

SUPREME COURT OF NIGERIA
14TH APRIL, 2000. SC. 34/1999
CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU, S. U. ONU,
O. ACHIKE, U. A. KALGO, JJSC

SUNDAY IHUEBEKA	APPELLANT	
V.		
THE STATE		RESPONDENT

CONSTITUTIONAL LAW - Fair trial - Bias - Where the appellant's counsel was granted every opportunity - Of presenting the appellant's defence - None of the provisions of s. 33 of the 1979 Constitution were breached.

CRIMINAL LAW - Murder - Evidence - Confessional Statement - Where the Victim died as a result of the voluntary act of the accused - It is material whether the accused's extra judicial statement - Is a confessional statement or not.

CRIMINAL LAW - Provocation - Defence of - No amount of provocation can excuse homicide - Or render it excusable - Except by virtue of s. 318 of the Criminal Code.

MURDER - Evidence - Medical evidence - Cause of death - Where the cause of death is obvious - Medical evidence ceases to be of practical legal necessity.

MURDER - Provocation - Defence of - No amount of provocation can excuse homicide - Or render it excusable - Except by virtue of s. 318 of the Criminal Code.

MURDER - Provocation - Defence of provocation - Loss of self control - Where the circumstances are not such as to make the accused lose his self control - The defence is not available.

MURDER - *Provocation - Defence of provocation - Words - Circumstances when words alone can constitute provocation - As to reduce the offence of murder to manslaughter.*

FACTS

In the High Court of former Bendel State (now Edo State) sitting at Ekpoma, the appellant was charged with the offence of murder. The deceased, Iregho Uluebeka was the father of the accused. At about 7 p.m. On 18/9/95, the deceased invited P.W. 1 to the family house where he was living. The accused who was at the time of the incident a Sales Representative of Green Sands Publishers at Benin came home that evening. In the presence of P.W.1, the deceased requested the accused to help in the payment of the school fees of his younger brother who gained admission into a Technical College at Afuze. The accused refused to assist despite persuasion from P.W. 1. The following morning, P.W. 1. went to the house of the deceased to greet him and the deceased told him that he was going to the farm to harvest yam tubers which the accused would take with him when returning to Benin later that day. The deceased was the elder brother of P.W. 1. Subsequently, on the same day, P.W. 1. was invited to the deceased's farm where he saw the latter in a pool of blood. He also saw two Policemen at the scene. The deceased told him that it was the appellant who macheted him. The deceased was taken to the Police station Ekpoma and then to the General Hospital where he died before any treatment was given to him. The appellant was arrested and he made a statement to the Police. The statement was tendered and admitted in evidence without any objection as Exhibit "1" through P.W. 4 who investigated the complaint. The accused testified on oath. His evidence was in the main, an affirmation of the contents of Exhibit "1". He testified that the deceased was his father, that he died from the injury he inflicted on his head and that he did not intend to kill him.

He further testified that because his wife and his father ridiculed him, he was angry, that was the reason he matcheted both of them. It was in the police station that he was informed that his father had died but his wife survived.

After considering the whole evidence including the defences of insanity and provocation the learned trial judge found the accused guilty of murder and sentenced him to death by hanging. His appeal to the Court of Appeal, Benin Division was dismissed. He has further appealed to the Supreme Court raising four issues. One of the issues was abandoned at the hearing of the appeal.

ISSUES FOR DETERMINATION.

(ii) *Whether the trial of the Appellant on the 24th day of October, 1990 with the learned trial judge acting as the Prosecutor and the Judge was not contrary to section 33 of the Constitution of the Federal Republic of Nigeria 1979, which occasioned miscarriage of Justice.*

(iii) *Whether Exhibit "I" can be classified as a confessional statement of the Appellant for murder.*

(iv) *Whether the defence of provocation can avail the Appellant to reduce the offence from murder to manslaughter."*

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

Constitutional law - Fair trial

1. From the above summary of the proceedings of the trial court on 24-10-90, I cannot conceive any action or utterance of the trial judge tending to show bias. If there is anybody to complain about the proceedings of 24-10-90, it is the prosecution who lost the opportunity to cross-examine the accused and address the court. None of the provisions of section 33 of the 1979 Constitution was breached in so far as the accused is concerned. His counsel was present in court throughout the days the case was heard, cross-examined all the witnesses for the prosecution and addressed the court. The court also obliged his counsel with all his applications for adjournment. He cannot be heard to complain. (p. 1367 C)

Evidence - Confessional statement

2. From the facts disclosed in Exhibit "I", the evidence of the accused on oath at the trial and the evidence of the prosecution witnesses, I have no doubt in my mind that the victim died as a direct result of the voluntary act

of the accused and the learned trial judge and the court below came to a right conclusion. It is therefore immaterial to me in the determination of this appeal whether Exhibit "I" is a confessional statement of the offence of murder or not. (p. 1370 H)

B

Evidence - Medical evidence

3. The medical officer who performed the autopsy was away in Saudi Arabia and it was impossible to reach him. It is an accepted principle of law in homicide cases that where the cause of death is obvious as in the instant case medical evidence ceases to be of practical legal necessity. See Enewoh v. The State (1989) 4 N.W.L.R. (pt.119) 98. The deceased died almost immediately from the voluntary act on the accused. (p. 1371 B)

D

Murder - Provocation

4. Even though the accused set up the defence of provocation, no amount of provocation can excuse homicide or render it excusable except by virtue of section 318 of the Criminal Code. (p. 1372 A)

E

Defence of provocation - Loss of self control

5. I am satisfied that no reasonable Nigerian of the same standing in life as the accused will be so rendered subject to passion or loss of self-control as to be led to use such violence leading to fatal result. The circumstances were not such as to make the accused lose his self-control as to inflict those fatal injuries on his father. He could also not be said to have acted in the heat of passion when after inflicting those matchet cuts on his wife at home, he proceeded to the farm to inflict the deadly cuts on his father. See John v. Zaria N.A. (supra), Nomad v. Bornu Native Authority (1954) 21 N.L.R. 31, The Queen v. Akpakpan (1956) 1 F.S.C. 1 at 2 and Ruma v. Daura N.A. (1960) 5 F.S.C. at 93. Certainly there was enough time for his passion to cool and reason to gain control of his mind. (p. 1372 F)

H

Defence of provocation - Words

6. I agree that words alone can constitute provocation as to reduce the offence of murder to manslaughter but from all I have said in this judg-

ment, such words, if any, did not satisfy the requirements set out in section 318 of the Criminal Code. The words themselves must be of such a provocative nature as to incense a reasonable man of the accused's standing in life and education to lose his self-control. See Akalezi v. The State (1993) 2 N.W.L.R. (Pt. 273) 1 at 114 and The Queen v. Akpakpan B (supra). I have seen nothing in the evidence of the prosecution witnesses and that of accused person himself that would have led the trial judge to any verdict other than that of "guilty of murder". The courts below were right in their conclusions. (p. 1373 B)

C

NOTABLE POINTS OF INTEREST

ONU JSC

1. Condition precedent for the defence of provocation

"For the defence of provocation to be available, the accused must have a reasonable belief that his life is in danger and the quality of force used by him must be the same as that from which he defends himself". See Okonji v. The State (1987) 3 S. C. N. J.. 33 at 39. (p. 1379 G)

E

ACHIKE JSC

2. Elements to be satisfied before a defence of provocation can be relied on.

For the killing of another to be excused in the sense that it is reduced to manslaughter, the person seeking to evoke the defence of provocation must satisfy the court on the following elements, namely,

(a) that he killed the deceased in the heat of the passion caused by sudden provocation, and

(b) that at the time of killing the heat of passion had not cooled. These conjunctive elements are demanding in that the appellant would have acted on the spur of the moment of the act of sudden provocation which left him no time for cooling of his passion. Put differently, the sudden provocation which generates the heat of passion would be quite contemporaneous with the killing of the victim of the murder, the heat of temper not having time to cool. (p. 1382 A)

G

H

KALGO JSC

3. The meaning of provocation.

In the case of R. v. Duffy (1949) 1 A. E. R. 932, Devlin J. defined "provocation" as "same 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 to make him for the moment no master of his mind". According to this simple definition, for the appellant to rely on provocation, he must have suddenly lost his self-control at the time he macheted his father as a result of provocation. (p. 1393 E)

REPRESENTATION

I. E. Imadegbello with E. O. Ogunkeye for the Accused/Appellant.
Mrs. O. S. Uwuigbe, Assistant Chief Legal Officer, Edo State for the Respondent.

