

SUPREME COURT OF NIGERIA

4TH JUNE, 1999. SC.150/1996.

**CORM:- M. L. UWAIS CJN, A. B. WALI, A. I. IGUH, S. O.
UWAIFO, A. O. EJIWUNMI, JJSC.**

AHMADU LADO	APPELLANT
V.		
THE STATE	RESPONDENT

APPEALS - Grounds of appeal - Incompetence - Where no particulars were given - The court was right in striking them out - As incompetent grounds of appeal.

CRIMINAL LAW - Defences - provocation - Gravity of - Provocation cannot be correctly assessed - In isolation from the manner of the community - To which the appellant is a member.

CRIMINAL LAW - Murder - Self Defence - Was rightly held inapplicable in this case - Where the deceased died as a result of the injury he received from the appellant.

CRIMINAL LAW - Provocation - Evidence of - Onus - To prove absence of provocation - Lies on the prosecution.

MURDER - Culpable homicide - Punishable with death - Before the court can convict on such a charge - It must be satisfied that the death - Was the probable consequence of the act of the accused.

MURDER - Culpable homicide - Punishable with death - Possibility of a presumption - One way or the other as to what brought about the clash - Between the accused and the deceased - How to resolve it.

FACTS

The accused was arraigned before the Kaduna State High Court charged with the offence of culpable Homicide punishable with death under section 221 (b) of the Penal Code. It is the case of the prosecution that one Auta Mohammed, the deceased, on the fateful day, in company of his 13 years old sister the P.W. 2 drove their herds of cattle for grazing. It was then that the accused came and hit the deceased with a hoe once on the head below his ear on the right side. The deceased fell down with blood gushing from the wound. The P.W. 2 after seeing what had happened drove the cattle back home and reported the incident to her father, who lodged complaint with the police. The deceased later died at the hospital. The accused was then arrested by the police. The accused in his defence stated that the deceased and P.W. 2 drove their cattle into his farm and destroyed his crops that were yet to be harvested. The accused then accosted the deceased. When the accused demanded compensation for his destroyed crops, a fight ensued between the two in the course of which the deceased raised his stick to hit the accused and the latter warded it off by hitting the deceased with a hoe (Exhibit 2).

At the conclusion of trial, the learned trial judge delivered a considered judgment in which he found the accused guilty as charged and sentenced him to death. The accused appealed against his conviction to the Court of Appeal, Kaduna, which unanimously dismissed his appeal. The accused has now further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"3.1 Whether the learned trial Judge wrongly appraised the evidence on the record and thereby occasioned a miscarriage of justice;

3.3 Whether the defences of provocation and self defence [or private defence] ought not to have been considered and resolved in favour of the Appellant;

3.4 Whether the lower Court ought to have struck out additional ground of appeal number one in the Appellant's Grounds of appeal;

HELD (Unanimously allowing the appeal in part per lead judgment of **WALI JSC**)

Criminal law - Murder

1. There is conclusive evidence that the deceased died on 27th December, 1985 as a result of the injury he received from the appellant. In Exhibit 1A the translated English version of the appellant's statement made under caution Exhibit 1, he stated-

"..... I took my axe and I cut his head, I later told the Fulani man to go home when blood started gushing out."

This evidence was confirmed by P.W. 2, Karimatu Alhaji Mohammed, who was the only eye witness to the incident. The learned trial judge was right in my view to rule out the applicability of self-defence in the light of the evidence before him; and the Court of Appeal was also right to have affirmed that finding - See Diala Amako v. The State [1995] 6 SCNJ 23 and Ejionwu v. The State [1995] 4 SCNJ 23. The fact that the appellant denied in his evidence viva voce that he hit the deceased with Exhibit 2 which was interchangeably being called a hoe or an axe would neither belie nor destroy the weight and credibility of Exhibit 1A.

(p. 1736 B)

Murder - Culpable homicide

2. Before the court can convict on a charge of culpable homicide punishable with death, it must be satisfied on the whole of the evidence, including any explanation offered by the accused, that the death was the probable consequence of the act of the accused. It will be sufficient to acquit the accused for culpable homicide punishable with death if the evidence adduced raises such a possibility of existence of circumstances entitling him to the benefit such that the court feels it cannot safely disregard.

