

SUPREME COURT OF NIGERIA
4TH JUNE, 1999. SC. 13/1998
CORAM: M. L. UWAIS CJN, A. B. WALI, A. I. IGUH, S. O.
UWAIFO, A. O. EJIWUNMI, JJSC.

JONAS EFFIA	APPELLANT
V.		
THE STATE	RESPONDENT

EVIDENCE - Evaluation of evidence - Contradiction - In the evidence of prosecution witnesses - For it to be fatal - The contradiction must be fundamental to the main issues in question.

MURDER - Defences - Provocation - The defence cannot be available to the appellant - When it was he that attacked the deceased a second time.

MURDER - Evidence - Witnesses - Evidence of witnesses whose evidence may be tainted - How treated by the court.

FACTS

At the Ogoja Division of the High Court of Cross-River State, the appellant was charged with murder. At the trial the prosecution called three witnesses. The first two witnesses (P.W. 1 and P.W. 2) are brothers. On the 3rd of March, 1983 P.W.1, P.W.2 and the deceased with some other persons were all gathered at the grave side of the mother of P.W.2. It was at this stage that a young boy came to the place with a bottle of wine and asked that the deceased should pour wine over the grave. The appellant started to struggle with the deceased over the bottle of wine. A fight ensued between them. The people who were there separated the fight. After they were separated every one returned to their seats but the deceased resumed his seat by the grave side. It was shortly after this that the deceased was heard shouting that the appellant had murdered him. And as the deceased was so shouting, the appellant took

to his heels with a penknife which had blood on it. When the P.W. 1 and others got to the scene, a stab wound was found on the neck of the deceased from where he was bleeding. P.W. 2 was then sent to report the incident to the police. The appellant in his defence admitted that he had a fight which resulted in the death of the deceased. But his contention remained that he had one continuous fight with the deceased. He claimed that the deceased refused to pour the drink he brought to the ceremony over the grave. And the deceased refused to return the drink to him at his demand. But rather that the deceased attacked him with a bottle of native gin which made him to grapple with the deceased. He claimed that the deceased stabbed him with a penknife which got stuck on his face. He then removed it and used it on the deceased.

At the conclusion of trial, the learned trial judge in a reserved judgment found the appellant guilty of the offence of murder. He was thereafter sentenced to death by hanging. The appellant then filed an appeal to the Court of Appeal, which court dismissed his appeal. He has now further appealed to the Supreme Court raising a lone issue.

ISSUE FOR DETERMINATION

Whether, in view of the nature and quality of evidence adduced by the prosecution, the Court of Appeal did not err by holding that the trial judge rightly convicted and sentenced the appellant to death for murder.

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

Murder - Evidence

1. It is the contention of learned counsel for the appellant that the learned trial judge was wrong to have relied on the evidence of PW 1 and PW 2, who are not only brothers of the deceased, but are also related to the deceased. While he conceded in his brief that the learned trial judge cautioned himself on relying upon the evidence of witnesses whose evidence may be tainted, yet he urged this court to hold that the trial court should not have accepted their evidence. It is my respectful view that the learned trial judge adverted adequately to the legal position with regard to such witnesses and duly warned himself of the danger of placing

reliance upon the evidence of PW 1 and PW 2. Having done all that he needed to do before accepting their evidence, I do not consider that there is merit in the complaint of the appellant in this regard. (p. 1755 D)

Murder - Defences - Provocation

2. From the evidence and the clear analysis of the sequence of events by the learned trial judge of what happened before the deceased died, I must reject the argument advanced for the appellant that the learned trial judge was wrong to have held that the fight was not a continuous fight. In my respectful view the defence of provocation cannot also be available to the appellant in view of the clear finding of the learned trial judge that it was the appellant who attacked the deceased a second time when the deceased was killed. (p. 1757 A)

