

**SUPREME COURT OF NIGERIA**  
25TH JUNE, 2004. SC. 231/2002  
**CORAM:- I. L. KUTIGI, A. I. IGUH, A. O. EJIWUNMI,**  
**D. MUSDAPHER, I. C. PATS-ACHOLONU, JJSC**

SUNDAY AMALA	.....	APPELLANT
V.		
THE STATE	.....	RESPONDENT

---

CRIMINAL PROCEDURE - Proof of guilt - Proof beyond reasonable doubt - Is the burden on the prosecution - And it never shifts (H1)

CRIMINAL PROCEDURE - Murder - Extra judicial statement - That is voluntary - Oral confessional testimony in court - All do support finding of guilt - Against the appellant (H2)

CRIMINAL PROCEDURE - Self defence and provocation - Were considered by trial court - Though he could have been more elaborate (H3)

CRIMINAL PROCEDURE - Courts - Charge - Explanation of charge before plea - Was done in this case - Though the court's record seems to be silent (H4)

CRIMINAL PROCEDURE - Courts - Plea - Issue of separate taking of - And separate recording of plea - Should not be absurd (H5)

CRIMINAL PROCEDURE - Murder - Conviction - Admission by appellant - Should be evidence only against him - Thereby making issue of conspiracy in this case irrelevant (H6)

**FACTS**

Before the Abia State High Court, Isiala Ngwa, the appellant was charged with another accused person with the offence of murder of one Nwa Nwaosuagwu Ojo. The incident occurred on the 5th of March,

1992. The prosecution called several witnesses whose testimonies were all circumstantial as there was no eye witness account. The voluntary statement of the appellant to the Police, Exhibits A and B, and his evidence in open court seem to have supported the prosecution's case.

Appellant said that he was hired by one Mr. Nwamuo to cut some palm trees and the surrounding bush. He did know that the land was in dispute between the deceased and Mr. Nwamuo. While appellant was coming down from a palm tree, the deceased threw sticks at him two times. As appellant came down, deceased tried to use his climbing rope that fell down to tie him to the palm tree. A fight broke out in the process of which appellant's knife cut the deceased on the belly and he died.

The trial court found the appellant guilty of murder. It also convicted the co-accused on ground of conspiracy. On appeal to the Court of Appeal, the co-accused was discharged while the appellant's conviction was upheld by a majority decision. Appellant has further appealed to the Supreme Court.

**ISSUES FOR DETERMINATION**

*“1. Whether there was proof beyond reasonable doubt that the appellant murdered the deceased.*

*2. Whether the defences of self-defence and provocation were adequately considered and did not avail the appellant.*

*3. Whether the arraignment and plea of the appellant was in compliance with the mandatory provisions of S. 215 of the Criminal Procedure Act.*

*4. Whether there was any evidence of conspiracy to warrant invoking the provisions of Sections 7 and 8 of the Criminal Code which was the basis of the conviction of the appellant which was affirmed by the Court of Appeal.*

*5. Whether the failure by the majority of the Justices of the Court of Appeal to make a specific finding that there was no evidence of conspiracy between both the appellant and the acquitted accused person is not fatal to the case.”*

**HELD** (Dismissing the appeal by majority judgment per **EJIWUNMI**

**JSC, PATS-ACHOLONU JSC Dissenting)**

***CRIMINAL PROCEDURE - Proof of guilt***

1. Now there is no question that the established principle in all criminal cases tried by any court within this jurisdiction is that the prosecution must establish the guilt of the accused beyond reasonable doubt upon the established evidence before the trial court. That burden on the prosecution never shifts. (p. 1795 H)

***Murder - Extra judicial statement***

2. It is settled law that the extra-judicial statements made by a prisoner are admissible in evidence at the trial of the prisoner, and if it is evident that they were made voluntarily by the prisoner, such evidence become admissible against him. Also the oral confessional testimony of an accused person at his trial is admissible and becomes upon those facts part of the evidence that the court may consider to determine whether he is or not guilty of the offence for which he was charged.

In the instant case, the extra-judicial statements made by the appellant, Exhibits A & B, were admitted in evidence at the trial without any objection. And there was also no dispute about them as to whether they were made voluntarily. In the said statements, he gave a graphic account of how he struck the deceased with the machete, which he had with him. It must be added that the evidence of the medical doctor who performed the postmortem on the body of the deceased and which remains unchallenged is revealing. According to the 6th P.W., a Dr. Anyinwo Joel Nzerem, the death of the deceased was due to severe hemorrhage from the cut on the chest and ruptured heart. The cut must have been inflicted with a sharp object like a knife. The court below by its majority decision was in my view right having regard to all the evidence before it, that it was the appellant who inflicted the fatal wounds that led to the death of the deceased. (p. 1797 D)