(p. 1739 G)

Criminal law - Defences

3. The gravity of the provocation as stated above cannot be correctly assessed in isolation from the manner or life of the community to which the appellant is a member. (p. 1740 H)

Culpable homicide punishable with death - Possibility of a presumption

4. Where there is possibility of a presumption one way or the other as to what brought about the clash between the accused and the deceased, as B in this case, the presumption is that the deceased must have been the aggressor see R. v. Amadu Adamu 10 WACA 161. (p. 1741 B)

Provocation - Evidence of

C 5. Once there is evidence of provocation either from the prosecution or from the defence, the onus is on the prosecution to prove absence for such provocation. See R. v. McPherson [1957] 41 Cr. app R 213. (p. 1741 E)

Appeals - Grounds of appeal

D 6. The 1st ground complained of delivering the judgment by the learned trial judge outside the three months period. No particulars were given. As for the 2nd ground the complaint was that the learned trial judge after E convicting the appellant under section 221(b) of the Penal Code, did not pronounce the sentence of death. Here again no particulars were given. The Court of Appeal was therefore right in describing these two additional grounds as "mere statements of general nature, vague and disclosing F ing no reasonable ground of appeal" and consequently striking them out. (p. 1741 F)

NOTABLE POINTS OF INTEREST

WALI JSC

G 1. *How to correctly assess the gravity of provocation*

Considering whether the provocation was enough to make a reasonable man do as the appellant did, it is relevant to compare the acts or things done which are put forward as provocation with the nature of the acts H committed by the appellant. It must be shown that there was instant provocation, negating the possibility of deliberation or craft or choice of alternatives. The explanation given by the appellant both in his evidence and Exhibit A1 coupled with the evidence given by P.W.2 was that

on the day of the incident the deceased was carrying a stick and that for no reason the appellant who was described by her as sane and normal, just emerged from nowhere and struck the deceased with an axe or a hoe - Exhibit 2 deserve close consideration. The evidence when considered as a whole gives more credence to the appellant's story. It also gives more support to the presumption that the deceased was the aggressor. To destroy the crops in the farm of a person with the appellant's background socially and educationally, followed by a threat of violence with a stick, is in my view such a grave and sudden provocation as to deprive him of self control and cause him to react in the manner he did. He was enraged at the site of the cattle in his farm and the extent of the destruction caused to the crops therein. To worsen the situation, he was threatened by the deceased with a stick. Although the appellant used deadly weapon on the deceased, the evidence did not conclusively show that he intended to kill. See the Queen v. Effiong Okon Eyo & Ors. [1962] ALL NLR 510. (p. 1740 B)

2. *Credibility of a witness*

The trial court should also have taken note of the fact that P.W. 2 was not only a sister to the deceased but also a minor at the time of giving evidence, in coming to his conclusion. (p. 1741 A)

3. *Grounds of appeal filed by the appellant from prison - Duty of counsel to amend*

Grounds 1, 2, 4 and 5 of the original grounds are also vague as described by the learned Justices of the Court of Appeal. These were the grounds filed by the appellant himself from prison. It was the duty of learned counsel for the appellant to have had a look at them and make necessary amendments, and this he failed to do. The Court of Appeal was right in striking them out as incompetent grounds of appeal. (p. 1741 H)

UWAIS CJN

4. *Need for a trial judge to consider all possible defences available to the accused*

In a trial for culpable homicide punishable with death, a trial judge is bound to consider all the possible defences available to the accused in order to be sure that the offence charge has been proved beyond reasonable doubt. In the present case, the defence of provocation which is capable of reducing the offence charged to culpable homicide not punishable with death, pursuant to section 222 subsections (2) and (4) of the Penal Code of Kaduna State, had not been sufficiently considered by the lower courts. (p. 1742 F)

UWAIFO JSC

5. *Consequences of a trial court overlooking a crucial evidence*

When a crucial evidence in a criminal case is overlooked or misunderstood by a trial court, it is likely to lead to a miscarriage of justice. This is because the appellate court, in considering a complaint by the accused against the judgment reached on that basis by the trial court, may be unable to say what the decision would have been had the trial court given proper consideration to such evidence. That then creates a reasonable doubt as to whether the decision is correct; and the doubt ought accordingly to be resolved in favour of the accused. That is the doubt that has arisen in this case which has to be resolved in favour of the appellant. (p. 1744 G)

EJIWUNMI JSC

6. *Definition of provocation*

In R v. Afonja (1955) 15 WACA 26, the West African Court of Appeal accepted the definition propounded by Devlin J. in R. v. Duffy (1949) 1 ALL ER 932:-

"Provocation is some act or series of acts done by the deceased to the accused which would cause in any reasonable person, and actually does cause in the accused, a sudden and temporary loss of self control, rendering the accused so subject to passion as make him for the moment

not master of his mind."

