given to him by one Alhaji, and also a wrist-watch. This defence is closely tied up with the story of having been waylaid by three persons. The appellant's story was rightly disbelieved by the trial court. The appellant could not take the police to Alhaji Abaraka whom he said gave him the money. A defence of property cannot exist if there is no property to defend. In any case, the story of the appellant that he was attacked by three persons was not believed by the trial court."*

It must be emphasized that where a person puts up a defence of his property, the law allows him the use of reasonable force in defence of the said property provided no harm is inflicted on the person whom the property is being protected. It follows that the force employed as well as the nature of the object (i.e. weapon) used by the Appellant must not be out of proportion with the way the Appellant employed to defend the said property otherwise this defence will not avail him. As earlier stated, this defence was completely disbelieved and rejected by the trial Judge based on the abominably appalling and inconsistent evidence tendered by the Appellant in this regard. In the result, I myself, I am unable to hold from the evidence on the record and the concurrent findings in this regard made by the two lower courts that any valid defence of property can avail the appellant. There is no evidence that the deceased attempted to dispossess or in fact did disposses the Appellant of any of his properties i.e. his money or his wristwatch. As far as the Appellant is concerned, the reason for stabbing the deceased, as earlier noted, was that he abused him.

#### Defence of Provocation

Again, on the defence of provocation, I wish to reproduce the specific finding of the learned trial Judge in this regard:

*" Counsel submitted that accused was provoked when he was attacked by three persons i.e. the deceased and two others whom the accused could not recognize because it was night. As stated earlier, I*

*hold that the story of the accused that he was waylaid by three people is not true. Consequently, the defence of provocation is not proved."*

On their own part, the Court of Appeal per Ubaezenu, JCA summarized the defence of provocation tersely but lucidly:

B "The appellant's story was that he was waylaid by there persons who attached him. If this story were true and believed by the court the defence of provocation or self defence may avail the appellant. But this story was rejected by the court as untrue. The court was right in disbelieving the evidence of the appellant in view of the evidence of PW1 and C PW2 and the surrounding circumstances."

It may then be asked, what is provocation? Unfortunately, the Anambra Criminal Code of 1989 does not define what constitutes the term provocation but merely attempts to explain it while providing an explanation in D distinguishing between murder and manslaughter. Section 273 of the Criminal Code of Anambra State, 1986 states as follows:

"When a person who unlawfully kills another in circumstances which, but for the provisions of this section, would constitute murder, E does the act which causes death in the heat of passion cause by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only."

The important element of what constitutes provocation leading to the F death of another must be shown to have been done "in the heat of passion cause by sudden provocation, and before there is time for his passion to cool."

Perhaps, we should fall back on what Lord Goddard described as the impeccable direction of the jury by Devlin, J in R v Duffy (1949) G 1 All E.R. 932 in a case in which the defence of provocation was raised. This is how Devlin, J put it:

"Provocation is some act, or series of acts, done by the dead H man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind."

There is clearly no evidence that the mere fact that the deceased

abused the Appellant caused him to lose his self-control as to resort to a lethal weapon such as a dagger, and to drive same into the body of the deceased that caused his death. The record of trial is completely porous as to the content of the above, talkless that the Appellant was in consequence thereof provoked to have savagely attacked the deceased. The B defence of provocation is not at large; it can only succeed if the effect of the abuse meted to the Appellant would have caused a reasonable man to lose his self-control and also that the Appellant did actually lose his self-control consequent to the provocation. See R v Nwanjoku 3 W.A.C.A. C 208 and R v Adekanmi 17 NLR 99. The case of Bedder v D.P.P. (1954) 2 All ER 801 is illustrative. The accused who was sexually impotent tried unsuccessfully to have sexual intercourse with a prostitute. She thereafter jeered at him and also kicked him causing him to lose self-control D whereupon he stabbed her twice and killed. On a charge of murder the accused pleaded provocation and the House of Lords upheld the direction that he proper test was the effect which the conduct of the prostitute would have on an ordinary person, not on a sexually impotent person.

Furthermore, it must also be stressed that the mode of resentment must bear a reasonable proportion to the provocation offered. Thus a fist-blow for a fist-blow may be proportional resentment but a savage attack by the Appellant with a lethal weapon in return for mere vituperative abuse by the deceased may not. See R v Akpakpan (1956) 1 FSC 1 F and R v Nwanjoku (ibib).

The final word that I wish to say about the defence of provocation is that where this defence is successfully established the effect is that the offence of murder is reduced to manslaughter. In other words, G under no circumstances will the defence avail the accused to excuse him for the charge of murder.

In the light of what I have stated above with regard to the nature of the defence of provocation, unquestionably, I agree with the opinion of the learned trial Judge that the defence of provocation as claimed on H behalf of the Appellant was not sustainable having regard to the evidence available on the record. I also share the view of the Court of Appeal expressed through the leading judgment of Ubaezonu JCA as stated ear-

lied. Probably, the Appellant would have made out a good defence of provocation if his alleged encounter with the three persons who waylaid him was believed and accepted by the learned trial Judge who preferred the evidence of PW1 and PW2 as well as that of PW4. In other words, B the simplistic defence of the Appellant that he did not enter the premises or compound of the deceased and that the incident leading to the death of the deceased took place completely along the main road was turned down by the trial court more so as the detailed evaluation of the available evidence on record and ascription of values to the said evidence caused the C learned trial Judge to prefer the combined evidence of the star witnesses for the prosecution.