CASES REFERRED TO

Okoduwa v. The State (1988) 3 N.W.L.R. (Pt.77) 333 at 347
Akinfe v. The State (1988) 3 N.W.L.R (Pt. 85) 729 at 752
Gbadamosi v. The State (1992) 9 N.W.L.R. (pt. 266) 465 at 478 & 479
Afolabi v. Commissioner of Police (1961) All N.L.R. 682
Oteki v. Attorney-General, Bendel State (1986) 2 N.W.L.R. (Pt. 24) 648
Ekpe v. The State (1994) 9 N.W.L.R. (Pt. 368) 268 at 269
Akalezi v. The State (1993) 2 N.W.L.R. (pt. 273) 1 at 14
Ruma v. Daura N. A. (1960) 5 F.S.C. 93
Akpan v. The State (1994) 9 N.W.L.R. (Pt. 368) 347 at 365 and 366
Kada v. The State (1991) 8 N.W.L.R. (Pt. 208) 134 at 156 and 157
Ukpo v. The State (1995) 33 L.R.C.N. 587 at 589
R. v. Sykes (1913) 8 Cr. App. R. 233 at 236

H STATUTES REFERRED TO

Criminal Code, s.318
Constitution of Nigeria 1979 s. 33

LEAD JUDGMENT BY OGWUEGBU JSC

The appellant was convicted for murder and sentenced to death by Okungbowa, J. on 14th January, 1991 at the High Court of the former Bendel State at Ekpoma. The offence was committed on 19th September, 1985 at Illeh-Ekpoma in the Ekpoma Judicial Division. B

The deceased, Iregho Uluebeka was the father of the accused. At about 7 p.m. on 18-9-85, the deceased invited P.W.1 (Abu Uluebeka) to the family house where he was living. The accused who was at the time of the incident a Sales Representative of Green Sands Publishers at Benin came home that evening. In the presence of P.W.1, the deceased requested the accused to help in the payment of the school fees of his younger brother who gained admission into a Technical College at Afuze. The accused refused to assist despite persuasion from P.W.1. C

In the morning of 19-9-85, P.W.1 went to the house of the deceased to greet him and the deceased told him that he was going to the farm to harvest yam tubers which the accused would take with him when returning to Benin later that day. The deceased was the elder brother of P.W.1. Later that day, P.W.1 was invited to the deceased's farm where he saw the deceased in a pool of blood. He also saw two police men at the scene. The deceased told him something. Shortly after, a vehicle arrived and with the assistance of the policemen, the deceased was put into the vehicle and they left for the Police station, Ekpoma and from there to the hospital. He died immediately they arrived at the hospital. D F

The accused was arrested and he made a statement to the police. The statement was tendered and admitted in evidence without any objection as exhibit "1" through P.W. 4 (Police Sergeant Koliko Umaru) who investigated the complaint. It reads: G

"Statement of Accused Person

".....I, Sunday Ihuebeka having been duly cautioned in English language that I am not obliged to say anything unless I wish to do so but whatever I say will be taken down in writing and may be given in evidence. (Sgd.) S. Uluebeka H

My name is Sunday Uluebeka. I am a native of Illeh village Ekpoma in Okpebho Local Government Area of Bendel State. I am mar-

ried but no issue yet. My wife is under pregnant. I am married to one Grace Uluebeka a daughter to one Watchday by name Ugbo of Udugho Irrua. I married Grace in the month of December, 1984. Since then she has been living with me. Since about two months now my wife Grace has
B been quarreling (sic) with me. She tells me that I brought her to my house for my parents to be insulting her since I have no job at hand. My father has been living with us since all the time until this morning 19/9/85 when I killed him because he has been telling me to leave his house with his wife. He also told me to go away from his house with my wife
C Grace. His wife's name is Mrs. Rose Uluebeka. This morning 19/9/85, members of my family gathered together and started quarreling with me and at the same time asked me and my wife Grace Uluebeka to leave my father's house. My father was also present at the gathering. One Abu
D Uluebeka my own brother was also present at the gathering. I was provoked this morning 19/9/85 because of home trouble and I took a decision of killing my father and his (sic) wife Mrs. Grace Uluebeka. I now say that I did not kill them but I gave them machet cuts. I only cut my
E father Uluebeka and my wife Mrs. Grace Uluebeka all of Illeh village, Ekpoma. Some people like Dr. Odiasie of Bendel Library headquarters Benin City is owing me a sum of N200 deposit I paid him to supply me with books, managing Director (sic) of Green Suanders (sic) Benin City
F No. 99 Sakpoba Benin City is owing me a sum of N1,000.00 as a sales man and I left him because of my ill-health. And it is because of this my ill-health that my parents are worrying me. I do not have any other thing to say than what I stated above. Abu Uluebeka is also owing me a sum of N190.00. I became annoyed because I have no money and everybody in
G my family continue (sic) to worry me more especial (sic) my father and his wife. I cut my wife because she was bull-ing (sic) me since I have no money. Since I have no money my family became annoyed of me without minding my ill-health. This is why I decided to end my life with any
H person available." (sgd.) ??? - 19/9/95.""

Four witnesses testified for the prosecuted. The accused testified on oath. His evidence was in the main, an affirmation of the contents of Exhibit "1". He testified that the deceased was his father, that he died

from the injuries he inflicted on his head and that he did not intend to kill him. In respect of Exhibit "I", the learned trial judge observed as follows:

"Exhibit "I" , was not retracted. It is direct and was properly proved. The accused person to a great extent maintained his statement to the police although he introduced other elements in his evidence-in-chief. For example, he stated on oath that he was mentally ill and was taken by his younger brother Isaac to one Dr. Ojelua of Irua without his wife and father knowing about it. Another addition was that his T. V. set, Radio Cassette Player and Electric pressing iron were stolen from his room on the day of the incident. In law those additions do not amount to contradictions or retraction of the voluntary statement Exhibit "I". The court can convict on the voluntary statement which is direct, positive, properly proved and unretracted."

After considering the whole evidence including the defences of insanity and provocation he found the accused guilty of the murder of Iregho Uluebeka and sentenced him to death by hanging. His appeal to the Court of Appeal, Benin Division was dismissed. His conviction and the sentence of death imposed by the trial court were affirmed hence the further appeal to this court.

From the grounds of appeal filed the following issues were submitted as arising for determination in the appeal:

(i) *Whether the failure of the learned trial judge to resolve the allegation of lack of faith against the court by the former Counsel and not informing the substitute Counsel or Appellant of this serious allegation breached the Appellant's right to fair hearing as guaranteed by section 33 of the Constitution of the Federal Republic of Nigeria 1979 (as amended).*

(ii) *Whether the trial of the Appellant on the 24th day of October, 1990 with the learned trial judge acting as the Prosecutor and the Judge was not contrary to section 33 of the Constitution of the Federal Republic of Nigeria 1979, which occasioned miscarriage of Justice.*

(iii) *Whether Exhibit "I" can be classified as a confessional statement of the Appellant for murder.*

(iv) *Whether the defence of provocation can avail the Appellant*

to reduce the offence from murder to manslaughter."

The four issues formulated in the respondent's brief raise similar questions as those formulated in the appellant's brief except that they are differently worded. I will therefore consider the issues submitted by the appellant and the answers to them will take care of those formulated in the respondent's brief.

At the hearing of the appeal the learned appellant's counsel abandoned issue (i) which is based on grounds (1), (2) and (3) of the grounds of appeal. Issue (i) together with grounds (1), (2) and (3) of the grounds of appeal from which it was formulated are hereby struck out. The learned respondent's counsel did not object to the abandonment of the issue.

The appellant's complaint on issue (ii) is that on 42-10-90 the learned trial judge acted both as the prosecutor and the judge and that this is in contravention of section 33 of the 1979 Constitution. It was submitted that this occasioned a miscarriage of justice. It was further submitted that the prosecuting State Counsel was absent on that day and instead of adjourning the case in the absence of the State Counsel, the trial judge hurriedly assumed the dual functions of a judge and a prosecutor, took the evidence of the accused as well as the address of the learned for the accused and adjourned the case for judgment. We were urged to hold that the trial judge therefore manifested his partiality to secure the conviction of the accused at all cost. We were referred to the cases of Okoduwa v. The State (1988) 3 N.W.L.R. (Pt.77) 333 at 347 and Akinfe v. The State (1988) 3 N.W.L.R (Pt. 85) 729 at 752. In her reply Mrs. Uwuigbe, Assistant Chief Legal Officer, Edo State submitted that it is clear from the proceedings of 24-10-90 that the accused had more than a fair trial and that the learned trial judge was right in proceeding with the case in the absence of the prosecuting counsel.