However, it is also my view that the definition of provocation given above, must be considered in the light of the particular facts and circumstances of the case under consideration. These include, among other things, the station in life of the person and the society in which he lives. See R. v. Akpakpan (1956) pages 1 & 2; R. v. Adekanmi (1944) 17 NLR 99. (p. 1747 C)

REPRESENTATION

Tunde Fagbohunlu for the appellant

No appearance for the respondent

CASES REFERRED TO

Amako v. The State [1995] 6 SCNJ 23

Ejionwu v. The State [1995] 4 SCNJ 23

R. v. Adamu 10 WACA 161

R. v. McPherson [1957] 41 Cr. app R 213

Queen v. Eyo [1962] ALL NLR 510

R. v. Duffy (1949) 1 ALL ER 932

R. v. Akpakpan (1956) pages 1 & 2

R. v. Adekanmi (1944) 17 NLR 99

STATUTES REFERRED TO

Penal Code, ss 221 and 222

Sudan Penal Code. s. 249(1)

LEAD JUDGMENT BY WALI JSC

Ahmadu Lado was arraigned before Usman Mohammed, J then of the Kaduna State High Court charged with the following offence:- H

"That you Ahmadu Lado, on or about the 27th day of December, 1985 at Tugen Village, Malumfashi Local Government Area of Kaduna State, did commit culpable Homicide punishable with death in that you

caused the death of Auta Mohammed by hitting him on the head with a hoe with the knowledge that his death would be the probable consequence of your act and thereby committed an offence punishable under section 221[b] of the Penal Code."

B The charge was read and explained to him and he pleaded not guilty. The case proceeded to trial with both sides calling witnesses and testifying. I shall, in the course of this judgment refer to such evidence where necessary.

C At the conclusion of the trial, the learned trial judge delivered a considered judgment in which he found the accused guilty as charged and sentenced him to death.

The accused person appealed against his conviction to the Court of Appeal, Kaduna and in a unanimous judgment of that court, his appeal D was dismissed.

The accused person has now further appealed to this court.

I think it is pertinent to give a resume of the prosecution's case at this stage.

E On the fateful day, Auta Mohammed in company of his 13 year old sister drove their herds of cattle for grazing. It was then that the accused came and hit Auta Mohammed with a hoe once on the head below his ear on the right side. Auta Mohammed fell down with blood F gushing from the wound.

Auta Mohammed's sister, Karimatu Alhaji Mohammed after seeing what had happened to her brother, drove the cattle back home and reported the incident to her father, Alhaji Mohammed Ahmed who immediately visited the scene of the incident and met his son bleeding and unconscious. He took Auta to Dayi Police Station and lodged a compli- G ant. Auta was taken to Malumfashi general hospital where he later died. The accused was then arrested by the police.

Henceforth the accused person will be referred to as the appel- H lant in this judgment.

In compliance with Rules of this court, appellant's brief was filed and was later amended with leave. The respondent neither filed respondent's brief nor appeared on the date the appeal came on for hear-

ing, despite the fact that he was served with the appellant's brief as well as the hearing notice.

Learned counsel for the appellant Tunde Fagbohunlu Esq., adopted his brief and made oral expatiation on some points. In the said brief, he formulated the following five issues:-

3.1 Whether the learned trial Judge wrongly appraised the evidence on the record and thereby occasioned a miscarriage of justice;

3.2 Whether the evidence of P.W.2 can properly form the basis of a conviction having regard to the circumstances in which it was received;

3.3 Whether the defences of provocation and self defence [or private defence] ought not to have been considered and resolved in favour of the Appellant;

3.4 Whether the lower Court ought to have struck out additional ground of appeal number one in the Appellant's Grounds of appeal;

3.5 Whether the Appellant's right to a fair hearing [and in particular the presumption of innocence] had not been violated in the instant case."