***Self defence and provocation***

3. It is evident from the above passage that the learned trial Judge did consider whether the two defences of self-defence and provocation were avail-

able to the appellant. True enough, he could have elaborated in that passage by giving his reasons for answering the question in the negative. It is, however, my view that the failure of the learned trial Judge to give elaborate reasons for coming to that conclusion cannot be interpreted to mean that he failed to consider the defences of self-defence and provocation in the course of his judgment. As I have also read the judgment in the light of the evidence led at the trial, it is my view that the court below by its majority decision was right to have affirmed the conviction of the appellant. (p. 1798 C)

***Explanation of charge before plea***

4. From the argument of the learned counsel for the appellant in the appellant's brief, it does appear that the thrust of his argument are two pronged. The first being that there is nothing on the face of the record to show that the charge was read and explained to the accused persons to the satisfaction of the trial court. This argument is easily disposed of as it ignored the basic principle that the judge in whose presence the charge was read and explained to the accused persons in the language common to all the parties in court has not been shown not to have understood the charge as read and explained to the accused persons. For the complaint to serve any useful purpose, there must be evidence that the learned trial Judge was deaf of hearing and if not, he was not able to understand the charge as read in the Igbo language. (p. 1799 D)

***Plea - Issue of separate taking of***

5. The second point of his argument in which he contends that the plea of each accused person should have been recorded separately also lacks merit. This court in Cyril Udeh v. The State (1999) 7 NWLR (Pt. 609) had to consider a question similar to that now raised in the instant case. I agree with the view held in that case that it would be absurd to suggest that a charge must be read separately to each of several accused persons jointly charged together.

There can be no doubt that the plea of an accused person must be taken before his trial, in obedience to Section 215 of the Criminal Procedure

Act, but care must be taken not to raise this question to fish for success in an appeal which is totally devoid of any merit upon the facts and the law. The appeal in this case falls into this class. (p. 1799 G/1800 E)

***Murder - Conviction - Admission by appellant***

6. Suffice it to say that the conviction of the appellant was affirmed on the basis of the evidence of the appellant. That was also the basis of his conviction by the trial court. True enough, the learned trial Judge considered the provisions of Sections 7 and 8 of the Criminal Code in order to convict the 2nd accused before him. The conviction of the 2nd accused was set aside by the court below, and rightly too. This is because there was no evidence against the 2nd accused, and it is settled law that the commission of the offence as admitted by him can only be evidence against the appellant. That the learned trial Judge adopted that wrong approach to convict the 2nd accused cannot in the circumstances lead to the conclusion that the verdict against the appellant ought to be set aside. I also do not see any merit in the complaint that the court below failed to make any finding that there was a conspiracy or not between the appellant and the 2nd accused at the trial court or any other person. This is because there is no evidence to justify such an exercise by the trial court and the court below. (p. 1800 H)

**NOTABLE POINTS OF INTEREST**

**IGUH JSC**

*1. Circumstantial evidence - When to ground a conviction*

It is crystal clear that the findings of the trial court against the appellant are based entirely on circumstantial evidence and the admissions of the appellant both in his written statements to the Police under caution and in his testimony on oath before the trial court. The law is firmly settled that where strong circumstantial evidence is led against an accused person in a criminal trial and this gives rise to the drawing of a presumption or inference irresistibly warranted by such evidence, the trial court will not hesitate to draw such a presumption or inference so long as it is so cogent and compelling as to convince the jury that on no rational hypothesis other than the inference can the facts be accounted for.

In the same vein, where the circumstantial evidence adduced by the prosecution cogently, irresistibly, positively, unequivocally, unmistakably and conclusively points to the accused as the perpetrator of the offence alleged to have been committed, a court of law would be entitled to infer from such evidence and surrounding circumstances that the accused committed the offence and convict him on such evidence. It will not matter that there was no real eye witness to the commission of the offence.  
(p. 1804 D)

2. *S.215 CPA on explanation of plea - Good practice trial court should adopt*

In this connection, I need to stress that there is no provision of Section 215 of the Criminal Procedure Act which stipulates or makes it mandatory that a note shall be made expressly in the record of proceedings to the effect that a charge was read over and explained to an accused person to the satisfaction of the trial court before his plea was taken. What the law enjoins the trial court to do is to satisfy itself that the accused on the charge being read over and explained to him understands the nature thereof before he pleads thereto. In my opinion, the test with regard to this requirement is subjective and not objective.