The prosecution closed its case on 19-9-90 and Mr. Udaze for the accused applied for an adjournment to enable him prepare the defence. The case was adjourned to 10-10-90. When the case came up for defence on 10-10-90 the accused was present as well as both learned counsel. Mr. Udaze for the accused again asked for a short adjournment. Miss Tedeye for the State had no objection and the court adjourned the case to 24-10-90

for defence. On 24-10-90, the accused and his counsel were present. The prosecuting counsel was absent and there was no information to the court or any body as to the reasons for her absence. The learned counsel for the accused did not apply for any adjournment and I do not see why he should even do so. The defence opened. The accused gave evidence on oath and called no witness. There was no body to cross-examine him and the record of proceedings did not show that he was cross-examined by any body let alone the court. Thereafter, counsel for the accused addressed the court and the case was adjourned to 14-1-91 for judgment. B

From the above summary of the proceedings of the trial court on 24-10-90, I cannot conceive any action or utterance of the trial judge tending to show bias. If there is anybody to complain about the proceedings of 24-10-90, it is the prosecution who lost the opportunity to cross-examine the accused and address the court. None of the provisions of section 33 of the 1979 Constitution was breached in so far as the accused is concerned. His counsel was present in court throughout the days the case was heard, cross-examined all the witnesses for the prosecution and addressed the court. The court also obliged his counsel with all his applications for adjournment. He cannot be heard to complain. C D E

In the case of Okoduwa v. The State (supra) referred to us, the appellants applied through their counsel after arraignment and commencement of trial for the case to be transferred to another judge of the High Court. The reason given was that from the conduct of the proceedings, they would not get justice. The trial judge refused the application and proceeded to charge the counsel with contempt. He was subsequently tried, found guilty, cautioned and discharged. From then on, the trial judge took active part in the cross-examinations of the appellants' witnesses and often asked more devastating and damaging questions than the prosecuting counsel. He recalled some witnesses and from questions he put to them, he raised issues which neither party to the case raised and used the information elicited from them in reaching his verdict. Of course he convicted the appellants. On appeal, this court found that the trial judge jumped into the arena and from his excessive interference with witnesses together with F G H

his attitude to counsel, it could not be said that the appellants had a fair trial.

Okoduwa's case is a classic example of a situation where the judge's conduct amounted to grave injustice to the appellants and a brazen
B breach of section 33 (4) of the Constitution. No such thing happened in the proceedings before the trial court which led to this appeal. The allegations of bias and impartiality levelled against the learned trial judge in the circumstances of this case are most unfair and should be discouraged.

C Issues (iii) and (iv) were argued together in the appellant's brief and I will consider them accordingly. It was submitted in the appellant's brief that for the extra-judicial statement (Exhibit 1) to qualify as a confessional statement, the accused who is alleged to have made it must admit or agree clearly, precisely and unequivocally in the statement that he had
D committed the offence charged and that the admission must be direct and positive. The cases of Gbadamosi v. The State (1992) 9 N.W.L.R. (pt. 266) 465 at 478 & 479 and Afolabi v. Commissioner of Police (1961) All N.L.R. 682 (Reprint) were referred to.

E It was also submitted that the prosecution failed to prove the guilt of the appellant beyond reasonable doubt for the offence of murder: The cases of Oteki v. Attorney-General, Bendel State (1986) 2 N.W.L.R. (Pt. 24) 648 and Ekpe v. The State (1994) 9 N.W.L.R. (Pt. 368) 268 at 269
F were cited. It was further argued that the accused admitted that he matcheted the deceased in Exhibit "1" because he was provoked by the deceased and his wife and that where an accused kills his victim under provocation, the offence committed is not murder but manslaughter and that spoken words can amount to provocation. The following cases were
G cited and relied upon: Akalezi v. The State (1993) 2 N.W.L.R. (pt. 273) 1 at 14 and Ruma v. Daura N. A. (1960) 5 F.S.C. 93. Reference was also made to section 318 of the Criminal Code Cap. 48 Laws of Bendel State, 1976 applicable to Edo State. It was finally submitted on behalf of the
H appellant that where the act of the accused caused him to lose "momentary control of his mind, the defence of provocation will avail him." The cases of Akpan v. The State (1994) 9 N.W.L.R. (Pt. 368) 347 at 365 and 366 and Kada v. The State (1991) 8 N.W.L.R. (Pt. 208) 134 at 156 and 157

were referred to us. We were urged to discharge and acquit the accused, or, in the alternative, to return a verdict of manslaughter.

For the respondent, it was submitted in his brief that Exhibit "1" is a confessional statement. We were referred to the portion of Exhibit "1" where the accused stated that he killed the deceased because the deceased had been telling him to leave his house and further said that he did not kill the deceased but only gave him matchet cuts. That in his evidence-in-chief, the accused further admitted that he inflicted the injuries which caused the death of the deceased. It was contended that these established that the accused knew what he did and he admitted them.

It was also submitted that a trial judge can convict on a confessional statement of an accused which is direct and positive and which properly establishes the truth of the guilt of the accused. The following cases were referred to us: Ukpo v. The State (1995) 33 L.R.C.N. 587 at 589 and R. v. Sykes (1913) 8 Cr. App. R. 233 at 236.

As to the defence of provocation, it was submitted that the provocation must be grave and sudden and must be such as to take away the accused's self-control and that the act of killing must have been done in the heat of passion before there was time for passion to cool and that the retaliation must be proportionate to the provocation offered. It was further submitted that if the accused was actually provoked, he would have attacked the deceased and his own wife in the heat of passion, that, instead, he attacked his wife at home and allowed the deceased to go to the farm before he went there to attack him. We were urged to hold that Exhibit "1" is a confessional statement which was positive and voluntary, that the defence of provocation did not avail the accused and that the appeal should be dismissed.

The facts are not in dispute. The accused admitted that he inflicted matchet cuts on the head of the deceased which caused his death. In his extra-judicial statement (Exhibit "1") he stated as follows:

"I was provoked this morning 19-9-85 because of home trouble and I took a decision of killing my father and his (sic) wife Mrs. Grace Uluebeka. I now say that I did not kill them but I gave them matchet cuts. I only cut my father Uluebeka and my wife Mrs. Grace Uluebeka

all of Ihieh village, Ekpoma I became annoyed because I have no money and everybody in my family continue (sic) to worry me more especial (sic) my father and his wife. I cut my wife because she was bullying (sic) me since I have no money. Since I have no money my family became annoyed with me without minding my ill health. This is why I decided to end my life with any person available. "

In his evidence on oath, the accused testified in part:

The deceased was my father. The deceased died from injuries I inflicted in his head. I did not intend to kill him.
Because my wife and my father ridicule me I was angry and so I went into the room and picked up a cutlass and cut my wife and my father. I was told later in the police station that my father had died but my wife did not die." (Underlining is for emphasis only).

Whatever doubt one might have had as to whether Exhibit "1" is a confessional statement or not to sustain a charge of murder, the evidence of the accused on oath established beyond any doubt that the deceased died from the injuries inflicted on him by the accused on the fateful day (19-9-85). Exhibit "1" is voluntary and there was no objection when the prosecution tendered it. It is part of the evidence before the court which the trial judge considered along with other pieces of evidence before he came to the conclusion that the prosecution proved its case beyond reasonable doubt and found the accused guilty as charged. The learned trial judge held as follows:

"On the evidence before me, I am satisfied that the victim in this case has died and that the cause of his death was the voluntary act of the accused person."

P.W.1 (Abu Uluebeka), P.W.3 (Sunday Okosun) and P.W. 4 (Police Sergeant Koliko Umaru) who investigated the complaint all testified that the deceased had machete cuts in several places including the head, the waist, the hand and the mouth and that he bled profusely. These witnesses also testified that the incident took place in the farm and that the deceased died immediately he was brought to the hospital before he could receive any medical aid.