Under Issues 1 and 3 it was the argument of learned counsel for the appellant that the Court of Appeal fell into the same error as the trial court when it failed to give proper consideration to the question of provocation and/or self defence raised by the appellant both in his extra-judicial statement and his evidence viva voce. Learned counsel referred to Exhibit 1 - the extra-judicial statement made by the appellant on 28th December, 1985, that is a day after the incident and his evidence given on 26th April, 1988 and submitted that both go to show that there was a fight between the appellant and the deceased which was provoked by the deceased when the latter drove his cattle into the appellant's farm and destroyed his crops. He submitted that had both the trial court and the Court of Appeal considered and evaluated this evidence along with that adduced by the prosecution, the issues of provocation and self-defence would have been resolved in favour of the appellant.

Learned counsel particularly referred to the contradictory evi-

dence of the prosecution on the question whether or not on the day and time of incident, the deceased was carrying a stick. He cited and relied on several decided cases amongst which are Bakare v. The State [1987] 1 NWLR (Pt. 52) 579; Abadallabe v. Bornu N. A. [1963] All NLR 152; Ozaki v. The State [1990] 1 NWLR (Pt. 124) 92; Palmer v. R [1971] 55 Cr. App. Rpt 223 at 242; Opeyemi v. The State [1985] 2 NWLR (Pt. 5) 101; Ukwunnenyi v. The State [1989] 4 NWLR (Pt. 114) 131.

There is conclusive evidence that the deceased died on 27th December, 1985 as a result of the injury he received from the appellant. In Exhibit 1A the translated English version of the appellant's statement made under caution Exhibit 1, he stated-

"..... I took my axe and I cut his head, I later told the Fulani man to go home when blood started gushing out."

D This evidence was confirmed by P.W. 2, Karimatu Alhaji Mohammed, who was the only eye witness to the incident when she testified that -

"The accused came and hit Auta once and Auta fell down. He hit Auta with a hoe on the head behind the ear on the right side of the head."

The evidence was accepted by the learned trial Judge as it was not discredited under cross-examination. Exhibit 3, the medical report also confirmed that the deceased died as a result of "stab wound found in the head from which he bled profusely." P.W.1, P.W.2 and P.W.3 confirmed that the injury was caused on the right side of the head below the ear.

The learned trial judge was right in my view to rule out the applicability of self-defence in the light of the evidence before him; and the Court of Appeal was also right to have affirmed that finding - See Diala Amako v. The State [1995] 6 SCNJ 23 and Ejionwu v. The State [1995] 4 SCNJ 23. The fact that the appellant denied in his evidence *viva voce* that he hit the deceased with Exhibit 2 which was interchangeably being called a hoe or an axe would neither belie nor destroy the weight and credibility of Exhibit 1A.

As for the defence of provocation, can it be safely said that this

has been thoroughly and properly considered by both the trial court and the Court of Appeal having regard to the whole evidence presented in this case?

The evidence adduced before the trial court, which culminated in the conviction and sentencing the appellant to death, was that on the day the deceased was murdered, the appellant suddenly emerged from no where and for no reason whatsoever, intercepted the deceased and gave him a fatal blow with Exhibit 2 on the right side of his head below the ear. In convicting the appellant the learned trial judge stated:-

"On the basis of the evidence so far adduced before the court I am left in no doubt that the accused hit the deceased with an axe which caused him such bodily injury as to cause death. Injury on the head which resulted in the brain matter coming out in addition to blood is such that death will not only be the likely but the probable consequence of the act of the doer of the act. The statement of the accused Exhibit 1 is confessional and it was properly obtained after administering all the usual precautions prescribed by law and the accused confirmed to have made same and endorsed by and before a superior police officer."

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"Clearly the confession in Exhibit 1 showed that the accused intended to cause such bodily injuries on the deceased when he hit the deceased with an axe (Exhibit 2) on the head which resulted in blood and brain matter coming out. Certainly any ordinary man of common sense and temper would hardly deny what the accused's intention in this act would be other than to cause death. I have seen exhibit 2 the axe and in my view only barbarians could use such an object and hit a human being on the head with it. P.W. 2's evidence was positive in this regard."

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"The presumption therefore against the accused has not been controverted. The presumption therefore is that the claim by the accused that what he did to the deceased was in the exercised of his right of private defence to his property was false, nor was there any fight sudden or otherwise between the deceased and the accused."