Without doubt, it is good practice for trial courts to record specifically that a charge was read over and explained to the accused to the satisfaction of the court and that he understood the same before pleading thereto. Where, however, the trial court has recorded that a charge was read over and explained to the accused person in the language he understood before he pleaded thereto, failure to add that this was done to its satisfaction cannot vitiate the proceedings or render the plea defective and null and void.  
(p. 1809 C)

3. *Recording of plea - Preferable method to adopt*

Without doubt, it would have been preferable for the learned trial judge to have recorded the plea of the two accused persons separately in the direct speech; however, failure to do this cannot be fatal to their plea so long as the charge was read over and explained to them, whether jointly or separately,

and they both understood the same and each of them individually entered his plea thereto. It would not matter, in my view, whether the court's record which described the event was written in direct or reported speech.  
(p. 1812 F)

4. S. 33 (6) (a) 1979 Constitution - Does not deal with arraignment in court

The stage at which a suspect is formally “charged” with a criminal offence by the Police after he has been arrested at the conclusion of the investigation of the offence levelled against him must be distinguished from the stage at which he is “arraigned” and his plea taken before the trial court. I think Section 33(6) (a) of the 1979 Constitution concerns the first stage at which time an accused is “charged “ by the Police and not the stage at which he is arraigned and his plea taken before the trial court. In my view, all references by learned appellant’s counsel to Section 33(6) (a) of the 1979 Constitution in connection with the validity or otherwise of the arraignment or plea of the appellant before the trial court are, with respect, misconceived. (p. 1814 B)

#### **PATS-ACHOLONU JSC (DISSENTING)**

5. *Self defence - When running away may be impossible*

However, in *The State v. Fatai Baiye Wunmi* (1980) 1 NCR 183, the Supreme Court held that the person threatened needs not run away but should show that he did not want to engage in the fight. To my mind, where the circumstances of the unproved attack was sudden and unavoidable and the accused cannot escape the probable fight due to where he was such as in this case when he was climbing down, when the unprovoked attack began, and escape was impossible, it is to my mind only reasonable for him to defend himself. In the present case, it is difficult to understand why the deceased pounced on the appellant hired to do a yeoman’s job of trimming a palm tree. It cannot be doubted that a man is entitled to defend himself from an unprovoked assault from which he has an apprehension of possible death or great violence to his person likely to result to grievous bodily harm, that he should effectively defend himself with any weapon available to him. (p. 1818 G)

6. *Proof beyond all reasonable doubt - Evidence should not be open to two probabilities*

It is important to emphasize the nature of the standard of proof described  
 B as proof beyond all reasonable doubt. It has been defined as proof that  
 precludes any reasonable hypothesis except that which it tends to sup-  
 port. Therefore, as in this case, for evidence to warrant conviction, it must  
 exclude beyond all reasonable doubt every other hypothesis other than of  
 C the accused 's guilt and I would hold that an accused shall be entitled to an  
 acquittal if the evidence adduced against him is susceptible to two probabili-  
 ties, id est, either guilt or innocence. (p. 1820 H)

7. *Murder - When appellate court should disturb findings of fact*

D It is well recognized that appraisal of evidence is the duty of the court of  
 first instance and an appellate court has no business in intervening except  
 when the appraisal and evaluation is perverse. See Okoye v. Kpajie (1973)  
 NLR 84 and Fashanu v. Adekoya (1974) 6 S. C. p.83. However, in Felix  
 E Nwosu v. The State (1986) 4 NWLR p. 348, Coker, JSC., held; "It is illogi-  
 cal to accept and believe the evidence of the two witnesses who gave  
 two different and irreconcilable conflicting accounts of the same situa-  
 tion. It is equally wrong for a trial judge to attempt to rationalize the evidence  
 F of a witness for the purpose of arriving at a preconceived conclusion." In  
 a criminal case when the liberty - nay, the life of an accused is at stake the  
 appellate court should adopt a more liberal attitude and examine carefully  
 the facts of the matter and should rather lean towards the accused. I find  
 it difficult not to hold that with the deceased unprovoked bellicose attitude  
 G of throwing sticks at the appellant, his attempt to tie him while climbing  
 down from the tree when the rope the appellant held fell and the deceased  
 almost choking the appellant while they were fighting cannot be regarded  
 as facts that would compel the appellant to defend himself and safeguard  
 H his own life. It is a pity that the attempt ended in death. (p. 1821 G)

**REPRESENTATION**

K. C. O. Njemanze, (with him, A.B. Asogu), for the Appellant.



Etigwe Uwa, for the Respondent.