From the facts disclosed in Exhibit "1", the evidence of the

accused on oath at the trial and the evidence of the prosecution witnesses, I have no doubt in my mind that the victim died as a direct result of the voluntary act of the accused and the learned trial judge and the court below came to a right conclusion. It is therefore immaterial to me in the determination of this appeal whether Exhibit "1" is a confessional statement of the offence of murder or not. B

The medical officer who performed the autopsy was away in Saudi Arabia and it was impossible to reach him. It is an accepted principle of law in homicide cases that where the cause of death is obvious as in the instant case medical evidence ceases to be of practical legal necessity. See *Enewoh v. The State* (1989) 4 N.W.L.R. (pt.119) 98. The deceased died almost immediately from the voluntary act on the accused. C

I am left with the question whether the defence of provocation D which is argued on behalf of the accused was established in order to reduce the offence of murder to that of manslaughter. The accused in Exhibit "1" alleged that he was provoked that morning "because of home trouble" and that he "took the decision of killing his father and his wife E Mrs. Grace Uluebeka." In the said Exhibit "1" he alleged that his parents were worrying him because of his ill-health and the fact that he had no money. He repeated the alleged acts of provocation in his evidence.

The courts below rejected the defence of provocation. They did F not believe the accused that he inflicted the machete cuts on his wife and father (deceased) in the house. The trial judge held as follows:

"I hold on the evidence before me that even if it was true that the deceased, deceased's wife, 1st P.W. and accused person's wife ridiculed him because he had lost his job and that accused person should leave the father's house with his wife, the statements do not amount to provocation. Even if the words amounted to provocation, it is my view that the accused person had enough time between the time he matcheted his wife at home and the time he walked to the farm where the deceased was, for his passion to cool". G H

The court below agreed with the trial court that the words do not amount to provocation in law and even if it did, the accused had enough time be-

tween the time he inflicted the injuries on his wife at home and the time he went to the farm where the deceased was, for his passion to cool.

Even though the accused set up the defence of provocation, no amount of provocation can excuse homicide or render it excusable except by virtue of section 318 of the Criminal Code which provides:

"When a person 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 caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only."

In R. v. Duppy (1949) 1 All E.R. 932 Devlin, J. defined provocation as:-

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

I am not persuaded by the argument of the learned counsel for the accused that the provocation alleged in this case was sufficient to reduce the offence of murder to that of manslaughter by virtue of section 318 of the Criminal Code. I have considered all the circumstances which led to and resulted in the killing of the deceased from the point of view would amount to provocation in the case of a reasonable person in Nigeria of the standing in life as the accused in consequence of the alleged provocation as contained in Exhibit "1" and **I am satisfied that no reasonable Nigerian of the same standing in life as the accused will be so rendered subject to passion or loss of self-control as to be led to use such violence leading to fatal result. The circumstances were not such as to make the accused lose his self-control as to inflict those fatal injuries on his father. He could also not be said to have acted in the heat of passion when after inflicting those matchet cuts on his wife at home, he proceeded to the farm to inflict the deadly cuts on his father. See John v. Zaria N.A. (supra), Nomad v. Bornu Native Authority (1954) 21 N.L.R. 31, The Queen v. Akpakpan (1956) 1 F.S.C. 1 at 2 and Ruma**

v. Daura N.A. (1960) 5 F.S.C. at 93. Certainly there was enough time for his passion to cool and reason to gain control of his mind.

Furthermore, the infliction of fatal matchet cuts on the deceased by the accused as a mode of resentment bore no relationship to the provocation offered. **I agree that words alone can constitute provocation as to reduce the offence of murder to manslaughter but from all I have said in this judgment, such words, if any, did not satisfy the requirements set out in section 318 of the Criminal Code. The words themselves must be of such a provocative nature as to incense a reasonable man of the accused's standing in life and education to lose his self-control. See Akalezi v. The State (1993) 2 N.W.L.R. (Pt. 273) 1 at 114 and The Queen v. Akpakpan (supra). I have seen nothing in the evidence of the prosecution witnesses and that of accused person himself that would have led the trial judge to any verdict other than that of "guilty of murder". The courts below were right in their conclusions.**

I find no merit in the appeal and I dismiss it for the reasons given above. The conviction and the sentence of death imposed on the accused are hereby affirmed.

BELGORE JSC

The appellant no doubt killed his father after inflicting grievous hurt on his wife. I find no reason to interfere with the well reasoned judgment of Court of Appeal which affirmed the decision of trial High Court. For the fuller reasons in the judgment of my learned brother, Kalgo JSC, I also dismiss the appeal as totally lacking in merit.

ONU JSC

I was privileged before now to read in draft the judgment of my learned brother Ogwuegbu, J.S.C. I am in entire agreement with him that the appeal lacks merit and it is accordingly dismissed by me. I wish to comment on the case briefly as follows:-

My learned brother has very ably reviewed the facts which in, my view, are so clearly indisputable that I do not intend to repeat them here. Suffice it to say, that learned Appellant's Counsel having withdrawn additional grounds 1, 2 and 3 of the grounds of appeal upon which Issue 1 B is founded, they were accordingly struck out. Left with only Issues 2, 3 and 4, learned Counsel made a succinct general comment on them by urging us to allow the appeal, failing which we were urged to return a verdict of manslaughter. I will now consider issues (II) and (III) together and then issue No. IV separately thus:-

C ISSUES NO.II & III. These issues first taken together ask:

(II) Whether the trial of the Appellant on 24th day of October, 1990 with the learned trial Judge acting as the prosecutor, and the Judge was contrary to Section 33 of the Constitution of the Federal Republic of Nigeria D 1979, which occasioned miscarriage of justice.

(III) Whether Exhibit '1' can be classified as a confessional statement of the Appellant for murder.

The learned Counsel for the Appellant on Issue (II) above submitted inter E alia that the failure of the learned trial Judge to resolve the allegation of lack of confidence in him undermined or compromised the Appellant's right to fair hearing as guaranteed by Section 33 of the Constitution of the Federal Republic of Nigeria, 1979 (as amended) (hereinafter referred to as the F Constitution). This grave allegation, was also not disclosed by the Court to the Appellant for inexplicable reasons but that this unresolved allegation left the integrity of the Court hanging, thereby eroding the confidence in the entire proceedings and judgment.

G Appellant further expatiated in his written Brief that the failure of the learned trial Judge to resolve the allegation of lack of faith hereinbefore referred to, coupled with the failure to inform him throughout the trial of the allegation by his former counsel against the Court, constituted a breach of the rule of natural justice or fair hearing. The net result, it was further H argued, was to have declared the decision null and void. Reliance was placed on the case of Adigun v. A. G. of Oyo State (1987) 1 NWLR (part 53) 678 and Section 33 (6) (c) of the Constitution (as amended), the latter which states that:-

(6) "every person who is charged with a criminal offence shall be entitled:

(c) to defend himself in person or by legal practitioner of his own choice." and

Section 352 of the Criminal Procedure Law, Laws of Bendel State 1976, B Cap. 49 (applicable to Edo State) which provides that:

"Where a person is accused of a capital offence the State shall if practicable be represented by a Law Officer or Legal Practitioner and if the accused is not defended by a Legal Practitioner the court shall, if practicable assign a Legal Practitioner for his defence." C

After our attention had been drawn to consistent previous decisions of this Court deprecating unfair trial and particularly failure to make available comprehensive facts of a case to an accused person, concealment or suppression of facts from him, we were referred to the cases of Denloye v. Medical Dental Practitioners Disciplinary Committee (1968) A.N.L.R. 298 (Reprint), Odofin Bello v. The State (1968) A.N.L.R. 298 at 302 and 303 (per Ademola, C. J. N.) and Modern Bar Advocacy by Honourable Justice C. A. Oputa. Appellant in addition cited the case of Mohammed v. The State (1991) 5 NWLR (Part 192) 438 at 456 as per Olatawura, J.S.C. and Hameed Apampa v. Balogun - Suit No. 1/211/65 of October 20, 1970 per Aguda, J. (as he then was) to buttress his argument. In illustrating that the Appellant was deprived of his right to fair hearing which occasioned a miscarriage of justice, it was further submitted that the learned trial Judge did not make the necessary disclosure, had concealed or suppressed from the Appellant as well as the substitute Counsel the allegation of lack of faith made against him. Learned Counsel after classifying what may amount to a confessional statement of the Appellant for murder, contended that the extra-judicial statement of the Appellant was erroneously classified as a confessional statement by the learned trial Judge and affirmed by the learned justices of the Court of Appeal whose findings thereon were perverse in that the Appellant never confessed to killing the deceased as charged. It was contended that for Exhibit 1 to qualify as confessional statement the Appellant who was alleged to have made it must admit or agree clearly, precisely and unequivocally in the statement that he committed the of-

ence with which he is charged, to wit: that a confession must be direct and positive. The cases of Gbadamosi v. The State (1992) 9 NWLR (Part 266) 465 at 478 and 479 and Raimi Adebisi Afolabi v. Commissioner of Police (1961) ANLR 682 (Reprint) were cited in support of the proposition.