Evaluation of evidence

3. It is pertinent to state that it is settled law that for any conflict or contradiction in the evidence of prosecution witnesses to be fatal to the case, the conflict or contradiction must be fundamental to the main issues in question before the court. See Onubogu & Anor v The State (1974) 1 ALL NLR (Pt.11) 5; Nasamu v The State (1968) NMLR 86; Enahoro v Queen (1965) 1 ALL NLR 125; Ibe v State (1992) 5 NWLR (Pt. 244) 642 at 649; Namsoh v State (1993) 5 NWLR (Pt.292) 129. In the instant case, the contradiction and inconsistencies harped upon by the learned counsel for the appellant are in respect of the evidence of PW1 & 2 on the one hand, and between PW 2 & PW 3. I have earlier on reviewed the evidence of PW 1 and PW 2 and cannot find such conflict in their testimonies to lead me to hold that their evidence cannot support the proof of the guilt of the appellant. The contradiction, between the evidence of PW 2 & PW 3 about whether it was the appellant who gave the knife, the murder weapon, to the police or it was PW 2 is in my view immaterial in the face of the evidence of the appellant himself who admitted that he gave the knife to the police. It is not every discrepancy or contradiction in the evidence of the prosecution witnesses that would lead to the rejection of such evidence. It must be shown that the

contradiction and inconsistencies in their evidence are so material that grave doubts are cast on the case of the prosecution. (p. 1757 D)

REPRESENTATION

B N. I. Quakers for the appellant
Respondent not represented

CASES REFERRED TO

- C Ebba v Ogoto (1984) 4 SC at pages 90-91; (1984) 1 SCNLR 372
Onwugbufo v Okoye (1996) 1 NWLR (Pt. 424) 252 at 289
R v Mcpherson (1957) 41 CR APRR 213
Onubogu v The State (1974) 1 ALL NLR (Pt.11) 5
Nasamu v The State (1968) NMLR 86
D Enahoro v Queen (1965) 1 ALL NLR 125
Ibe v State (1992) 5 NWLR (Pt. 244) 642 at 649
Namsuh v State (1993) 5 NWLR (Pt.292) 129
Ugwumba v. The State (1993) 5 NWLR (pt. 296) 660
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LEAD JUDGMENT BY EJIWUNMI JSC

Upon an information filed by the State at the Ogoja High Court Division of the High Court of Cross-River State, the appellant was charged
F with the offence of murder. His plea was taken, and the appellant pleaded not guilty. In support of its case, the State called three witnesses. At the end of the case for the prosecution, the appellant gave evidence on oath on his own behalf. The learned trial Judge, following the addresses of counsel for the appellant and the State, delivered a reserved judgment.
G For the reasons given in that judgment, the appellant was found guilty of the offence of murder. He was thereafter sentenced to death by hanging.

The appellant then filed an appeal to the Court of Appeal against the judgment and orders of the trial court. His appeal was dismissed.
H The appellant has now appealed to this court against the judgment of the Court below. Upon the ground of appeal filed, the only issue identified in the appellant's Brief of Argument for the determination of this appeal is whether, in view of the nature and quality of evidence adduced by the

prosecution, the Court of Appeal did not err by holding that the trial judge rightly convicted and sentenced the appellant to death for murder.

It must be noted that no respondent's Brief of Argument was filed on behalf of the State. There is evidence, however, that appellant's Brief of Argument was delivered to the Ministry of Justice of the former Cross-River State at Uyo; Via the Services of DHL World Wide Express, at the instance of the learned counsel for the appellant, Mr. Olisa Agbakoba SAN. When the appeal was called for hearing on the 11/3/99 the appellant's counsel was absent. The respondent was also not represented by counsel. In view of the rules of this court, it was decided to hear the appeal on the appellant's brief.