**CASES REFERRED TO**

- Cyril Udeh v. The State (1999)5 S.C. (Pt.1) 87; (1999) 7 NWLR (Pt. 609)  
 Sunday Kajubo v. The State (1988) 1NWLR (Pt. 73) 721 at 731 B  
 Ogunye v. The State (1999) 4 S.C. 30  
 Samuel Erekanure v. The State (1993) 5 NWLR (Pt. 294) 385.  
 Okoye v. Kpajie (1973) NLR 84  
 Fashanu v. Adekoya (1974) 6 S. C. p.83. C  
 Felix Nwosu v. The State (1986) 4 NWLR p. 348  
 Owis v. The State (1995) NWLR (Pt. 3) p.470  
 Miller v. Minister of Pension (1947) AER p. 372  
 R v. Afonja (1955) 15 WACA 26 D

**STATUTES REFERRED TO**

- Criminal Procedure Act ss. 215, 333  
 Criminal Code ss. 286, 319, 318  
 Constitution of Nigeria 1979 s. 33 (6) (a) E

**LEAD JUDGMENT BY EJIWUNMI JSC**

By this appeal, the appellant, Sunday Amala is seeking to set aside the majority judgment recorded against him by the court below, per Ikongbeh & Ogebe, (JJCA), wherein his conviction for the offence of murder by the trial court was affirmed. His trial and conviction arose upon an information filed by the Attorney-General of Abia State that the appellant and Ngozi Onyenso on the 5th day of March, 1992, at Ntigha Nvosi, in Isiala Ngwa Judicial Division murdered one Nwa Nwaosuagwu Ojo. G

At the trial, the learned trial Judge having considered the evidence, delivered a considered judgment in which he concluded that the two accused persons were guilty of the offence of murder, convicted each of them and passed the sentence of death on each of them. As they were both dissatisfied with the judgment and orders of the trial court, each of them appealed to the court below. That court after due consideration of the evidence on record and the submissions of learned counsel for the parties, H

formed the view that the 2nd appellant, namely, Ngozi Onyenso was wrongly convicted by the trial court. The court below therefore ordered that the conviction and sentence pronounced upon Ngozi Onyenso be set aside. In its place, the court below made an order of discharge and acquittal in his favour.

B This appeal as stated above is therefore against the conviction of Sunday Amala and its affirmation by the court below. In order to appreciate the argument canvassed in this appeal for and against his conviction, I will reiterate briefly the facts led at the trial as found in the printed record.

C The case for the prosecution appears to be that, on the 5th day of March, 1992, Imo Onuoha P.W.3, saw the appellant while P.W.3 was returning from Ndiolumbe pushing his motorcycle that had broken down. He alleged that he heard the appellant shouting and running. He had with him a

D machete and a climbing rope. He then saw him run into the house of Christopher Nwamuo and he immediately raised an alarm in order that some persons might go to verify if there had been an accident or someone had fallen from a palm tree. Lovina Enyinaya next gave evidence as P.W.4.

E Part of her evidence is that the deceased was a friend of her family and that on the 5th day of March 1992, he had his breakfast at 6 a.m. with her in her residence. The deceased thereafter left for work. At 2 p.m. of the same day, she came to the road when she heard some people shouting that the deceased had been killed. And there on the road she saw the body of the

F deceased on the ground. She further testified that she saw the appellant, Christopher Nwamuo and the other accused at Uzomgbalo. The P.W.4 then went to inform the maternal relations of the deceased that he had died. They then went with her to the scene where they saw the dead body of the

G deceased, and P.W.4 added that she saw that the legs of the deceased were tied with rope. The evidence of the arrest of the appellant was given by Friday Onwughara who claimed that he was a member of the search party that was set up to locate the whereabouts of the appellant. He was ac-

H cording to this witness arrested in Obonro on the 27th of April, 1992. After his arrest, he was handed over to the police in Umuahia. P.W.7, Corporal Ogbonnaya Item, No. 132271, who was detailed to investigate the alleged crime, took two voluntary statements from the appellant which were

admitted by the trial court and marked Exhibits “A” & “B” respectively. P.W.7 also executed a search warrant in the home of the appellant where he recovered a climbing rope and a machete. They were both admitted at the trial and marked Exhibits “E” & “F” respectively. The prosecution also called Nwaogwugwu Ojo as P.W.I, a brother of the deceased who also identified the body of the deceased to P.W.6, Dr. Anyinwo Joel Nzerem. In the opinion of P.W.6, cause of death of the deceased was due to severe hemorrhage from the cut on the chest and ruptured heart. He also formed the view that the cut must have been inflicted with a sharp object like a knife.

In his defence, the appellant stated that on the 5th day of March, 1992, he had gone on hire to trim or cut some palm trees and the surrounding bush for one Christopher Nwamuo. For the job, he used climbing ropes and a knife. According to the appellant, he claimed he had no knowledge that the land on which he worked was being disputed with any person as no one told him anything. However, he continued by saying that after trimming the palm trees, the deceased, whom the appellant said he did not know before, accosted him and wanted to know what he was doing. He responded by telling the deceased that it was Christopher Nwamuo who had hired him to trim the palm trees for him. He claimed that the deceased then threw a stick at him and when he asked why the stick was thrown at him, the deceased threw a stick at him a second time. At that stage, appellant said that one of his ropes fell down and the deceased picked it up. Appellant continued by saying that while climbing down the tree, he noticed that the deceased was already at the foot of the palm tree. According to the appellant, the deceased then tried unsuccessfully to tie him to the palm tree with the climbing rope. As a result, a fight ensued between him and the deceased. In the course of the fight, the deceased being stronger than the appellant, threw the appellant to the ground. The deceased who had a knife, then held the appellant by the throat, and that prevented him from shouting. Appellant claimed that while struggling to free himself from the deceased, his (appellant’s) knife cut the deceased on his belly. The appellant said he then took to his heels. The deceased chased him for a while and fell down. The appellant made good his escape by running to his own house. And

when he learnt that the deceased had died, he ran from his house to take refuge at Itunata, where he was arrested.