In Exhibit '1', it is stated that the Appellant killed the deceased under provocation. It is further argued that the learned Justices of the Court of Appeal relied heavily on that confessional statement to murder and incorporated same in the judgment convicting the Appellant and that this serious misdirection in misconstruing Exhibit '1' as a confessional statement, has occasioned a miscarriage of justice which furnishes a ground for quashing the conviction. It was further submitted that the Appellant made no confession to murder as wrongly held by the learned justices of the Court below, adding that in the absence of any direct evidence to sustain the charge of murder, the circumstantial evidence not being cogent, complete and unequivocal to sustain such a serious charge. The circumstances, it is maintained, supported the offence of manslaughter, adding that as the circumstantial evidence is equivocal, the Court should be wary to convict on it. The case of Michael Peter v. The State (1997) 12 NWLR (Part 531) 1 at 19 was called in aid. It was therefore maintained that where a reasonable doubt was created by the evidence given by either the prosecution or the defence as to the guilt of the accused for the offence charged, the benefit of doubt should enure in his favour. The case of Akpabio v. The State (1994) 7 NWLR (Part 359) 635 at 670 was cited in support thereof, stressing that for the doubts highlighted, a verdict of discharge and acquittal or in the alternative, a conviction for the offence of manslaughter in view of the un rebutted evidence of provocation, was the appropriate verdict to arrive at.

In respect of Issue II, it is pertinent to point out firstly, that when on 24th October 1990, this case was called (see page 13 of the Record), the learned State Counsel prosecuting the case was absent while Mr. J. O. Udaze, Counsel for the Appellant was present in Court. In spite of the absence of the State Counsel, the trial Judge proceeded with the trial whereby the Appellant gave evidence and was not cross-examined. (See

page 14 of the Record), Mr. Udaze further addressed Court and the case was adjourned for judgment. It is therefore not trite that a reading of the proceedings of 24/10/90 reveals clearly that the Appellant had no fair trial. Should anyone complain, it is the State that was not represented that ought to do so but surely not the Appellant. Clearly, the Appellant's grouse is B groundless more so, that he even had every opportunity to extricate himself but he did not do so. Seeing that he was not even cross-examined after giving his defence evidence, I agree with the Respondent for submitting that the learned trial Judge was right when he carried on with the case in the absence of the prosecution. This clearly did not occasion any miscarriage of justice. Moreover, the decisions of the two courts below constitute concurrent findings of fact warranting no interference whatsoever. C See Mora & Ors. v. Nwalusi & Ors (1962) 1 ALL NLR Part 4 681.

If the Appellant was not represented by Counsel, how then could D the learned trial Judge have been shown to be in error? It is not correct to suggest that the record of Proceedings depicts that the learned trial Judge either conducted the case of the prosecution for it or even put a question to betray the semblance of descending into the arena to assist any of the con- E tending parties. Rather, the Appellant and his Counsel partook in a free and unfettered trial wherein I cannot see any breach of section 33 (1) of the 1979 Constitution (now Section 36 (1) of the 1999 Constitution).

In this wise, all authorities cited by the Appellant in his quest to F show that he received no fair trial in the two courts below are not only inapposite, they are in my respectful view, of no avail. Besides, not only were the proceedings of 24/10/90 an impartial trial of the Appellant, there was nothing that could be a fairer one that was conducted. In the circumstances, the case of Akinfe v. The State (1988) 3 N.W.L.R. (Part 85) 729 G does not apply to the instant case.

On issue (iii) as to whether Exhibit "I" can be classified as a confessional statement of the Appellant for murder, I am of the firm view that that statement constitutes a positive one made by the Appellant. For H instance, in it, the Appellant stated as follows:-

"I did kill him because he has been telling me to leave his house with his wife."

He further stated " I did not kill them but gave them matchet cut."

In his evidence-in-chief at his trial, the Appellant further admitted that he inflicted the injuries which caused the death of the deceased. This has established the fact that the Appellant knew what he did and he admitted it. Even though there was no eye-witness to the crime therefore, the Appellant made a voluntary statement (Exhibit "1") which the trial court rightly regarded as a confessional statement and the court below upheld it. The fact that the trial Judge could convict on the confessional statement (Exhibit "1") of the Appellant which is direct, positive and unequivocal and which properly established the truth of the guilt of the Appellant, was made clear in the case of Silas Ikpo v. The State (1995) 33 L.R.C.N. 587 at page 589 (ratio 3) where this court held as follows:-

"a free and voluntary confession of guilt whether judicial or extra-judicial, if it is direct and positive and properly established is sufficient proof of guilt and is enough to sustain a conviction so long as the court is satisfied with the truth of such a confession."

See R. v. Sykes (1913) 8 C.A.R. 233 at 236" See also R. v. Onabanjo (1936) 3 WACA 3 R. v. Igwe (1960) 5 FSC 55 and Isiyaku Mohammed v. Kano N.A (1968) 1 All NLR 424 at 426. I am in agreement with the respondent's submission that the test in R. v. Sykes (supra) in respect of the confessional statement, to wit: Exhibit "1", is corroborated by the evidence given by the prosecution witnesses, the totality of which confirms the truth of the confessional statement. For instance, PW1, PW2 and PW4 testified that the deceased had matchet cuts on the head and body and although they were not eye-witnesses, the appellant's conviction, as it was based upon the circumstantial evidence received which is cogent, compelling and upon which there are no co-existing circumstances, that could create a doubt as to the guilt of the Appellant. See Udo Udedibia v. The State (1976) 11 S.C 133. In other words, where, as in the instant case, the Appellant's confession is direct and positive, there is no need to seek for corroborative evidence. See R. V. Omokaro 7 WACA 146; Edet Obosi v. The State (1965) NMLR 119 and Jimoh Yesufu v. The State (1976) 6 S.C. 167.

Where the statement of an accused is voluntary as in the instant

case, vide Exhibit 1 and it was properly admitted, for which See R. v. Obiasa (1962) 1 ALL NLR. 651; Achabua v. The State (1976) 12 S.C. 63, the fact that the statement was later retracted, (which was also not the case here) is immaterial. See R. v. Kanu 14 WACA 70 and R. v. Egboghonome (1993) 7 NWLR (Part 306) 383 at 428 and 434. B

In the Udebibia Case (supra), this Court held that where direct testimony of an eye-witness is not available, the court is permitted to infer from the facts proved, the existence of other facts that that may be logically inferred. In the instant case, the trial Judge, rightly in my view, C inferred that the circumstances point to the guilt of the Appellant and the Court below was justified in affirming same.

Issue No IV asks whether the defence of provocation is available to the Appellant. The learned trial Judge found the defence of provocation not to avail the Appellant and held that if in fact he (Appellant) was ridiculed by words of mouth by the deceased and his wife, that he lost his job, such statements do not amount to provocation. The Court below unhesitatingly affirmed the decision, more so that it is now settled law that the provocation must be grave and sudden and must be such as to take away freely from the accused the power of self control making him for the moment not a master of his mind. See R. v. Afonja (1955) 15 WACA 26, following the observation in R. v. Duffy (1949) 1 ALL E. R. 932 (per Devlin J. (as he then was). See also the decision of this court in Ogbonna Nwede v. The State (1985) 3 NWLR (Part 13) 444. The act of killing F must have been done in the heat of passion before there was time for passion to cool and then there must be a retaliation not disproportionate to the provocation offered.

Thus, "for the defence of provocation to be available, the accused G must have a reasonable belief that his life is in danger and the quality of force used by him must be the same as that from which he defends himself". See Okonji v. The State (1987) 3 S. C. N. J.. 33 at 39. If indeed, the Appellant was actually provoked by the deceased by taunting and ridiculing him for his inability to assist the family financially sequel to the loss of H his job in Benin, he would have attacked the deceased and his wife in the heat of passion and before he had time for the passion to cool down. Rather,

the Appellant attacked his wife at home and allowed the deceased to go to the farm where he was rendering a humanitarian job of reaping yams therefrom for him (Appellant) to take away back to Benin, when he went there (farm) to attack him with matchet cuts leading to his (deceased's) death. It is from the overwhelming evidence adduced against the Appellant herein that I hold the view that the Appellant was not provoked at all. Rather, the murder was cold, dastardly and premeditated. Assuming that there was provocation, the injuries inflicted on the deceased would not appear to bear any reasonable proportion to the provocation if any, given. There are no mitigating circumstances, in my view, to make the defence of provocation available to the Appellant so as to reduce the offence of murder charged to that of manslaughter. Appellant's case bears no redeeming features in my opinion.