At the trial, the prosecution called three witnesses. The first two witnesses who are brothers, were PW 1, Oregi Effia, and PW 2, Mbam Effia. PW 1 said that on the 3rd of March, he was with PW 2 and Ugow Effia, the deceased. They were all gathered with some other people at the graveside of Obeji Effia, the mother of PW 2. While they were so gathered, a young boy came to the place with a bottle of wine and asked that the deceased should pour wine over the grave of the deceased's mother. Just as the bottle of wine was brought, the appellant started to struggle with the deceased over the bottle of wine. In the course of the struggle, the appellant picked a stone with which he hit the deceased on the mouth and blood gushed out of the deceased's mouth. The deceased then hit the appellant on the forehead with an empty bottle of Mirinda. At that stage, the people who were there separated them. After they were separated, everyone including the witness and the appellant returned to their seats. Apparently, they continued with their drinking. But he noticed that the deceased resumed his seat by the graveside. Shortly after they had all resumed their seats as aforesaid, he heard the deceased shouting, "Jonas has murdered me", "Jonas has murdered me". And as the deceased was so shouting, he Jonas the appellant, took to his heels with a penknife which had blood on it. He did not know when the appellant left them where they were all drinking. The witness with others, then rushed to where the deceased was, a distance of about 60 yards from where they were. He claimed that when he came to the deceased,

he saw a stab wound on his neck and from where he was bleeding. PW 1 said that he spoke to him but there was no response as he was already dead. He then sent PW 2, Mbam Effia to go and report the incident to the police. He sat with others beside the corpse, kept a vigil, until the police arrived there the next day with the appellant.

Mbam Effia, who gave evidence as PW 2, said that on the 3rd of March, 1983, he was busy entertaining his visitors. This was in connection with the burial ceremonies of his late mother. It was while he was with his visitors that he heard the sound of people panicking and running. He then came and was told that his brother had been killed. He ran to the scene, where he saw that his brother (the deceased) had been stabbed on the left side of the neck. He was bleeding profusely from the wound. He claimed that he talked to the deceased who told him that Jonas had stabbed him. The 3rd and last witness for the prosecution was Sgt. Kieran Uwum, attached at the time to the Divisional Crime Branch, Ogoja. He gave evidence of the investigation he conducted after the case was referred to him. He said that in the course of his investigation, he visited the locus in quo where he saw the deceased. He saw a wound on his neck from where blood was coming out. He subsequently charged and cautioned the appellant in the English language. The appellant made a statement in the English language, which the witness recorded. The statement was read over to the appellant and he agreed that it was correctly recorded. He therefore signed it. The statement was tendered at the trial court and admitted as Exhibit 1. The penknife which had blood stains on it, and allegedly used in stabbing the deceased, was tendered as Exhibit 2. The 3rd PW, further said that Post-Mortem examination was carried out on the body of the deceased by Dr. O.A.K. Sani. The Doctor who was at the time serving his youth Corps program there had since left the state. As his whereabouts were not known, he was unable to give evidence at the trial.

The appellant who gave evidence at the trial admitted that he had a fight which resulted in the death of the deceased. But his contention remained that he had one continuous fight with the deceased. He admitted also that he went to the scene to honour the deceased being his-in-

law. He also admitted that he brought a bottle of Champion beer to the ceremony for libation to be poured on the grave. He claimed that the deceased refused to pour the drink over the grave. He then went to the deceased to collect his bottle of drink. But the deceased refused to return it to him. The appellant said that the deceased then hit him with a bottle B containing native gin which the deceased had with him. That annoyed the appellant, and he then grappled with the deceased who threw him on the ground. Appellant then claimed that it was while he was in that position that the deceased brought out a penknife from his pocket with which he stabbed the appellant. According to the appellant, the penknife C got stuck on his face. He then removed it and used it on the deceased. After he had stabbed the deceased, the deceased released his grip on him, and the appellant then ran away.