In the result, I am clearly of opinion that the defence of provocation cannot avail the Appellant in all the circumstances of this case. I find nothing from the evidence before the court of anything done or said by the deceased or any person, for that matter, which could have provoked the Appellant to temporarily lose his self-control and made him unleash his dagger brutally into the body of the deceased.

## E Self- defence

Appellant's efforts to put up defence of self-defence were very feeble. He narrated how he was beaten up by three men who injured him on the wrist, finger and one eye and rather strangely he was not treated F for the injuries he sustained. The learned trial Judge, accepted the evidence of PW1 and PW2 with regard to the alleged incident and disbelieved Appellant's evidence in this regard.

The court below in a unanimous judgment equally rejected Appellant's defence of self-defence. And in its leading judgment per G Ubaezonu JCA, the Court of Appeal denounced the defence of self-defence quite briefly:

" Although the appellant alleged that he was wounded with a  
matchet but the evidence of PW1 and PW2 who came to the scene at the  
time of the fight does not support this nor was the evidence believed by  
the trial Judge. On the words of the appellant, he stabbed the deceased  
because the deceased abused him. I am unable to visualize by what  
stretch of imagination a defence of self defence can avail the appellant

*in the circumstances of this case. I am of the view that the lower court rightly rejected the defence of self-defence."*

Again, I must emphasize that the defence of self-defence for homicide committed while acting in self-defence is not at large. It is mandatory in a charge of murder preferred against the Appellant and B who pleads self-defence to establish that the nature of attack by the deceased was such as to cause a reasonable apprehension of death or grievous bodily harm. No doubt, the test of reasonableness of Appellant's apprehension of death or grievous harm must be assessed objectively C and the Appellant must further show that he could not otherwise have preserved himself from death or grievous harm that loomed from the deceased's attack.

It is clear from the above that the plea of self-defence is not D open to an abnormally nervous or excitable person because the defence is predicated on the reasonableness of the apprehension of death or grievous harm. See R v Onyemaizu (1958) NR NLR 93.

In the case in hand, there is no scintilla of evidence either that the deceased was armed with any object or that he inflicted any blow or E injury on the Appellant. Rather, and on the ipse dixit of the Appellant, all that the Appellant placed reliance on for his dastardly act of stabbing the deceased, as far as the record can bear out, is that the deceased abused the Appellant. It is difficult to appreciate the magnitude of abuse or F vituperation that can ever cause a reasonable apprehension of death or grievous harm as to warrant a person in fear of such danger to cause him to defend himself with a lethal weapon such as a dagger. Even giving the greatest latitude to the Appellant against the background of our culture G and perhaps relative minimum education for people of the standing of the Appellant (who appears to be a cattle dealer) I cannot by any stretch of the mind find justification for the Appellant belonging to the background that I have tried to depict, resorting to a lethal weapon to preserve himself from reasonable apprehension of death or grievous harm by reason H of any satanic verbal abuse of the deceased, be it even the abuse that Appellant is a wizard, of again, there is no evidence whatsoever what was the content of the abuse that impelled the Appellant to resort to this

extreme conduct.

In the circumstance, I find it extremely difficult to imagine how a person can justifiably plead self-defence for fatally stabbing another person by reason of the abuse of the assailant by the deceased who, on the overwhelming evidence on record, was not armed with any weapon whatsoever. To uphold such a defence will lead to anarchy. Accordingly, I reject Appellant's defence of self-defence.

#### Defence of Intoxication

From the evidence led at the trial, and particularly the oral evidence of the Appellant in court, as well as his extra-judicial statements admitted in evidence as Exhibits B and C, nothing seriously was really urged on behalf of Appellant by his counsel on the plea of intoxication.

Except for the fact that it was generally said in the course of this case that the Appellant was drunk which the Appellant himself denied, it is quite clear to me that no meaningful defence of intoxication can be agitated on Appellant's favour, the record being mute on the fact that the Appellant drank any intoxicating drink, and even if he did, the end result of such drinking was equally unclear or nebulous. This is enough to discard with the defence of intoxication. Accordingly, I hold that that defence cannot avail the appellant.