For the reasons given and the more elaborate ones contained in the leading judgment of my learned brother Ogwuegbu, JSC. I dismiss this appeal as lacking in merit. I accordingly affirm the decision of the Court below.

ACHIKE JSC

I have had a preview of the leading judgment of my learned brother, Ogwuegbu, JSC. I am in total agreement with the reasoning and conclusions that this appeal is lacking in merit and the same should be dismissed.

The appellant was charged with the offence of murder of his father on the fateful day. After due trial, he was convicted and sentenced to death by the learned trial judge, Okungbowa, J. of the High Court of Ekpoma in the defunct Bendel State (within present Edo State). The facts of this case are hardly indispute and have been lucidly set out in the leading judgment of my learned brother which I respectfully wish to adopt as mine in my brief consideration of one aspect of this appeal, namely, the defence of provocation based on mere words - abusive or vituperative.

The salient words uttered by the deceased that could be relied upon, possibly as defence of provocation in the instant case, and as may be gleaned from the appellant's statement to the police or his testimony in

court are as follows: Statement of accused person, Exhibit 1:

"..... My father has been living with us since all the time until this morning 19/9/85 when I killed him because he has been telling me to leave his house with his wife I was provoked this morning 19/9/85 because of home trouble and I took a decision of killing my father and wife Mrs Grace Uluebeka. I now say that I did not kill them but I gave them machet cuts And it is because of ill-health that my parents are worrying me I became annoyed because I have no money and everybody in my family continue (sic) to worry me more especial (sic) my father and his wife. I cut my wife because she was bull-ing (sic) me since I have no money. Since I have no money my family became annoyed of me without minding my ill-health. This is why I decided to end my life with any person available".

Appellant's testimony

"..... Because my wife and my father ridicule me I was angry and so I went into the room and picked up a cutlass and cut my wife and my father".

It is against this background that learned counsel for the appellant, inter alia, urged the defence of provocation on behalf of the appellant, relying on section 318 of the Criminal Code Cap. 48, Laws of Bendel State, 1976 applicable to Edo State. Learned counsel submitted that when the act of the accused caused him to lose "momentary control of his mind, the defence of provocation will avail him".

On the defence of provocation, learned appellant's counsel submitted that provocation must be grave and sudden and must be such as to take away the accused's self-control and that the act of killing must have been done in the heat of passion before there was time for passion to cool and that the retaliation must be proportionate to the provocation offered.

The question due for consideration is, whether the defence of provocation, as postulated under Issue No. 4, can avail the appellant to reduce the offence from murder to manslaughter. The defence of provocation is set out under section 318 of the Criminal Code, Cap 48 Laws of Bendel State 1976, applicable to Edo State Section 318 states:

"When a person 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 caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only."

B For the killing of another to be excused in the sense that it is reduced to manslaughter, the person seeking to evoke the defence of provocation must satisfy the court on the following elements, namely,

(a) that he killed the deceased in the heat of the passion caused by sudden provocation, and

C (b) that at the time of killing the heat of passion had not cooled.

These conjunctive elements are demanding in that the appellant would have acted on the spur of the moment of the act of sudden provocation which left him no time for cooling of his passion. Put differently, the sudden provocation which generates the heat of passion would be quite contemporaneous with the killing of the victim of the murder, the heat of temper not having time to cool.

The evidence from which the act of provocation can be elicited is very narrow and circumscribed. It is contained in Exhibit 1 and appellant's testimony in court as set out above there being no real eye-witnesses to the killing. Exhibit 1 shows that appellant's father (probable, and his mother) had been telling the appellant to vacate his house. This did not go well with the appellant. When the same request was made on the fateful day of 19/9/85, the appellant, by his ipsi dixit, said he was provoked. I will interpret this to mean that he was angry and also according to him, he took the decision to kill his parents. Furthermore, from his testimony at the trial he explained that the request by his parents that he should vacate their house amounted to being ridiculed by them which made him angry and caused him to go for his matchet with which he killed his father. It is as I had earlier observed, within the confines of this narrow piece of evidence that appellant's learned counsel had urged the defence of provocation. Except for the apparent verbal ridicule by appellant's parents that the appellant should leave their house and, establish his own home, nothing else has been shown to have generated such sudden provocation meted out to the appellant and which, while the passion so generated still lingered, to

warrant the appellant to kill his father. In another jurisdiction, it has been more lucidly put that the heat of passion was such as would make the person, like the appellant herein, lose his self-control as to make him at that critical point in time, no longer magister animi in killing or inflicting the devastating matchet cuts on his father, See R. v. Duppy (1949) 1 All E.R. 932 at p. 932 per Delvin, J, R. v Nwanjoku 3 WACA 208, R v. Afonja 15 WACA 26 and Nwede v. The State (1985) 3 NWLR (Pt. 13) 444. In my view, neither the appellant from the evidence placed before the court nor his learned counsel's submission has explicitly demonstrated the temporary loss of self-control by the appellant as to afford him a defence under section 318 of the Criminal Code. B
C

The appellant from his oral testimony gives the impression that the inflicting of matchet cuts on his wife and the devastating matchet cuts on his father were executed contemporaneously at their home, but, on the contrary, there is evidence of three prosecution witnesses, i.e. PW 1, PW 3, and PW 4, to the effect that the brutal matcheting of the deceased occurred at his farm. Assuming, but not conceding, that mere words, comprising ridicule to the effect that appellant should found his own home and to that reason should vacate the deceased's house, would such words alone be sufficient to ground the defence of provocation? Unfortunately, the exact words of alleged ridicule were not explicitly stated in order to enable one enquire whether they can justifiably be such as would make a person lose his self-control. Be that as it may, will mere words, without more, afford a person the defence of provocation?. The English courts turned in a negative answer. Thus in Reg v. Sherwood 174 English Report 936 it was held that no provocation by words alone will reduce the offence of murder to that of manslaughter. In contrast, see Bedder v. D. P. P. (1954) 2 All E.R. 801. The accused who was sexually impotent tried unsuccessfully to have sexual inter-course with a prostitute. She thereafter jeered at him and also kicked him causing him to lose self-control whereupon he stabbed her twice and killed her. On charge of murder, the accused pleaded H provocation and the House of Lords upheld the direction that the proper test was the effect which the conduct of the prostitute would have on an ordinary person, not on a sexually impotent person. Again, in the split D
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decision of 3:2 of the Supreme Court in Mallam Zakari Ahmed v. The State (1999) KLR Vol. 5 Part 84 p. 1391, while the majority decision (Belgore, Mohammed & Kalgo, JJSC) held in effect, that mere verbal abuse would ground the defence of provocation, the majority decision (Ogundare & Achike, JJSC) strongly held otherwise. Here, it is quite clear that the appellant failed to establish that he was at great rage at the critical moment, and ceased to be the master of his own understanding when he landed matchet cuts on his father consequent to the fatherly insistence that the appellant should establish his own home. Even if verbal provocation is cognizable, it must however be borne in mind that it is not every slight provocation, even by striking or blow, will justify the appellant to retaliate with a weapon, such as matchet or gun, that is lethal and likely to cause death. The question here is whether the appellant can be said to be justified to have resented the verbal words of alleged ridicule of the deceased by using a deadly weapon calculated to cause death. The answer to be turned in must clearly be in the negative and to that extent there will be no justification for the reduction of the crime of murder to manslaughter. See E Yusuf v. The State (1988) 4 NWLR (Pt. 86) 96 and R. v. Adekanmi (1944) 17 NLR 99.

Finally, I am clearly of opinion that there was ample or sufficient interval between the time the deceased uttered the words of alleged ridicule to the appellant while at home and the moment the deceased was brutally inflicted with several matchet cuts on the body by the appellant at the farm for cooling of appellant's passion and thereby enable him to regain the master of his understanding. Consequently, I am clearly of opinion that the murder was brutal, premeditated and completely out of proportion with the seeming provocation meted to the appellant.

For the fuller reasons given in the leading judgment of my learned brother and what I have said herein, I am satisfied that the two lower courts were respectively right in convicting, and affirming the conviction of, the appellant of murder and not reducing the offence to manslaughter.