The appellant's story as revealed in his statement Exhibit A1 and

his evidence in court is that the deceased and P.W. 2 drove their cattle into his farm and destroyed his crops that were yet to be harvested. This information was related to him by his wife, D.W. 2. He came to the farm and met the deceased. After some exchange of words between the appellant and the deceased, the deceased and P.W. 2 drove the cattle out of the appellant's farm. When the appellant demanded compensation for his destroyed crops, a fight ensued between the two in the course of which the deceased raised his stick to hit the appellant and the latter ward off by hitting the deceased with Exhibit 2.

It appears that the learned trial judge confined himself to part of the evidence of P.W. 2 and Exhibit A1.

Both in his evidence in court and in Exhibit A1 the appellant complained of the destruction of his farm crops by the cattle under the control of the deceased. There was no investigation by the prosecution to ascertain the truth or falsity of this allegation.

The question whether the deceased was carrying any stick on the day of incident was not put to P.W. 2 by the prosecution. But when cross-examined on the issue, she replied-

"Auta [meaning the deceased] fale (sic) down with his stick and it was left there and I have not seen it again."

This goes to support the appellant's statement that the deceased was carrying a stick at the time of confrontation.

The other aspect of P.W. 2's evidence which did not receive proper consideration by the learned trial judge is where she stated-

"On the day, the accused did not talk to any one of us, he just hit the deceased. The accused is not a lunatic and has not gone mental. I am surprised as to why the accused attack the deceased."

It is a notorious fact that a Fulani cattle rearer carries a stick with him wherever he goes. It is with the stick that he controls the cattle. The learned trial Judge ought to have given a serious consideration as to why the appellant, who was described to be sane with no evidence of any mental incapacity should attack the deceased for no apparent cause. If he had given consideration to these pieces of evidence he could not have escapes coming to the conclusion that there were

exchanges between the deceased and the appellant which resulted in a fight see Kavuwa Takida v. The State [1969] ALL NLR 260. This could have led him to consider the issue of provocation as provided in section 222(1) of the Penal Code. The sub-section provides as follows:-

"222. (1) Culpable homicide is not punishable with death if the offender whilst deprived of power of self control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

Explanation:- Whether the provocation was grave and sudden enough to prevent the offence from amounting to culpable homicide punishable with death is a question of fact."

The law does not tabulate the acts that are likely to cause or produce provocation but it is concerned with the creation and existence of the provocation. What acts constitute provocation under section 222(1) of the penal code is a question of fact. The provocation may be verbal or physical or both. For example drawing out a dagger by the deceased in an attempt to stab the accused was held to be grave provocation within the context and meaning of section 249(1) of the Sudan Penal Code see Sudan government v. Adam Mohammed Ibrahim [1968] SLJ R 142 and Bassey v. The Queen [1963] All NLR 285. Section 249 (1) of the Sudan Penal Code is substantially the same as section 222(1) of the Penal Code of the Northern States of Nigeria. For ease of comparison I reproduce below section 249(1) of the Sudan Penal Code:-

"S. 249(1) . Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

Whether the provocation was grave or sudden enough to prevent the offence from amounting to murder is a question of fact."

Before the court can convict on a charge of culpable homicide punishable with death, it must be satisfied on the whole of the evidence, including any explanation offered by the accused, that the death was the probable consequence of the act of the accused. It will be sufficient to acquit the accused for culpable homicide pun-

ishable with death if the evidence adduced raises such a possibility of existence of circumstances entitling him to the benefit such that the court feels it cannot safely disregard.

B Blows as well as threatening gestures if near, are enough and serious as to cause loss of self-control and may justify and indeed reduce the killing to culpable homicide not punishable with death, particularly where the community is primitive, less secure and less settled in its habits.

C Considering whether the provocation was enough to make a reasonable man do as the appellant did, it is relevant to compare the acts or things done which are put forward as provocation with the nature of the acts committed by the appellant. It must be shown that there was instant provocation, negating the possibility of deliberation or craft or choice
D of alternatives.

The explanation given by the appellant both in his evidence and Exhibit A1 coupled with the evidence given by P.W.2 was that on the day of the incident the deceased was carrying a stick and that for no reason
E the appellant who was described by her as sane and normal, just emerged from nowhere and struck the deceased with an axe or a hoe - Exhibit 2 deserve close consideration. The evidence when considered as a whole gives more credence to the appellant's story. It also gives more support
F to the presumption that the deceased was the aggressor.