The appellant was as previously noted, convicted of the offence of the murder of the deceased by the trial court and sentenced accordingly to hang by his neck until pronounced dead. His conviction and sentence were confirmed by the majority decision of the court below. In this court, learned counsel for the appellant, based on the grounds of appeal filed against the judgment and orders of the court below, has in the appellant's brief raised the following issues for the determination of the appeal:

- C "1. *Whether there was proof beyond reasonable doubt that the appellant murdered the deceased.*
2. *Whether the defences of self-defence and provocation were adequately considered and did not avail the appellant.*
- D 3. *Whether the arraignment and plea of the appellant was in compliance with the mandatory provisions of S. 215 of the Criminal Procedure Act.*
- E 4. *Whether there was any evidence of conspiracy to warrant invoking the provisions of Sections 7 and 8 of the Criminal Code which was the basis of the conviction of the appellant which was affirmed by the Court of Appeal.*
- F 5. *Whether the failure by the majority of the Justices of the Court of Appeal to make a specific finding that there was no evidence of conspiracy between both the appellant and the acquitted accused person is not fatal to the case."*

In the respondent's brief, learned counsel for the respondent formulated two issues, which adequately encompassed the questions raised in this appeal by the appellant. However, the merits of this appeal would be considered upon those issues raised in the appellant's brief.

In the appellant's brief, issues 1 & 2 were argued together. With regard to these issues, the questions raised for the appellant are two fold. The first being, whether the guilt of the appellant was established beyond reasonable doubt as required in law. And the second question is, whether in the course of the consideration of the evidence led, the learned trial Judge considered adequately the defences of self-defence and provocation, which

learned counsel argued were available to the appellant.

In respect of the 1st issue, it is contended for the appellant that the prosecution did not prove beyond reasonable doubt the guilt of the appellant. Particularly, the prosecution failed to prove by direct evidence that it was the voluntary acts of the appellant that caused the death of the deceased. B In other words, argued the appellant's learned counsel, no direct evidence linking the appellant with the death of the deceased was proved by the prosecution. Also learned counsel argued that there was no circumstantial evidence that the prosecution could call in aid to establish the guilt of the C appellant. In support of all his submissions, he referred to the following cases: *Alabi v. State* (1993) 7 NWLR (Pt. 307) 511; *Okoro v. State* (1988) 12 S.C. (Pt II) 83; (1988) 5 NWLR (Pt.94) 255; *Ubochi v. State* (1993) 8 NWLR (Pt. 314) 697; *Bello v. State* (1994) 5 NWLR (Pt. 343) 177. Learned D counsel for the appellant also invited the attention of the court to the view taken of the evidence of the appellant that he lied with regard to his evidence concerning the events that led to the death of the deceased. As this view by the trial court, he submitted, was erroneously affirmed by the court E below, it is his submission that the finding be reversed. It being his submission that the duty lies on the prosecution to establish its case by proven evidence. In support of that submission, he referred to the following cases: *Yisau v. State* (1995) (Pt. 379) 636 at 644; *Gulwat v. State* (1994) 2 NWLR (Pt. 327) 435 at 462. F

With regard to whether the defences of self-defence and provocation were duly considered by the trial court before concluding that the appellant was guilty of the offence, it is his submission that the trial court did not consider those defences. And he further submitted that the court below G wrongly affirmed that decision of the trial court. I do not propose to set out herein the arguments for the respondent in the respondent's brief in reply to that of the appellant, but they would be considered along with my consideration of the merits of the issues raised by the appellant.

**Now, there is no question that the established principle in all H criminal cases tried by any court within this jurisdiction is that the prosecution must establish the guilt of the accused beyond reasonable doubt upon the established evidence before the trial court.**

**That burden on the prosecution never shifts.** After due consideration of the evidence led at the trial, the learned trial Judge found the appellant guilty. Now, I accept the submission that from the evidence led, none of the prosecution witnesses gave evidence that they saw the appellant inflict the mortal wounds that caused the death of the deceased. However, the learned trial Judge in the course of his judgment had this to say about the evidence at page 52 of the record. It reads:-