I cannot end this judgment without touching briefly on alleged conflict in evidence with regard to the actual situs of the locus in quo. To the Appellant, the incident of that fateful night occurred on the road. As would be expected, Appellant's learned counsel submitted that this lent credibility and confirmation to the Appellant's claim of having been way-laid by his three attackers. For the prosecution, no such contradiction occurred nor existed. The testimony of PW4 who was already in bed when the incident began in quite useful. Inter alia PW4, the wife of the deceased testified as follows:

*"It is about my husband. He was killed by somebody. About 2 and half years ago in our house as we went to sleep at night. At about 2.00 a.m. that night as I was praying I heard a voice asking who is that? Who is that? It was a night watchman by name Sunday the PW1 who was asking who is that. I then heard a knock on the door of Mama Friday an*



*Igala woman. The woman told the person knocking to go away. Also a girl called baby asked the man who was knocking to go away. I heard shout saying he has killed me, he has killed me. I ran out and saw my husband and I asked what was the matter. He told me that a Hausaman has stabbed him. I saw Sunday PW1 holding a Hausaman and I saw another Hausaman also holding the same man."* B

Under cross-examination, in part, she fielded this answer to a question put to her:

*"No. Sunday (meaning PW1) and the other Hausaman (meaning PW2) were holding the accused (meaning Appellant) near our gate but inside the compound."* C

Thereupon, a question was directly put to her whether she would be surprised to hear that PW1 testified in court that the incident took place on the road and not inside the compound. Her response was terse, lucid D and unequivocal. She said:

*"Sunday cannot say so. My husband was stabbed inside the compound."*

PW4's evidence can only be properly evaluated against the background E of her earlier examination - in-chief where she stated as follows:

*"At about 2.00 a.m. that night as I was praying I heard a voice asking who is that? who is that? it was a night watchman by name Sunday the PW1 who was asking who is that. I then heard a knock on the door of Mama Friday an Igala woman. The woman told the person F knocking to go away. Also a girl called baby asked the man who was knocking to go away. I heard shout saying that he has killed me, he has killed me."*

It is absurdly ridiculous for any person to imagine that the incident G occurred on the road and yet unchallenged evidence was given by PW4 that there was persistent knocking on the door of the room of an Igala woman and the person knocking was asked to go away both by the Igala woman and a girl called baby. H

It was not pointedly put to the PW1 where exactly the incident occurred in terms of whether it was on the road or within the compound of the deceased's house. Probably, this was so in that none had sought to

capitalize on this point. But in fairness to all, and particularly to the Appellant and his counsel, under cross-examination, PW2 testified briefly:

*"When I came out, I saw the deceased and PW1 outside the deceased's compound, it was on the road."*

B Perhaps, that could leave anyone nervous and undecided if that was all the evidence placed before the court in respect of this issue.

Finally, PW5, the Investigating Police Officer testified that when he visited the locus in quo he has shown by PW4 where the deceased was at the time he shouted "Ogbuolamuo" "That," according to PW5 in C his testimony "was right inside the Verandah of the deceased". And answering a question under cross-examination, PW5 clarified thus:

*"A road passes in front of the compound there was no fence but now there is a fence put up after the incident."*

D *On the apparent situs of the scene of the incident, the learned trial Judge resolved the issue thus:*

*"Whether the incident happened inside the premises of the deceased or on the road makes little or no difference in this particular case.*

E *This is because the evidence of PW5, Police Inspector Charles Onuoha, which I believe to be true, shows that a road passes in front of the compound of the deceased. The witness said that there was no fence then but now there is a fence put up after the incident. In my view, this explains the reason for the apparent contradiction. See the case of Asuquo Williams*

F *v. The State (1975) 5 ECSLR. 576. I accept the evidence of PW5 that as of the date of the incident there was no fence separating the compound of the deceased from the road, there is no doubt in my mind that the incident happened in front of the deceased's house and that accused came to the house late at night."*

G This resolution of the seeming contradiction as to the locus in quo and finding of fact made in respect thereof is manifestly supported by evidence and cannot be said to be perverse. Any further debate on H this issue cannot be said to be in good faith because that finding was never made a ground of appeal.

In the light of the above resolution with respect to the actual scene of the incident, I hold that there is no such contradictions or incon-

sistencies in the evidence of the witnesses for the prosecution as alleged by the defence that would render the prosecution's case unreliable.

For all I have been saying, I entirely agree with the concurrent findings of fact of both the trial court and the Court of Appeal which in turn confirmed the conviction and sentence imposed on the Appellant. I am satisfied that the defences canvassed on behalf of the Appellant by his learned counsel cannot in the circumstances of this case reduce the charge of murder to manslaughter. Regrettably, therefore, I am unable to subscribe to the judgment of my learned brother, Mohammed JSC for the reasons elicited in my judgment. Nevertheless, I thank him for the pre-view of his judgment that I was privileged to read in draft.

All in all, therefore, I dismiss this appeal and affirm the judgment of the Court of Appeal.

D

### KALGO JSC

I have read in advance the judgment of my learned brother Mohammed, JSC and I entirely agree with the conclusions reached therein.

The appellant was tried and convicted of the offence of murder contrary to section 274 (1) of the Criminal Code, (Cap. 36 of the laws of Anambra State of Nigeria) and sentenced to death by hanging. His appeal to the Court of Appeal was unsuccessful and he appealed to this Court.