The argument proffered for the appellant in the appellant's brief D is directed mainly at the evaluation of the evidence led at the trial. **It is the contention of learned counsel for the appellant that the learned trial judge was wrong to have relied on the evidence of PW 1 and PW 2, who are not only brothers of the deceased, but are also related to the deceased. While he conceded in his brief that the learned trial judge cautioned himself on relying upon the evidence of witnesses whose evidence may be tainted, yet he urged this court to hold that the trial court should not have accepted their evidence.** F Argument similar to the above was canvassed before the Court. Akanbi, PCA dismissed the argument thus at page 83 of the records, and I quote:-

"The simple answer to this argument or submission is that it is beyond the duty of the court to substitute its view for that of the trial Judge who saw and heard the witnesses. It is settled law that the ascription of probative value to the evidence of witnesses is pre-eminently that of the trial court and unless his finding is not backed up by evidence, or is perverse, it ought not be reversed." G

That statement of the learned president of the Court of Appeal is H undoubtedly good law. See Ebba V Ogodo (1984) 4 SC at pages 90-91; (1984) 1 SCNLR 372; Onwugbufor V Okoye (1996) 1 NWLR (Pt. 424) 252 at 289. I have also had the benefit of reading the record where the

learned trial judge dealt with that compliant made for the appellant. **It is my respectful view that the learned trial judge adverted adequately to the legal position with regard to such witnesses and duly warned himself of the danger of placing reliance upon the evidence of Pw 1 and PW 2. Having done all that he needed to do before accepting their evidence, I do not consider that there is merit in the compliant of the appellant in this regard.** It is also argued for the appellant that if the learned trial judge had properly evaluated the evidence of these two witnesses with the evidence of the appellant, he would have held that the fight which led to the death of the deceased was one continues fight. By that contention made for the appellant, learned counsel also argued that the defence of provocation would have been available to the appellant. This is based on the principle that the onus of proving absence of provocation rests on the prosecution throughout. See R V Mcpherson (1957) 41 CR APRR 213.

On this contention of the learned counsel for the appellant, I need to refer to the portion of the judgment of the trial court where the learned trial judge considered the question. At page 32 of the record, the learned trial judge, said:-

"From the evidence before me, I do not believe that the fight was a continuous one, I accept PW 1's evidence that the fight stopped, and the celebrants dispersed. Therefore, the accused still exasperated by deceased's action in not using his wine to pour libation attacked the deceased the second time and stabbed the deceased to death. In fact, it would be strange having regard to human conduct, if sympathizers were to stand by and watch a fight at graveside without intervening to stop the fight. Hence, I am convinced that the fight was stopped. I therefore find as a fact that after the accused and deceased were first separated, the accused who was controlled by his anger launched another and fresh attack on the deceased and in a most barbaric manner stabbed the deceased on the neck, one of the most vital organs of a human body."

It must be borne in mind that the contention being made for the appellant is not that the appellant did not fight with the deceased, but that it was a continuous fight. This contention made for the appellant was

also argued before the court below and it was rejected. **From the evidence and the clear analysis of the sequence of events by the learned trial judge of what happened before the deceased died, I must reject the argument advanced for the appellant that the learned trial judge was wrong to have held that the fight was not a continuous fight. In my respectful view the defence of provocation cannot also be available to the appellant in view of the clear finding of the learned trial judge that it was the appellant who attacked the deceased a second time when the deceased was killed.**

Learned counsel for the appellant in the brief of argument has also complained that the court below should not have affirmed the judgment of the trial court because of the contradiction and inconsistencies in the evidence of the witnesses for the prosecution. This contention now made to this court was also made to the court below which did not find merit in it. **It is pertinent to state that it is settled law that for any conflict or contradiction in the evidence of prosecution witnesses to be fatal to the case, the conflict or contradiction must be fundamental to the main issues in question before the court. See Onubogu & Anor v The State (1974) 1 ALL NLR (Pt.11) 5; Nasamu v The State (1968) NMLR 86; Enahoro v Queen (1965) 1 ALL NLR 125; Ibe v State (1992) 5 NWLR (Pt. 244) 642 at 649; Namsoh v State (1993) 5 NWLR (Pt.292) 129. In the instant case, the contradiction and inconsistencies harped upon by the learned counsel for the appellant are in respect of the evidence of PW1 & 2 on the one hand, and between PW 2 & PW 3. I have earlier on reviewed the evidence of PW 1 and PW 2 and cannot find such conflict in their testimonies to lead me to hold that their evidence cannot support the proof of the guilt of the appellant. The contradiction, between the evidence of PW 2 & PW 3 about whether it was the appellant who gave the knife, the murder weapon, to the police or it was PW 2 is in my view immaterial in the face of the evidence of the appellant himself who admitted that he gave the knife to the police. It is not every discrepancy or contradiction in the evidence of the prosecution witnesses that would lead to the rejection of such evidence.**

It must be shown that the contradiction and inconsistencies in their evidence are so material that grave doubts are cast on the case of the prosecution.