To destroy the crops in the farm of a person with the appellant's back ground socially and educationally, followed by a threat of violence with a stick, is in my view such a grave and sudden provocation as to deprive him of self control and cause him to react in the manner he did.
G He was enraged at the site of the cattle in his farm and the extent of the destruction caused to the crops therein. To worsen the situation, he was threatened by the deceased with a stick .

Although the appellant used deadly weapon on the deceased, the
H evidence did not conclusively show that he intended to kill. See the Queen v. Effiong Okon Eyo & Ors. [1962] ALL NLR 510.

The gravity of the provocation as stated above cannot be correctly assessed in isolation from the manner or life of the com-

munity to which the appellant is a member.

The trial court should also have taken note of the fact that P.W. 2 was not only a sister to the deceased but also a minor at the time of giving evidence, in coming to his conclusion.

There are some lapses in the inspection of the episode by the prosecution as well as in the evidence presented to prove the charge under section 221 of the Penal Code. **Where there is possibility of a presumption one way or the other as to what brought about the clash between the accused and the deceased, as in this case, the presumption is that the deceased must have been the aggressor see R. v. Amadu Adamu 10 WACA 161.** The learned trial judge had failed to properly direct himself on the whole evidence adduced before him. Although the wound inflicted on the deceased by the appellant was severe and not the mortal part of the body, it is pertinent to bear in mind that where two primitive people are engaged in a fight with lethal weapons, it "is apt to make a thorough job of it and this does not necessarily show that he was not bound to kill in order to save his own life." See R. v. Amadu Adamu (supra).

Once there is evidence of provocation either from the prosecution or from the defence, the onus is on the prosecution to prove absence for such provocation. See R. v. McPherson [1957] 41 Cr. app R 213.

The 1st ground complained of delivering the judgment by the learned trial judge outside the three months period. No particulars were given.

As for the 2nd ground the complaint was that the learned trial judge after convicting the appellant under section 221(b) of the Penal Code, did not pronounce the sentence of death. Here again no particulars were given.

The Court of Appeal was therefore right in describing these two additional grounds as "mere statements of general nature, vague and disclosing no reasonable ground of appeal" and consequently striking them out.

Grounds 1, 2, 4 and 5 of the original grounds are also vague as

described by the learned Justices of the Court of Appeal. These were the grounds filed by the appellant himself from prison. It was the duty of learned counsel for the appellant to have had a look at them and make necessary amendments, and this he failed to do. The Court of Appeal B was right in striking them out as incompetent grounds of appeal.

For reasons stated above, I am unable to say that both the trial court and the Court of Appeal were right in their respective decisions that the appellant was not entitled to benefit from the defence of provocation under section 222(1) of the Penal Code. I set aside the concurrent findings of the two courts on this issue. See Ogunlana & Ors. v. The State C [1995] 5 SCNJ 189 and Ikpo & Anor. v. The State [1995] 12 SCNJ 99.

I substitute in place of conviction and sentence under section 221(b) of the Penal Code, a conviction under section 222(1) of the same D Code. I hereby sentence the appellant to a term of twelve [12] years imprisonment, effective from the date he was taken into custody, to wit 28th December, 1985. See Okon Bassey v. The Queen [1963] ALL NLR 285. This disposed of issues 1, 2 and 3 of the appellants' brief.

E The appeal partially succeeds.

UWAIS CJN

F I have had the opportunity of reading in draft the judgment read by my learned brother Wali, JSC. I entirely agree with him that this appeal has merit.

In a trial for culpable homicide punishable with death, a trial judge is bound to consider all the possible defences available to the accused in order to be sure that the offence charge has been proved beyond G reasonable doubt. In the present case, the defence of provocation which is capable of reducing the offence charged to culpable homicide not punishable with death, pursuant to section 222 subsections (2) and (4) of the H Penal Code of Kaduna State, had not been sufficiently considered by the lower courts. The evidence adduced by the prosecution as per P.W.2 is that the Appellant suddenly attacked the deceased with an axe and for no apparent cause. However, the Appellant alleged in both his testimony and

confessional statement to the Police, Exhibits A and A1, that the cattle tended by the deceased and P.W. deceased and P.W. 2 were driven onto his farm and on the farm which he had not harvested. The Appellant stated in his testimony that -

*"The cattle destroyed the whole of my cotton farm and made B
extensive damage to my guinea corn crops."*