KALGO JSC

I have read in draft the judgment of my learned brother Ogwuegbu JSC just delivered and I entirely agree with him that the appeal has no merit and ought to be dismissed. I however wish to add the following by way of emphasis.

In the Ekpoma High Court of former Bendel State (now Edo State) the appellant was charged and tried of one court of murder which reads as follows:-

STATEMENT OF OFFENCE

Murder contrary to Section 319 (1) of the Criminal Code Cap. 48 vol. 11 laws of Bendel State of Nigeria, 1976.

PARTICULARS OF OFFENCE

Sunday Ihuebeka (M) on or about the 19th day of September, 1985 at illeh-Ekpoma in the Ekpoma Judicial Division murdered one Iregho-ULUEBEKA (male).

On the 16th of October, 1989 when the charge was read and explained to the appellant, he pleaded not guilty. The trial proceeded whereby the prosecution called 4 witnesses and tendered the caution statement of the appellant which was admitted as exhibit 1. The appellant gave evidence in his defence but called no witnesses. At the end of the trial, only the defence counsel who was present in court addressed the court. The case was then adjourned for judgment. On the 14th of January, 1991, the learned trial judge, Okungbowa J, in a well-considered judgment found the appellant guilty of murder, convicted him of the offence and sentenced him to death. The appellant appealed to the Court of Appeal Benin, as he was entitled to do, but the Court Appeal dismissed his appeal. He now appealed to this court on seven grounds.

In accordance with the rules of this court, both parties filed their respective written briefs and exchanged them between themselves. The appellant in his brief formulated the following issues for the determination of this court:-

(i) Whether the failure of the learned trial judge to resolve the allegation of lack of faith against the court by the former Counsel and not informing the substitute Counsel or Appellant of this serious allegation

breached the Appellant's right to fair hearing as guaranteed by section 33 of the Constitution of the Federal Republic of Nigeria 1979, (as Amended).

(ii) Whether the trial of the Appellant on the 24th day of October, 1990 with the learned trial judge acting as the prosecutor and the Judge
B was contrary to Section 33 of the Constitution of the Federal Republic of Nigeria 1979, which occasioned miscarriage of Justice.

(iii) Whether Exhibit "I" can be classified as a confessional statement of the Appellant for murder.

(iv) Whether the defence of provocation can avail the Appellant
C to reduce the offence from murder to manslaughter.

For the respondent, 4 issues were also raised thus:-

(i) Whether the manner in which the learned trial judge conducted the trial of the Appellant after his counsel withdrew from the case breached
D the Appellant's right to fair hearing or occasioned any miscarriage of justice.

(ii) Whether the learned trial judge acted as the prosecutor and judge on the 24th day of October, 1990.

(iii) Whether Exhibit 'I' was a confessional statement positively
E made by the Appellant.

(iv) Whether the defence of provocation is available to the Appellant.
F

After going through the issues set out by both parties in their separate briefs, I find that the issues are virtually the same, I will therefore adopt, for the purpose of this appeal, the issues raised by the appellant.

At the hearing of this appeal, both counsel essentially adopted their briefs on behalf of their respective clients and urged the court to deal
G accordingly. It is however pertinent to note here that the learned counsel for the appellant in course of argument, applied to abandon or withdraw his issue I for determination which related to grounds of appeal 1 and 2. There was no objection from the learned counsel for the respondent and so
H issue I was accordingly struck out. I will say nothing about it in this judgment.

In issue 11, the appellant's complaint was that on the 24th October 1990, during the trial of the appellant, when the state counsel pros-

ecuting the case was absent, the learned trial judge proceeded with the trial whereby he took the defence of the appellant and the address of the defence counsel. This, learned counsel for the appellant submitted in the brief, went contrary to the provisions of Section 33 of the 1979 Constitution and occasioned a miscarriage of Justice. He further submitted that B this conduct of the judge established his likelihood of bias and lack of impartiality which vitiated the entire trial. He cited these cases in support: Okoduwa v. State (1988) 2 NWLR (pt. 77) 333 at 347; Akinfe v. The State (1988) 3 NWLR (Pt. 85) 729 at 752-3; David Uso v. C. O. P. (1972) C 11 SC 37 at 46; Kim v. The State (1992) 4 NWLR (pt. 233) 17 at 40.

Mrs Uwugbe, learned Assistant Chief Legal Officer for the respondent submitted in the brief that the proceedings of the 24th October, 1990 was more than a fair trial in that the appellant gave his evidence in defence without being cross-examined and the learned trial judge did not D ask him any question at all before adjourning the case for judgment. She further submitted that the appellant had nothing to complain about on that day's proceedings; if any body was to complain, it would be the respondent who was not represented. Learned counsel therefore submitted that E the learned trial judge conducted the proceedings of 24th October, 1990, fairly without any inclination of bias or partiality towards the appellant and that there was no miscarriage of justice or any contravention of the provisions of Section 33 of the 1979 Constitution in relation to the appellant. F

For a clear understanding of what happened on 24th October, 1990, in the trial of the appellant, it is pertinent to examine the proceedings immediately before the 24th of October, 1990. On the 10th of October, 1990, G when the case was called in the presence of the parties, the following proceedings was recorded on page 13 of the record:-

"Case called. Accused person is present. M. Tedeye State Counsel (Miss) appears for the State. J. O. Udaze Esq; appears for the accused person. J. O.. Udaze Esq; asks for a short adjournment. M. Tedeye H State Counsel (Miss) has no objection. Court:- This case is adjourned to 24/10/90 for defence.

sgd. G. U. O. Okungbowa Judge 10-10-90"

(underlining mine)

On the 24th October, 1990, the following proceedings took place:-

"Case called. Accused is present. J. O.. Udaze Esq; appears for the accused person. State Counsel is absent.

B *Defence Opens his case"*

This was immediately followed by the evidence of the appellant in his defence, which went over to page 14 of the record. At the end of the appellant's evidence, this was recorded:-

C *" J. O.. Udaze Esq; informs the court that this is the case for the defence".*

This was immediately followed by the address of Udaze, the learned counsel for the defence, after which the case was adjourned for judgment.

D Form the above, it was clear that on the 10th October, 1990, the case was adjourned for defence with the consent of the learned State Counsel for the respondent to the 24th of October, 1990. On the 24th of October, 1990 when the state counsel failed to appear, the defence of the appellant
E proceeded unhindered and at the end of it, there was no cross-examination by the learned trial judge or any body at all. The appellant got away with all what he said in his defence except when considered in relation to other evidence produced earlier by the state counsel. The learned trial judge,
F according to the proceedings of 24th October, 1990, did not and could not by any stretch of imagination be taken to assume the double role of judge and prosecutor at the same time in this case nor could he be taken to be biased or impartial in the performance of his normal functions. Therefore the appellant cannot be justified at all in his complaint in issue 11 against
G the judge as he was more than fairly treated and there cannot be any mis-carriage of justice in the conduct of his trial by the learned trial judge. The state counsel did not complain against the learned trial judge for proceeding with the case in their absence thereby depriving them of the opportu-
H nity to cross-examine the appellant on defence evidence.

The appellant was granted every opportunity of presenting his defence during his trial and there is no question of any unfair trial or mis-carriage of justice arising thereby. See Kano N.A. v. Obiora (1960) N. R.

N. L. R. 42. The appellant was present throughout the trial and his counsel also represented him throughout the trial. And although there was a change of counsel when Dr. Okoloise decided to withdraw his representation for the appellant, the trial court immediately assigned another Mr. Udaze to represent the appellant and the appellant did not object to appearance of the new counsel for him. On the 24th of October, 1990, when the learned trial judge decided to continue the trial in the absence of the state counsel, the appellant's counsel was present; he led the appellant in his defence and addressed the court at the end of the trial. There is no doubt therefore that trial of the appellant was fair and not in contravention of the provisions of Section 33 of the said Constitution. C

I have gone through all the cases cited by the learned counsel for the appellant on this issue, and I found them to be irrelevant and inapplicable to the facts and circumstances of this case. I resolve issue II in favour of the respondent. D

Issue III and IV were argued together by the learned counsel for the appellant in his brief. They dealt with the confessional statement of the appellant Exhibit I and the defence of provocation. E

In order to appreciate the relevance of issues III and IV in relation to the circumstances of this case, it appears to me useful at this stage, to set out, albeit briefly the facts of the case as presented to the court by the prosecution. F

In the evening of the 18th September, 1985, the appellant arrived in Benin to visit his father Irogho Uluebeka (the deceased). At about 7 p.m. that evening, Mr. Irogho Uluebeka invited his junior brother Abu Uluebeka, P.W.1, to the family house where the latter met the appellant. In the presence of the appellant, Irogho Uluebeka told P.W.1 that the appellant had refused to assist him (the deceased) in the payment of the school fees of his (the appellant's) brother who had gained admission into a Technical College in Afuze. On hearing this, P.W.1 immediately invited the appellant to his own house where he pleaded with the appellant to assist his father in the payment of the school fees of his brother. The appellant still refused and P.W. 1 reported this back to his senior brother the deceased. P.W. 1 then returned to his house and the matter left to rest. G H

It is pertinent to observe that at this time, the appellant was a sales representative of Green Sands Publishers Company N. 165 upper Sokponba Road, Benin City and had a vehicle assigned to him for the promotion of the company's goods.