In the written brief filed on behalf of the appellant by his counsel, the following issues for determination were formulated:-

(1) *Whether the trial court as well as the Court of Appeal evaluated the evidence tendered before it properly.*

(2) *Were there material conflicts in the statements and evidence of prosecution witnesses which rendered their various pieces of evidence unreliable and can the conviction of the Appellant based on such unreliable evidence be sustained and upheld?*

(3) *Whether the trial court as well as the Court of Appeal were right when they held that the defences of provocation, self defence, defence of property and defence of intoxication do not avail the Appellant in this case".*

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For the respondent, only two issues were raised for the determination of this court which read thus:-

*"(i) Whether the defences of provocation, self-defence, property and intoxication do avail the Appellant.*

B *(ii) Whether the respondent had proved its case beyond reasonable doubt taking into consideration all the surrounding facts of the case".*

C Issue 1 and 2 of the appellant can adequately be argued together in issue (ii) of the respondent. I therefore adopt the issues raised by the respondent for the consideration of this appeal.

D Issue I deals with the possible defences open to the appellant in the circumstances of this case. In determining this issue, the facts of this case as disclosed in the evidence at the trial must be properly assessed and evaluated. No piece of evidence should be presumed for or against a party except where legal proof thereof has been given or such presumption is supported by law.

E In this trial, nine witnesses testified for the prosecution and only the appellant gave evidence in his defence. In assessing or evaluating the evidence of the prosecution; the learned trial judge had this to say on page 64 of the record:-

F *"The story as presented by the prosecutor was that accused entered the compound of the deceased at night when people had gone to bed. Accused was knocking on a woman's door - one of the inmates in the deceased's compound. This attracted the attention of the deceased who came out of his room while the occupant of the room where accused was knocking asked the accused to go away".*

G He went on say on page 66 - 67 of the record that:-

H *"PW 4, Janette Obudike testified that Mama Friday, an Igala woman on whose door accused was knocking, asked the accused to go away. She also testified that another girl called baby asked accused to go away. There is convincing evidence to show that accused came to the premises of the deceased and the entire incident started there....."*

*Evidence showed that it was the knocking by the accused at the woman's door late at night in the compound of the deceased that accused*

*(sic) the deceased to come out of his room. The refusal of Mama Friday to open the door for the accused afforded the accused an opportunity to event the anger accused by his disappointment on the deceased by stabling him."*

*It was after this review of the evidence that the learned trial judge proceeded to make the following finding on page 67 of the record, thus:-*

*"From the evidence before me I find as a fact that accused came to the premises of the deceased very late at night and was knocking at a woman's door when the deceased came out from his room. It was then that accused used his dagger and stabbed the deceased severely from which the deceased died".*

With due respect to the learned trial judge, I think that his assessment or review of evidence of the prosecution witnesses and his findings are not accused/appellant was the person who knocked at the door of Mama Friday. P.W.4 was the only witness who testified about the door knocking and this was what she said on page 38 of the record:-

*"I then heard a knock on the door of Mama Friday an Igala woman. The woman told the person knocking to go away. Also a girl called baby asked the man who was knocking to go away".*

P.W.4 did not say in her evidence at the trial, who the person who was knocking the door was. She could not have done so because she was in her room when she presumably heard the knock. She did not say that she recognized the voice of the person knocking the door. Also neither Mama Friday nor the girl called "Baby" gave evidence at the trial. The appellant made two statements to the police Exhibits 'B' and 'C'. Exhibit B was made on the 21st September, 1991 the day the incident happened and 12 days later on 30th October, 1991, Exhibit 'C' was made. In neither of these statements did the appellant say that he went to the deceased's house and knocked at the door of any person. No other witness testified on the knocking of the door of Mama Friday or any body that night. In his evidence at the trial the appellant denied entering any body's house that night, and the what happened took place on the main road. He denied knowing any Igala woman in his life or any woman at all called Sera Abba. He did not say that he had any altercation with the

deceased in the compound.

The finding of the learned trial judge, referred to above, also suggested that it was as a result of the door knocking by the appellant that the deceased (the house owner) came out and accosted the appellant from where the whole incident sparked off. There is no evidence to suggest this at all, and in my view, the learned trial judge by his finding, was bringing in the issue of motive for the offence implicating the appellant.

Also the learned trial judge in the findings said the deceased came out from his own room. Unfortunately, there is no such evidence at all the trial and the learned judge was just making this up for the prosecution. P.W.4 the deceased's wife who could be the best witness on this, did not say anything about the movements of the deceased on that day. The essential part of her evidence in chief reads:- (page 38 of record):-

*"About 2 and half years ago in our house as we went to sleep at night. At about 2: 00 am that night as I was praying I heard a voice asking who is that ? Who is that ? It was a night watchmen by name Sunday the P.W.1 who was asking on the door of Mama Friday an Igala woman. The woman told the person knocking to go away. Also a girl called baby asked the man who was knocking to go away. I heard shout saying he has killed me he has killed me. I ran out and saw my husband and I asked what was the matter. He told me that a hausaman has stabbed him."*

P.W.4 also answered two questions among others in her cross-examination on page 40 thus:-

*"Q. You did not hear your husband except when he was shouting he has killed me, he has killed me.*

*ANS. I did not except when he was shouting he has killed me, he has killed me.*

*Q. Did you hear your husband exchanging words before you heard his shouts.*

*ANS. No. "*

From her evidence, P.W.4 did not even say where her husband was when she was praying in her room. It was only when she ran out after hearing

the shouts that she saw her husband and that she did not hear him outside exchanging words with any body before she ran out of the room.