Surely for a person of Appellant's station in life the destruction of his crops on the farm was sufficient to provoke him to attack the deceased. The police failed in their investigation to verify the allegation or if they did, no evidence to that effect was adduced before the learned trial judge. This has created some doubt as to whether the Appellant did not suffer a sudden and grave provocation. C

In a criminal case it is the duty of the prosecution to prove its case beyond reasonable doubt. The allegation by the Appellant had cast doubt on the prosecution case as to whether the Appellant acted without provocation. In the circumstances of this case the doubt ought to have been resolved by the lower courts in favour of the Appellant. I, therefore, agree with the submission of learned counsel for the Appellant that the appellant suffered sudden and grave provocation from the deceased by reason of his (deceased's) cattle being on the Appellant's farm and destroying the cross thereon. D E

Consequently, the Appellant is entitled to have the conviction against him reduced to culpable homicide not punishable with death by virtue of the provisions of section 222 (1) and (4) of the Penal Code. F

It is for these and the fuller reasons ably stated by my learned brother Wali, JSC that I too hereby allow the appeal and set aside the decision of the Court of Appeal which affirmed that of the High Court. I adopt as mine the consequential order contained in the lead judgment. G

IGUH JSC

H

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Wali, J.S.C. and I agree entirely with the reasoning and conclusions therein reached.

Accordingly I, too, allow this appeal in part and abide by the consequential order made in the leading judgment.

UWAIFO JSC

B

I read in draft the judgment of my learned brother Wali, JSC. I am satisfied that he has carefully dealt with an otherwise unsettling circumstances of this case. I agree with his reasoning and conclusion.

C

The issue of provocation upon which the matter was finally resolved is one the learned trial judge did not give appropriate consideration. The evidence of P.W. 2, Karimatu Alhaji Mohammed, the deceased's sister who was an eye-witness to the incident, was that the deceased had a stick with him. This turned out to be a crucial piece of evidence. In his review of the evidence before him, the learned trial judge made no mention of this. But worse still was when he proceeded to say:

D

"P.W. 2 who was an eye witness said that they took their cattle for grazing and they were not even near the farm of the accused let alone destroying his farm crops, when the accused suddenly emerged from nowhere with an axe in his hands and hit the deceased on the head. That that day the deceased was not having any stick with him."

E

The learned trial judge did not seem to represent the evidence of P.W. 2 correctly on the question whether the deceased had a stick with him. With that misconception that he had not, the learned trial judge made it impossible for himself to give the defence of provocation a fair consideration because the evidence of the appellant that the deceased first hit him with the stick would not then have any probative value.

F

G

When a crucial evidence in a criminal case is overlooked or misunderstood by a trial court, it is likely to lead to a miscarriage of justice. This is because the appellate court, in considering a complaint by the accused against the judgment reached on that basis by the trial court, may be unable to say what the decision would have been had the trial court given proper consideration to such evidence. That then creates a reasonable doubt as to whether the decision is correct; and the doubt ought accordingly to be resolved in favour of the accused. That is the

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doubt that has arisen in this case which has to be resolved in favour of the appellant.

In the circumstances, I too allow the appeal against the conviction and sentence for murder. I however convict the appellant of culpable homicide not punishable with death on the basis that the defence of provocation was open to him. I abide by the order made by my learned brother Wali JSC.

EJIWUNMI JSC

I have had the privilege of reading in its draft form the judgment just delivered by my learned brother WALI, JSC. In that judgment the facts and the issues raised thereon have been carefully considered and I agree with the conclusion reached that the appeal ought to succeed in part. This means that the appellant, though found guilty, would serve a term of twelve years imprisonment, effective from the date he was taken into custody, to wit 28th December, 1985.

It is pertinent that I should add that the reason which led to this conclusion is that the court below failed to consider whether the defence of provocation was open to the appellant. It is settled law that the onus lies on the prosecution to prove the guilt of an accused beyond reasonable doubt. In the process of proving the guilt of the accused, the prosecution also, where there is evidence of provocation from the defence, has the burden to prove the absence of such provocation. See R. v. Mcpherson (1957) CR APPR 215.