*“If the deceased was bigger and stronger as both accused said, and was holding machete, how could the first accused alone have overpowered, killed him and never got a scratch in return? The truth is that the three men who P.W.2 saw at the scene and 1st accused in Exhibit “A” admitted that P.W.2 came to the scene and who P.W.4 saw running through a track road at Uzoe Ngbogo did the act with malice afore-thought supplied by P.W. 1 to the effect that Christopher Nwamuo who had land dispute with the deceased.”*

The question then is, whether the Court of Appeal by its majority judgment was right to have affirmed the decision of the trial court to find the appellant guilty. It is apt to refer to part of the reasoning of the court below in the course of its judgment. It reads:-

*“The appellant himself made it clear, both in his statements to the police, Exhibits, A and B, and his evidence before the court, that he inflicted a wound on the deceased, who bled profusely and soon thereafter fell down and later died.”*

The further question that must be answered, is, in my view, whether there is evidence that stands in support of the majority decision of the court below to prove that the appellant was guilty of the offence charged. Earlier in this judgment, I had set out, briefly, though, the evidence given by the witnesses for the prosecution, and the evidence given by the appellant. As already remarked, no witness gave evidence for the prosecution that the appellant was seen applying the fatal wound that caused the death of the deceased. But the evidence as to what happened that led to the death of the deceased was given by the appellant in the course of his oral testimony at the trial. As part of his evidence said that it was on the day of the incident that he met, for the first time, the deceased. This was when

he was trimming a palm tree for Christopher Nwamuo on a piece of land, which he presumed belonged to the said Christopher Nwamuo. He claimed that he knew of the presence of the deceased where he was when the deceased threw a stick at him. He then asked why the deceased should throw a stick at him. But without giving any explanation for this conduct, the deceased threw a second stick at him. So, the appellant decided to climb down the tree. Upon getting down, the deceased who was standing beside the tree tried to tie him to the tree. As the deceased failed to tie him, a fight ensued between them. Appellant now claimed that in the course of the fight, the deceased was seen with a machete, but they continued with the fight. In the middle of it, appellant claimed that the deceased tried to choke him and it was while he struggled to rescue himself that appellant's machete struck the stomach of the deceased who was lying on his back. That evidence which the appellant gave at his trial by the appellant are in material terms similar to what he stated in his extra-judicial statements, Exhibits "A" & "B". **It is settled law that the extra-judicial statements made by a prisoner are admissible in evidence at the trial of the prisoner, and if it is evident that they were made voluntarily by the prisoner, such evidence become admissible against him. Also the oral confessional testimony of an accused person at his trial is admissible and becomes upon those facts part of the evidence that the court may consider to determine whether he is or not guilty of the offence for which he was charged.**

In the instant case, the extra-judicial statements made by the appellant, Exhibits A & B, were admitted in evidence at the trial without any objection. And there was also no dispute about them as to whether they were made voluntarily. In the said statements, he gave a graphic account of how he struck the deceased with the machete, which he had with him. It must be added that the evidence of the medical doctor who performed the postmortem on the body of the deceased and which remains unchallenged is revealing. According to the 6th P.W., a Dr. Anyinwo Joel Nzerem, the death of the deceased was due to severe hemorrhage from the cut on the chest and ruptured heart. The cut must have been inflicted with a sharp object

**like a knife. The court below by its majority decision was in my view right having regard to all the evidence before it, that it was the appellant who inflicted the fatal wounds that led to the death of the deceased.**

B What remains to be considered is, whether, before coming to its conclusion on the guilt of the appellant, the trial court considered the defences of self-defence and provocation which it is argued were available to the appellant. It is very clear that before arriving at his conclusion, the learned trial Judge at page 52 of the Record stated thus:-

C *“Does self-defence, provocation or Section 286 of the Criminal Code avail in the circumstances of this trial? I answer this in the negative.”*

**It is evident from the above passage that the learned trial Judge did consider whether the two defences of self-defence and provocation were available to the appellant. True enough, he could have elaborated in that passage by giving his reasons for answering the question in the negative. It is, however, my view that the failure of the learned trial Judge to give elaborate reasons for coming to that conclusion cannot be interpreted to mean that he failed to consider the defences of self-defence and provocation in the course of his judgment. As I have also read the judgment in the light of the evidence led at the trial, it is my view that the court below by its majority decision was right to have affirmed the conviction of the appellant.**

In respect of issue (3), which is, whether the arraignment and plea of the appellant was in compliance with the mandatory provisions of Section 215 of the Criminal Procedure Act. This complaint was made before the court below, and it was rejected by the decision of the majority in that court. The complaint in this regard is that whether the plea of the appellant who was charged with another person was properly taken before the commencement of their trial at the High Court. In this regard, he referred to the relevant portion of the record where the learned trial Judge recorded the plea of the accused persons thus:-

*“Charge read and explained to the two accused persons in Igbo language and both pleaded not guilty to the charge.”*



Having regard to the manner in which the learned trial Judge took the plea of the accused persons, reproduced above, it is the contention of learned counsel for the appellant that the plea of the accused persons as taken was in breach of the provisions of Section 215 of the Criminal Procedure Act.