From all this, it is utterly wrong for the learned trial judge to suggest that it was the appellant who was knocking at the door of Mama Friday that night and when the deceased accosted him, he stabbed the deceased. This was not supported by any evidence at all and could not in my view, be properly inferred from any part of the evidence. It could perhaps be inferred if Mama Friday or "baby" had given evidence to show that the appellant was the person who was knocking at their door that night. This was not to be, as neither Mama Friday nor "Baby" gave evidence at the trial for reasons best known to the prosecution.

On the description of where the incident took place P.W.1, the first person to arrive at the scene had this to say on page 30 of the record:-

*"The Osuagwu who was stabbed was living in the adjoining compound. A compound wall separates where I was working, that is, the hotel and Osuagwu's compound. I saw the accused and Osuagwu on the road outside but close to the front of Osuagwu's compound".*

P.W.2. who arrived at the scene next to P.W. 1 on the night of the incident also testified on page 37 of the record thus:-

*"When I came out I saw the deceased and P.W.1 outside the deceased compound. It was on the road".*

The evidence of P.W.5 Inspector Onuaha on this issue is not credible as against the testimonies of P.Ws 1 and 2 even though he narrated what they told him. In any case that part of his evidence is hearsay and ought to be rejected. The appellant himself in his evidence in chief on page 53 of the record said:-

*"I did not enter any man's house. What happened was along the main road".*

The totality of the evidence showed that the incident in question which happened that night did so on the main road just in front of the house of the deceased. However it is pertinent to observe that the learned trial judge said that he had no doubt in his mind that the incident happened in front of the deceased's house not inside the house. This put the matter

to rest.

The Court of Appeal also proceeded in its judgment under the same misconception of facts and fell into the same trap as the trial judge when in its lead judgment Ubaezonu JCA on page 112 of the record B said:-

"The facts of the case briefly are that the appellant, in the night of the incident for which he was charged, went to the house of a woman, in an apparently drunken mood and started knocking at the door to be open unto him. The woman Sarah Abba alias Mama Friday, who was one of the several tenants in the premises however did not open door to the appellant. The appellant persisted in his knocks which attracted the attention of the deceased who was the landlord of the premises. The landlord, Osuagwu Obudike, came out of his room and confronted the D appellant to leave the premises. The appellant refused. A fight apparently ensued between the deceased and the appellant who used his knife on the deceased. The deceased was taken to the hospital where he died". (underlining mine)

With due respect to the learned Justice of the Court of Appeal, most of what he said in the above quoted extract especially those underlined are not supported by any iota of evidence not to talk of legally proved evidence. Therefore all what the trial court found and apparently adopted by the Court of Appeal, are conclusions not based on evidence F and in my view highly speculative. This is not in accord with what this court said in the case of Akpabio V. The State (1994) 7 NWLR (pt 359) 635 at 669 - 670 where Iguh JSC said:-

"The point must be stressed that it is a fundamental principle of G law that findings of facts of a trial court should be based on evidence adduced before the court and not on speculations or possibilities. See State v. Aibangbee & Anr (1988) 2 NSCC 192; (1988)3 NWLR (part 84) 548. It is not the function of a court of law to speculate on possibilities H which are not supported by any evidence. See State V Ibong Udo & Anr (1964) 1 All NLR 243 Queen V Gabriel Adaoju Wilcox (1961) All NLR 631 and Iteshi Onwe V State (1975) 9-11 SC 23 at 31. No trial court is entitled to draw conclusion of a fact outside the available legal evidence



before it".

*In the light of what I said above, I would now consider issue 1 first. It is trite law that a court trying a criminal case must consider all the defences raised by the accused and all other defences which surfaced in the evidence before the court however slight or minor. See Akpabio V The State (1994) 7 NWLR (pt 359) at 671; Oguntolu V The State (1996) 2 NWLR (part 432) 503 at Adebayo V The Republic (1967) NMLR 391.*

I will start with the defence of intoxication which was in my view adequately dealt with by the lower courts and my learned brother Ogundare JSC. It is very clear from the record that although the appellant said in his testimony at the trial and in his cautioned statements Exhibits 'B' and 'C' that he was unconscious when he was brought to the police station Awka, he did not raise or rely on intoxication as a defence. The learned trial judge must have picked that defence up from the evidence of P.W. 2 Aminu Bello who, in cross-examination on page 37 of the record said:-

*"We were able to tie the accused because at that time he was drunk. When I came to the police station I told police so... The accused was not able to resist because he was drunk .....The accused was Their (sic) talking without control. We took the accused to the Police without resistance".*

The appellant did not say anywhere in his statements to the police or his testimony in court that he was drunk at the material time nor anything to suggest that. The only thing he said was that he was unconscious when he was brought to the police station and when he regained consciousness, he asked the police what brought him to the police station. This cannot be taken to be any act or conduct of drunkenness. Apparently P.W.2 was only expressing an opinion when he attributed the drunkenness on the appellant because according to him, the appellant was talking without control and did not resist arrest. In my view, none of these acts or signs is capable of fully showing or proving that a person is drunk. The police, who were told this by P.W.2, did not take the appellant for any medical test for alcohol and the appellant did not request for same. Furthermore, the appellant did not in his defence raise any defence of

drunkenness or intoxication and I do not find it necessary to consider that defence in this appeal having regard to the evidence. I therefore agree with the courts below that the defence of intoxication is not available to the appellant.