B I have anxiously considered the evidence of these witnesses and do not have any doubts as to their credibility. The common thread that ran through their evidence is that the appellant was the one, and no other, who with a penknife fatally wounded the deceased.

C For all the reasons given above, I am satisfied that the prosecution established the guilt of the appellant beyond reasonable doubt. The appeal is therefore dismissed by me and the judgment and orders of the court below are hereby upheld.

D **UWAIS CJN**

I have had the opportunity of reading in draft the judgment read by my learned brother Ejiwunmi, J.S.C. and I entirely agree with the judgment.

E I too hereby dismiss the appeal and affirm the decision of the Court of Appeal which confirmed that of the trial court.

WALI JSC

F I have had the privilege of reading before now the lead judgment of my learned brother Ejiwunmi, JSC and I agree with his reasoning and conclusion for dismissing the appeal.

G For the same reasons, which I hereby adopt as mine, I also dismiss the appeal and affirm the judgment of the lower court and the court below.

H **IGUH JSC**

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ejiwunmi, J.S.C. and I agree entirely that this appeal has no merit and should be dismissed.

The findings which were accepted by the learned trial Judge and affirmed by the court below are that it was the appellant who without any justification started the fight by attacking the deceased with a stone. After they were successfully separated, both the appellant and the deceased returned to their seats. Subsequently, the appellant, after the expiration of ample time for passion to cool down suddenly launched a second vicious attack on the deceased with a knife and stabbed him to death. Both courts below considered the defences of provocation and self defence raised on behalf of the appellant but, rightly in my view, dismissed them as fictitious.

This appeal is without substance and I, too, dismiss it. The judgment of the trial court as confirmed by the Court of Appeal is hereby further affirmed by me.

UWAIFO JSC

I read in advance the judgment of my learned brother Ejiwunmi JSC and I agree with him that the appeal has no merit. The only issue canvassed on behalf of the appellant is that the quality of the evidence adduced by the prosecution did not warrant his conviction for murder.

The appellant admitted stabbing the deceased to death. The defence he tried to raised was that he did so during a fight with the deceased in which he was acting in self-defence. But the learned trial court held, and this is adequately supported by the evidence, that the appellant acted in retaliation in circumstances which destroy either self-defence or provocation. He in fact found the appellant to be the aggressor. He concluded:

"Having found the accused was all along the aggressor and had attacked the deceased first and resumed the attack after they were separated, I cannot find anything in the evidence which suggests the defence of self-defence."

As regards the defence of provocation, which the learned trial judge considered from the evidence, he said:

"Even if the deceased had annoyed the accused for not pouring

his wine and a fight ensured, he had enough time to cool down after they had been separated. The second vicious, murderous and unprovoked attack by the accused on the deceased who was then sitting down at the graveside which led to the deceased (sic) death on the spot cannot be said to have been done in the heat of passion, and cannot form the basis of a defence of provocation."

These findings of the learned trial judge were accepted by the court below. They are sufficiently justified by the evidence on record. These are concurrent findings of fact which will not be interfered with by this court unless special reasons justify such interference, such as where there is some miscarriage of justice arising from a violation of some principles of law or procedure, or the findings are perverse: see Ugwumba v. The State (1993) 5 NWLR (pt. 296) 660; Ogunlana v. The State (1995) 5 NWLR (pt. 395) 266.

I too have come to the conclusion that this appeal ought to be dismissed, and accordingly I dismiss it.

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