For a proper appraisal of the argument of counsel, I deem it necessary to quote the provisions of the said Section 215 of the Criminal Procedure Act. It reads:-

*“The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order; and the charge or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court, and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the court finds that he has not been duly served therewith.”*

**From the argument of the learned counsel for the appellant in the appellant’s brief, it does appear that the thrust of his argument are two pronged. The first being that there is nothing on the face of the record to show that the charge was read and explained to the accused persons to the satisfaction of the trial court. This argument is easily disposed of as it ignored the basic principle that the judge in whose presence the charge was read and explained to the accused persons in the language common to all the parties in court has not been shown not to have understood the charge as read and explained to the accused persons. For the complaint to serve any useful purpose, there must be evidence that the learned trial Judge was deaf of hearing and if not, he was not able to understand the charge as read in the Igbo language.**

**The second point of his argument in which he contends that the plea of each accused person should have been recorded separately also lacks merit. This court in Cyril Udeh v. The State (1999) 7 NWLR (Pt. 609) had to consider a question similar to that now raised in the instant case. I agree with the view held in that case that it would be**

**absurd to suggest that a charge must be read separately to each of several accused persons jointly charged together.** On this issue, I would gratefully quote the dictum of Ayoola, JSC, in that case at page 18 of his judgment. It reads:-

B *“It is difficult to fathom the logic in the argument which in effect, is that the trial Judge should have stated that the charge had been read to each of the accused persons, or; that only separate reading of the charge meets with the requirements of Section 333. The argument founded on the use of*  
 C *singular person in Section 333 is misconceived having regard to the provision of Section 41 of the Interpretation Law which has been referred to in this judgment. It is not difficult to agree with Salami, JCA., when he held that ‘the complaint of the appellant giving rise to the issue concerning the validity of the arraignment was predicated upon misapprehension of*  
 D *Section 333 of the Criminal Procedure Law Cap. 37 which is in pari materia with the provisions of Section 215 of the Criminal Procedure Act Cap. 80 of the Laws of the Federation of Nigeria 1990’. I hold that notwithstanding the joint reading and explanation of the charge there was compliance with*  
 E *Section 333 of the Criminal Procedure Law Cap. 37 and the Court of Appeal was right to have so held.”*

**There can be no doubt that the plea of an accused person must be taken before his trial, in obedience to Section 215 of the Criminal Procedure Act , but care must be taken not to raise this question to**  
 F **fish for success in an appeal which is totally devoid of any merit upon the facts and the law. The appeal in this case falls into this class.**

I now turn to the consideration of issues 4 and 5. By his issue 4, appellant is asking whether there was any evidence of conspiracy to war-  
 G rant invoking the provisions of Sections 7 and 8 of the Criminal Code which was the basis of the conviction of the appellant and which was affirmed by the Court of Appeal. I think this question as worded totally misconceived the majority judgment of the court below. I do not need to review the basis of  
 H their judgment, which had been earlier set out in this judgment. **Suffice it to say that the conviction of the appellant was affirmed on the basis of the evidence of the appellant. That was also the basis of his conviction by the trial court. True enough, the learned trial Judge considered the**

provisions of Sections 7 and 8 of the Criminal Code in order to convict the 2nd accused before him. The conviction of the 2nd accused was set aside by the court below, and rightly too. This is because there was no evidence against the 2nd accused, and it is settled law that the commission of the offence as admitted by him can only be evidence against the appellant. That the learned trial Judge adopted that wrong approach to convict the 2nd accused cannot in the circumstances lead to the conclusion that the verdict against the appellant ought to be set aside. I also do not see any merit in the complaint that the court below failed to make any finding that there was a conspiracy or not between the appellant, the 2nd accused at the trial court or any other person. This is because there is no evidence to justify such an exercise by the trial court and the court below.

In the result, as all the issues have been resolved against the appellant, his appeal must be dismissed. It is hereby dismissed in its entirety. The judgment and orders of the court below are hereby affirmed.

---

### KUTIGI JSC

I read before now the judgment just delivered by my learned brother, Ejiwunmi, J.S.C. I agree with him that the appeal has no merit. It is accordingly dismissed.

---

### IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother; Ejiwunmi, JSC.; and I entirely agree that this appeal is devoid of substance and should be dismissed.

The appellant along with one Ngozi Onyenso were tried before Isuama, J., in the High Court of Abia State of Nigeria, holden at Okpuala Ngwa, with the offence of the murder of Nwosuagwu Ojo, on the 5th day of March, 1992, at Ntigha Nvosi, contrary to Section 319 of the Criminal Code, Cap. 30, Vol. 2, Laws of Eastern Nigeria, 1963, applicable in Abia State. They were both convicted as charged and sentenced to death.