B I now come to the defence of self-defence and the defence of property.

The substance of the appellant's defence was that when he was waylaid and attached by three persons including the deceased, the sum of N3000.00 and his Seiko wrist watch were forcibly taken away from him in the course of which he had to use his dagger on the deceased to defend himself. This is what he said in his first caution statement to the police (Exhibit 'B') page 22 of the record:-

"I was coming from Mohammed's house at Dike Street Amikwo Awka, where I went to collect money from my master whose name is Alhaji Abaraka the sum of three thousand naira (N3,000.00) which he gave me that evening and left to Maiduguri in the morning time. As I was going to keep that money at one Alhaji musa that those people attacked me to made (sic) away with my money, which numbered three people, during the struggle with these people that they pushed me down and searched me and collected that my money and one Seiko wrist Watch valued at about five hundred naira (N500.00) .....".

(underlining mine)

F In his second statement to the police (Exhibit 'C') on page 24 of the record, the appellant said:-

"I took off from Mohammed's house heading towards Alhaji Musa in order to go and eat food. Then on my way going, I was also of the view that I will go and keep the money on me after eating food in Alhaji Musa's house. But on my way three men emerged from no where and started beating me, one of them was standing from one side of the road while the other two stood one side. I never knew that they stood with bad intention. They beat me and one of them hit me on the head while the other cut me with a knife on the hand. The deceased started searching me and finally removed the sum of N3,000.00 three thousand naira and made away with the money and my Seiko 5 wrist watch. I was

*shouting at them thief thief, then I removed my dagger and use it on him". (underlining mine)*

In this evidence at the trial (page 52 of the record) he had this to say on what happened to him:-

*"As I was going to Alhaji Musa's house 3 persons beat me and I felt down. I held one of them and started shouting thief thief. At that time I was beaten up and people were coming out and I lost consciousness on account of the beating. One of those beating me put his hand into my pocket and I held one of them. They took away my money and a wrist watch seiko 5. When they snatched the watch from my hand it pained me and blood started to flow from my body. I was injury on the wrist and on my finger and one of my eyes".*

He went on to say on page 53 of the record that:-

*When I was going to Alhaji Musa's house three persons waylaid me on the road beat me up and took my money the sum of N3000.00. They took it with my wrist watch seiko five. Before they beat me up I had a knife with me. I had a knife me (sic) because as we control the herd of cattle any one about to die we kill it in order to sell it. As they were beating me they injured me in the eye and blood was rushing out so I took out the knife and waived it to defend myself".*

From the above quotations of the evidence and the caution statements of the appellant which were admitted at the trial, the appellant has stated clearly what happened to him on the night in question. He called no witness in support of this and since he is a competent witness in his defence the trial court must consider it as his defence. Unfortunately the learned trial judge did not consider in detail the defence of self-defence or defence of property raised by the appellant in the above quoted statements. He only said in his judgment that since the appellant came to the deceased's house in the middle of the night where the incident happened, the issue of being waylaid is an after thought. And also since P.W.5 testified that the appellant could not take him to the house of his master Musa from where he (appellant) got the money, the appellant must be telling a lie. The learned trial judge was in my view wrong to refuse to consider other aspects of the appellant's evidence and statements in de-

termining whether he has a good defence or not which he has a duty to do. In Asanya v The State (1991) 3 NWLR Part 180) 422 at page 452, Nnaemeka-Agu JSC said:-

"Obviously the course taken by the learned trial judge touched  
 B on at least two fundamental principles in our administration of justice;  
 namely that the court must consider every defence open to an accused on  
 the evidence and that whole account which a person gives of a transac-  
 C tion must be taken and considered as a whole. He could not therefore  
 take the unfavourable parts of the appellant's statement in the case and  
 refuse to consider the defence open to him on the same statement."

The Court of Appeal on the other hand considered the various defences  
 open to the appellant according to the evidence but here again, Ubaezonu  
 JCA who delivered the leading judgment relied solely on the findings of  
 D the learned trial judge particularly on self-defence and of property. He  
 however dealt with the defence of provocation and intoxication in some  
 detail and came to the conclusion that neither of the defences are avail-  
 able to the appellant. I agree with him to a large extent on this.

E From the legally proved facts which I have elicited above, there  
 is no apparent reason why the appellant should kill the deceased. There  
 was no previous quarrel or misunderstanding between them and none  
 could arise from the facts. The appellant would therefore have no inten-  
 F tion whatsoever to kill the deceased. And although motive is not a sine  
quo non to the offence of murder, sometimes it is necessary for the  
 prosecution to prove it in order to succeed, because evidence of motive  
 is always admissible in order to show that it is more probable that the  
 accused committed the offence charged. See R v. Ball 1911 A. C. 47 H.  
 G L; R v. Buckley 13 Cox 293. Therefore since the appellant did not stab  
 the deceased as a result of any altercation in his house, and there was  
 nothing to indicate motive or premeditation to kill deceased on his part,  
 what happened that night must have been sudden and unexpected. There  
 H was no eye witness to what has happened that night and the only evi-  
 dence of what transpired was what the appellant told the police in his  
 caution statements Exhibit 'B' and 'C' and what he told the trial court in  
 his evidence at the trial. I have already in this judgment set out the

substantial parts of these peices of evidence which in my respectful view should be considered in the defence of the appellant except where there is any other evidence to the contrary or inconsistent therewith.