B The following day 19/9/85, the deceased went to his farm to harvest some tubers of yams to give to his son the appellant who was going away later in the day. P.W 1 also went to his own farm that morning and whilst he was there, one Victor Arebu came to him on a motor cycle and told him something, as a result of which he followed Victor Arebu to the
C deceased farm where he found the deceased in a pool of blood nearing death. The deceased told him that it was the appellant who macheted him. The deceased was taken to the Police Station Ekpoma and then to the General Hospital where he died before any treatment was given to him.
D The appellant was then arrested. On the 29/9/85 a medical officer conducted post-mortem examination on the corpse of the deceased after P.W.1 identified it as that of his brother Orogho Uluebeka. P.W. 2 Vincent Oseghale testified that the appellant took him and some other people to the
E deceased farm and showed them where he (appellant) matcheted the deceased and left him lying in a pool of blood. On the same day, the appellant also inflicted some matchet cuts on his wife Grace and this was seen by P.W. 3 Sunday Okosun, who took Grace to the Police Station Ekpoma and
F then to the General Hospital where she was admitted for treatment.

P.W. 4, who was the investigator of the case, also took the statement of the appellant under caution on the day of the incident - 19/9/85. It was signed by the appellant and admitted in evidence at the trial as Exhibit
1.

G That briefly is the evidence of the prosecution in this case. I shall now consider issues III and IV in the light of the evidence.

The question raised in issue III, is whether Exhibit I, can be classified as a confessional statement. What then is a confessional statement
H in law? It is simply a statement of an accused person charged with a criminal offence, which is a confession. What amounts to a proper confession in this context? In Osborne's concise Law Dictionary, Sixth Edition page 87 confession is defined thus:-

"An admission of guilt made to another by a person charged with a crime. It is admissible only if free and voluntary; i.e. if it is not forthcoming because of inducement, or threat, held out by a person in authority. It must not be made under hope of reward (other than spiritual) or fear of punishment in relation to the proceedings. The onus of proof that a confession was voluntary is on the crown (D. P. P. V. Pin Lin [1915] 3 W. L. R. 419). Admission may be obtained from a person by questions fairly and properly put to him by a Police Officer". (underlining mine)

P.W. 4 Sgt. Koliko Umaru was the Police Officer who investigated the case of the appellant. In the course of his investigation he collected a statement made by the appellant before another Policeman in his presence on the 19th of September, 1985, the day the incident happened. In his evidence-in-chief at the trial, he tendered it in evidence and it was admitted in evidence as Exhibit I without any objection by the appellant or his counsel. In his evidence in his defence, the appellant did not deny making Exhibit I nor retract anything from it. In fact he made no mention of the statement he made to the Police and as the prosecution counsel was absent on that day nothing was said about Exhibit I.

Before making Exhibit I it was very clear that the appellant was cautioned in the language he understands; that he was not obliged to say anything and that anything he wished to say would be recorded and might be given in evidence. Exhibit I showed that the appellant signed the statement after he made it on the 19th of September 1985, the date of the incident, when the facts were fresh in his mind.

In Exhibit I, the appellant inter alia had stated that:-

"My father has been living with us since all the time until this morning 19/9/85 when I killed him because he has been telling me to leave his house".

In his evidence in chief, the appellant also said:-

"The deceased was my father. The deceased died from injuries I inflicted in his head".

The above statements sufficiently constitute an admission of guilt by a person charged with the murder of his father. There was also nothing on

the face of Exhibit I itself or from the evidence in the trial court to indicate that the appellant was induced, threatened or forced into making Exhibit I held out by a person in Authority. See for example the cases of R. v. Marshall-Graham (1967) 2 W. L. R. 1094; Madu Fatumani v. The King B (1950) 13 WACA 39. I am therefore satisfied that Exhibit I was made voluntarily by the appellant as found by the learned trial judge. The appellant clearly admitted killing his father in Exhibit I after he was accused or charged with the murder of the father. Exhibit I therefore becomes a relevant fact against the appellant within the provisions of Section 27 of the C Evidence Act. Also from the evidence of the prosecution witnesses especially PWs 1, 2 and 3, and the circumstantial evidence accepted and believed by the learned trial judge, I have no doubt in my mind, that the appellant intended by his act to kill his father, the deceased, or to inflict D such grievous bodily harm that was likely to cause his death. See Uyo v. A. G., Bendel State (1986) 1 NWLR (pt. 17) 418. In the final analysis I will answer issue III in the affirmative.

Issue IV is straight forward. It is whether the defence of provocation can in this case, avail the appellant. It is trite law that in a criminal E trial, a court is bound to examine and consider all possible defences from the evidence in favour of an accused person. See Uwani v. State (1988) 1 NWLR (pt. 70) 274. It is also common ground that a defence of provocation properly raised will result in reducing the offence of murder to that of F manslaughter. See Ajunwa v. The State (1988) 4 NWLR (pt. 89) 380.

In the instant appeal, the appellant in Exhibit I, said:-

"My father has been living with us since all the time until this morning 19/9/85 when I killed him because he has been telling me to G leave his house with his wife. He also told me to go away from his house with my wife Grace. His wife's name is Rose Uluebeka. This morning 19/9/85 members of my family gathered together and started quarrelling with me and at the same time asked me and my wife Grace Uluebeka to H leave my father's house. My father was also present at the gathering. I was provoked this morning 19/9/85 because of home trouble and I took a decision of killing my father and his wife Mrs Grace Uluebeka". (Underlining mine)

In his evidence in chief in his defence, the appellant while talking about the family meeting also said:-

"Shortly afterwards my wife joined the 1st P. W. and other members of my family to ridicule (sic) me. Because my wife and my father ridicule (sic) me I was angry and so I went into the room and picked up a cutlass and cut my wife and my father".

The impression given here by this quotation is that when his father ridiculed him, he (appellant) got angry, when into the room, picked up a cutlass and cut the father with it. This was not the case at all. According to the prosecution evidence, which was unchallenged and which was accepted and believed by the learned trial judge, the appellant met the deceased on his farm where he went to harvest some yam tubers for appellant to take away, and he macheted the old man there leaving him aground in a pool of blood. So that even though, the learned trial judge believed the appellant that he was ridiculed and asked to leave his father's house at the family meeting which the deceased attended, the appellant did not act at the spur of the moment according to the facts and circumstances of the case when he could not control his anger. In the case of *R. v. Duffy* (1949) 1 A. E. R. 932, Devlin J. defined "provocation" as "same 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 to make him for the moment no master of his mind". According to this simple definition, for the appellant to rely on provocation, he must have suddenly lost his self-control at the time he macheted his father as a result of provocation. In this case even if the deceased took part in asking the appellant to leave the house at the family meeting, the act of macheting did not suddenly happen in the house. The appellant waited until the deceased went to the farm where he met and inflicted the fatal machet cuts on him. Also it is trite law, that provocation given to the person provoked must be commensurate to the offence committed. See *Yusuf v. The state* (1988) 4 NWLR (pt. 86) 96. I do not think that for merely asking the appellant to leave his father's house, he would reasonably be provoked to kill the father especially as the appellant is an "educated and civilized person" as opposed

to an "illiterate and primitive peasant" whose passions are for more readily aroused than of a civilized and enlightened person. See the case of R. v. James Adekanmi (1944) 17 NLR 99 at page 101.

From all what I have said in my consideration of this issue, I find
B that provocation as a defence cannot avail the appellant on the facts and
circumstances of this case. I therefore answer issue IV in the negative.

For the reasons stated above, and the more detailed reasons given
in the leading judgment of my learned brother Ogwuegbu JSC, I find that
C there is no merit in this appeal. It is accordingly dismissed. I affirm the
decision of the Court of Appeal confirming that of the trial court.

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