In the instant case, the point taken by learned counsel the appellant was that the court below fell into the error as the trial court when it failed to give proper consideration to the question of provocation and/or self defence raised by the appellant both in his extra-judicial statement and his evidence viva voce. Learned counsel referred to Exhibit 1 - the extra-judicial statement made by the appellant on 28th December, 1985, that is, a day after the incident and his evidence given on 26th April, 1988. He then submitted that both go to show that there was a fight between the appellant and the deceased which was provoked by the de-

ceased when the latter drove his cattle into the appellant's farm and destroyed his crops. He submitted that had both the trial court and the Court of Appeal considered and evaluated this evidence along with that adduced by the prosecution, the issues of provocation and self defence would have been resolved in favour of the appellant. Particularly, learned counsel referred to the contradictory evidence of the prosecution on the question whether or not on the day and time of the incident, the deceased was carrying a stick. In support, learned counsel referred to several decided cases including the following: Bakare v. The State (1987) 1 NWLR (Pt. 52) 579; Abadallabe v. Bornu N.A. (1963) ALL NLR 152; Ozaki v. The State (1990) 1 NWLR (Pt. 124) 92; Palmer v. R. (1971) 55 CR APPR 223 at 242; Opeyemi v. The State (1985) 2 NWLR (Pt. 5) 101.

In my respectful view the defence of self-defence which was canvassed before the court below cannot be available to the appellant, upon the facts disclosed on record. It was rightly rejected.

However, in my humble view, the defence of provocation was open to the appellant had the court below and the trial court adverted properly to the evidence on record. It is manifest that the evidence of the appellant as revealed in his statement Exhibit A1 and his evidence in court is that the deceased and PW 2 drove their cattle into his farm and destroyed his crops that were yet to be harvested. This information was related to him by his wife, DW 2. He came to the farm and met the deceased. After some exchange of words between the appellant and the deceased, the deceased and PW 2 drove the cattle out of the appellant's farm. When the appellant demanded compensation for his destroyed crops, a fight ensued between the two in the course of which the deceased raised his stick to hit the appellant and the latter to avoid the attack hit the deceased with Exhibit 2.

Now, upon a careful reading of the judgment of the learned trial judge, I am unable to find where any consideration was given to that aspect of the defence of the appellant. I have earlier in this judgment stated that the duty lies on the prosecution to prove the absence of provocation, and that burden never shifts. In the case in hand there is nothing to suggest that the defence of the appellant with regard to his damaged

crop, and the stick with which he claimed he was attacked by the deceased was investigated. In the absence of any evidence to the contrary on this vital defence of the appellant, and the failure of the learned trial judge and the court below to advert to it, I think that learned counsel for the appellant was right in his submission that the defence of provocation was not properly considered by the court below. In my respectful view, the court below fell into the same error as the trial Court in that regard. In this connection it is relevant to observe what a Court ought to be concerned with in deciding whether the defence of provocation would enure to the benefit of an accused upon a charge of murder. In R. v. Afonja (1955) 15 WACA 26, the West African Court of Appeal accepted the definition propounded by Devlin J. in R. v. Duffy (1949) 1 ALL ER 932:-

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

However, it is also my view that the definition of provocation given above, must be considered in the light of the particular facts and circumstances of the case under consideration. These include, among other things, the station in life of the person and the society in which he lives. See R. v. Akpakpan (1956) pages 1 & 2; R. v. Adekanmi (1944) 17 NLR 99. In R. v. Igiri (1948) 12 WACA 377 recognition was given to the primitive condition in which people lived in their own society to reduce the offence of murder to manslaughter. Returning to the instant case, it is my humble view that the court below and the trial court ought to have considered the evidence of the appellant with regard to the attack allegedly launched against the appellant with the stick carried by the deceased when the deceased was queried by the appellant for the damage and destruction of his crops by the deceased.

I believe that if the court below had adverted to this evidence the decision reached would have been different. While this court will not normally interfere with the concurrent findings of the two lower courts,

it will do so where there is some miscarriage of justice or a violation of some principles of law or procedure. See Osayeme v. The State (1966) NMLR 388; Sanyaolu v. The State (1976) 5 SC 37; Wankey v. The State (1993) 5 NWLR (Pt. 295) 542 at page 552; Ugwunba v. The State (1993) 5 NWLR (Pt. 296) 660 at 671. In the instant case, it is my humble view from what I have said above that there is miscarriage of justice or a violation of a principle of law or procedure to warrant the intervention of this court.

I will therefore allow this appeal in part for the above reasons and the fuller reasons given in the leading judgment of my learned brother Wali, JSC. I also abide by the consequential orders made in the said judgment.

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