In Exhibit 'B' which was recorded on the day of the incident when the facts were fresh in his mind, the appellant said he collected the N3,000.00 in Mohammed's house and was going to Alhaji Musa's house to keep the money, when he was attacked by three persons who beat him up and in course of the struggle and encounter, took away the money N3,000.00 and his Seiko 5 wrist watch. In the process of the attack, he was injured on the thumb and he "matchetted" one of the men with his dagger. In Exhibit 'B' but added that he attackers beat him on the head and cut him with a knife on the hand. He also admitted removing his dagger and used it on the deceased. In his evidence at the trial, the appellant stated clearly that he got the N3,000.00 from one Mohammed Wal-da-had and was going to Alhaji Musa's house to give his brother the money to keep when he was waylaid by the three men, who beat him up until he was unconscious and in the process took away the money and his Seiko 5 wrist watch. He said he was injured on his wrist, finger and eye as a result of which he took out his knife and "waived" it to defend himself. It is significant to observe that in each story of the appellant, he said he collected the money from either Mohammed or from his house; that he was going to keep the money in Alhaji Musa's house when he was attacked; that as a result of the attack his N3,000.00 and his Seiko 5 wrist watch were taken away by his attackers; that he was beaten up by the attackers and injured on the wrist, thumb and finger.

Exhibit 'B' and 'C' were properly tendered and admitted at the trial through P.W. 7 and P.W. 9 respectively. I have carefully examined Exhibit 'B' and 'C' and find that the contents of neither of them is substantially inconsistent with the evidence of the appellant at the trial. I find therefore that the learned trial judge was not justified in holding that the appellant was telling a lie. Having so found, it appears to me very clearly that the appellant has raised the defences of self-defence and defence of property and has elicited relevant evidence in support thereof. It is up to the prosecution to produce evidence to negative it as in the case of alibi

see Adedeji v The State (1971) 1 All N.L.R. 75. And in Archibold, pleading, Evidence and Practice in Criminal cases 14th Edition, the learned author in paragraph 2472 says:-

"Where a defence of self-defence is raised, the burden rests on the prosecution of negating it, but the prosecution are not obliged to give evidence in chief to rebut a suggestion of self-defence before that issue is raised or indeed to give any evidence on that issue at all".

In this case the issue of self-defence would appear to have been raised in Exhibits 'B' and 'C' first which were in full possession and control of the prosecution. Therefore they have a duty to investigate the matter fully and give evidence on it with a view to negative it. In this case, the prosecution did nothing. The only evidence given in that direction was that of Inspector Onuoha, P.W. 5, who on page 42 of the record said:-

"At the time of arrest the accused told me that his master by name Musa gave him sum of N3,000.00. I later found this story to be false. This is because I asked the accused to make (sic) me to his master Musa and he the accused told me that he could not trace his master's house or the business place of the master".

In the first place P.W. 5 was not referring to any statement made by the appellant in either Exhibit 'B' and 'C', and in the second place, even if he was, in neither Exhibit 'B' nor 'C' did the appellant say that he got the money from Alhaji Musa. Therefore even if what P.W. 5 said was taken to be true, it did not go to affect anything contained in Exhibit 'B' or 'C'. Indeed throughout the trial, the appellant was not asked or cross-examined on the N3,000.00 or the wrist watch, and no further efforts were made to investigate the contents of Exhibits 'B' and 'C' in order to negative or challenge them.

It is trite that under our criminal law, an accused person can properly claim the defence of self-defence where, as in this case, the accused admits that he did the act which caused the death of the deceased but was justified in doing so to protect his own life and would have been killed or was in such fear when he committed the act.

In this case, the appellant admitted stabbing the deceased with his dagger (Exhibit A) which according to P.W. 8 caused the death of the

deceased. In his caution statements and in his evidence at the trial, the appellant said that he was attacked at night by three persons who beat him up until he was unconscious, took away his N3,000.00 and Seiko 5 wrist watch and injured him wrist and finger. There was evidence of his being unconscious soon after the attack when he was brought to the police station in a wheel barrow and there was evidence by P.W. 7 that he had some bruises on his hand at that time. The appellant also said that he used the dagger to defend himself both in Exhibit 'C' and in his testimony in court.

In Archibold, 14th Edition referred to earlier, in paragraph 2470 on self-defence, the learned author on page 1239 said:-

*"Where there has been an attack so that defence is reasonably necessary, it should be recognized that a person defending himself cannot weight to a nicety the exact measure of necessary defensive action. If a jury is of the opinion that in a moment of unexpected anguish the person attacked did only what he honestly and instinctively thought was necessary, that should be regarded as most potent evidence that only reasonable defensive action was taken. Palmer v R (1971) A.C. 814."* (underlining mine)

This means that where there is an attack as in this case, and the person attacked must defend himself, the measure of defensive action must be that which the jury, in this case the court, believes that the person attacked honestly and instinctive thought was necessary. They appellant was attacked in the night by three persons; he was beaten up and his properties removed from his body and he was injured. He then used his dagger to attack one of the aggressors. I am of the opinion that he did so "honestly and instinctively" in self-defence. Still under the paragraph on self-defence, the learned author of Archibold added:-

*"Where a person who was attacked uses a greater degree of force than was necessary in the circumstances and thereby kills the aggressor, and the jury accordingly reject a defence of self-defence, a verdict of manslaughter may in some cases still be open to them ..... However, the facts on which the defence of self-defence was unsuccessfully sought to be based may in some cases*

*go to show that the defendant acted under provocation or that, although acting unlawfully, he lacked the intent to kill or to cause grievous bodily harm and in such cases a verdict of manslaughter would be proper".*

This means that in the circumstances of this case, even if the defence of self-defence is rejected, the appellant may still be convicted of the lesser offence of manslaughter. Again where the accused had no intention to kill or cause grievous bodily harm as in this case, and the facts proved show that he acted under provocation, but fell short of proving self-defence, the accused could be found guilty of manslaughter Only. In this case the appellant was shown to have no intent to kill the deceased; infact he said he did not know any of his attackers. He must have been provoked in my view by such a sudden attack in the night by 3 men. This situation alone, according to the learned author of Archibold may entitle him to a verdict of manslaughter. I agree with this proposition in the circumstances of this case and I so hold.

The Court of Appeal as I said earlier very heavily on the findings of facts by the learned trial judge and held that the appellant's story was rightly disbelieved by the trial court. As a result of this, it rejected all the possible defences raised by the evidence in favour of the appellant. Infact, the Court of Appeal did not even consider the defence of self-defence in its judgment. While I agree with them that the appellant would not be entitled to defences of provocation and intoxication, I do not, for the reasons I stated earlier, agree with them that the appellant would not be entitled to the defence of self-defence and defence of property in the circumstances of this case.

I now come to the evidence of P.W. 2 Aminu Bello, where he said on page 36 of the record:-

*"I asked the accused person what the matter was and he told me the deceased abused me and I stabbed him."*

This piece of evidence to my mind has also afforded the appellant another opportunity of raising the defence of provocation. Although in law words alone may not in all cases amount to or constitute provocation, it has been held that in some particular cases, they can. This of course depends on the words used and what they mean defending on the cus-



tom or background of the person on whom the words are used. See Alonge v A. G. Western Nigeria (1964) 1 All NLR 115. In this case, it was not stated in the evidence which words were used in abusing the appellant and the appellant was never cross-examined on this. It is not possible therefore to determine whether or not they are sufficient to raise the defence of provocation. I hold therefore that this piece of evidence has no effect on the defence of the appellant in this case.

I cannot end this judgment without expressing a very strong view that this case was very badly investigated and prosecuted. The result was that the learned trial judge had to deal with half-baked evidence which left him with having to assume, presume and speculate on certain evidence and circumstances. With proper investigation by the police, this could have been a straight forward case one way or the other. There are also a lot of irregularities in the investigation and prosecution of this case which could have marred and vitiated the whole trial. Take for example the caution statement of the appellant Exhibit 'B' which was recorded by P.W. 7. P.W. 7 testified that the appellant volunteered a statement in Hausa, but he recorded the statement in English instead of taking it verbatim in Hausa and translating it later into English. Not only that if one examines the statement, one finds that he started writing what the appellant was saying in the first person singular pronoun, then he changed to reported speech in the 3rd person pronoun. (he was shouting - they were beating him - they gave him injury e.t.c). This was improper and should not have been done in a criminal case of this magnitude. In my view, a caution statement to be reliable must be recorded in the language of the accused and then translated into the language of the court. If it becomes necessary to record it into the English by automatic or direct translation from the language spoken by the accused, then it must be done in the first person singular and not in the form of a reported speech. See Queen v Sapele & Ors (1957) 2 F.S.C. 24.

From all what I have said above, I answer issue I in the affirmative to the extent that the appellant was entitled to the defences of self-defence and defence of property under the facts and circumstances of this appeal. Issue 2 will therefore have to be answered in the negative.

I have earlier found in this judgment that the trial court and indeed the Court of Appeal have made findings of facts which in my view were wrong in that they failed to properly evaluate the evidence on the issues particularly as regards the evidence adduced by the defence. It is  
B my respectful view therefore that basis exists for this court to interfere with these findings which I consider to be perverse in the circumstances.

In sum, and in all the circumstances of this case, I am able to say that on the proved facts before the trial court, defences of self-  
C defence and defence of property are sufficiently available to appellant. I therefore find the appellant guilty of manslaughter only and convict him accordingly. In the result, I allow this appeal, set aside the conviction and sentence passed on the appellant by the trial court and affirmed by the Court of Appeal and in substitution for the sentence of death, I hereby  
D pass a sentence of ten years imprisonment on the appellant.

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