Dissatisfied with' this judgment, they appealed to the Court of Appeal which allowed the appeal of the 2nd appellant, Ngozi Onyenso, on the 29th January, 2002 and acquitted and discharged him but affirmed the conviction and sentence passed on the appellant on the 11th April, 2002. The appellant, B aggrieved with this judgment of the Court of Appeal, has further appealed to this court.

The two main issues formulated by the respondent for the determination of this appeal are as follows -

C        *"1. Whether the court below was right in affirming the conviction of the appellant for the murder of the deceased.*

*2. Whether there was a valid arraignment of the appellant."*

In my view, the two issues are more than ample for my determination of this appeal..

D        The facts of the case as found and accepted by the trial court and affirmed by the court below are that one Christopher Nwamuo had a land dispute with the deceased, Nwaosuagwu Ojo, in their village. The dispute between them was fixed for arbitration by the elders for the 6th day of E March, 1992. However, on the 5th March, 1992, three men, including the appellant, who was recognized by P.W.2 were seen talking in the bush. P.W.2 advised them not to quarrel and left. Shortly afterwards, P.W.2 heard voice from the location he saw the men shouting the appellant's name, F "Sunday Amala, Sunday Amala". P.W.2 immediately ran back to the scene and there saw the deceased on the ground dead. Appellant who presently escaped from the scene was seen by P.W.3 running away. He was holding a machete and a climbing rope as he ran and was seen running into the house of Christopher Nwamuo. P.W.4, who at the same time heard shouts G that the deceased had been killed, started to run from her house to the scene of crime. On her way, she saw the appellant, Christopher Nwamuo and the 2nd accused run out from a track road in the bush into their house. At the scene, she saw the deceased lying dead on the ground in a pool of blood H with machete cuts on his body and his legs were tied together with a climbing rope.

The appellant escaped from his village immediately after this incident on the 5th March, 1992, and unceremoniously took refuge at an unknown

place. His villagers organized a search party and offered reward for information that would disclose his whereabouts and arrest. As a result, and on information received, the appellant was traced to and arrested on the 29th April, 1992, at a town called Itunta where he was hiding. When he was arrested in a night operation by his people, he unwittingly exclaimed that he thought he had escaped. He was subsequently handed over to the Nigeria Police at Umuahia. B

P.W.6, Dr. A. J. Nzerem who performed postmortem examination on the body of the deceased on the 6th March, 1992, testified as to the severe machete cuts on the chest and body of the deceased. In his opinion, the cause of death was due to severe loss of blood as a result of deep machete cuts. C

It ought also to be mentioned that the appellant in his written statement to the Police, Exhibit B, admitted cutting the deceased with a machete on the 5th March, 1992, as a result of which he fell down and died. He, however, claimed that he killed the deceased in self-defence while they were engaged in a fight. The defences of accident and provocation were also raised by him. The learned trial Judge painstakingly considered the appellant's account of the incident to the effect that there was a fight between the deceased and himself. He also considered all the three defences of self-defence, provocation and killing by accident raised by the appellant as arising from his alleged fight with the deceased. The appellant's version of the incident was rejected by the learned trial Judge as false. Said he - D E F

*"..... the accused persons are merely lying in order to escape the consequences of their act. Was there a fight as stated by the 1st and 2nd accused and as urged upon the court by the learned defence counsel? If the deceased was bigger and stronger as both accused said, and was holding a machete, how could the first accused alone have over-powered him, killed him and never got a scratch in return? The truth is that the three men who P.W.2 saw at the scene, and 1st accused in Exhibit 'A' admitted that P.W.2 came to the scene, and who P. W. 4 saw running through a track road at Uzor Ngbogo did the act with malice aforethought supplied by P.W.I to the effect that Christopher Nwamuo had land dispute with the deceased. G H*

*Does self-defence, provocation or Section 286 of the Criminal Code*

*avail in the circumstances of this trial? I answer this in the negative”.*

The learned trial Judge, after a thorough consideration of the circumstantial evidence adduced before him together with the appellant’s rejected version of the incident concluded as follows -

B *“From the totality of the evidence before me, therefore, I hold that the prosecution has proved its case beyond reasonable doubt against the first and second accused persons. I accordingly find them guilty as charged.”*

C The court below, for its own part, could find nothing with which to fault the conclusion of the learned trial Judge in so far as it relates to the appellant.

D Before us, the learned counsel for the appellant stressed that none of the seven witnesses called by the prosecution was an eye witness to the murder of the deceased. He therefore urged this court to hold that the prosecution failed to establish by direct evidence that it was the voluntary acts of the appellant that caused the death of the deceased.

E It is crystal clear that the findings of the trial court against the appellant are based entirely on circumstantial evidence and the admissions of the appellant both in his written statements to the Police under caution and in his testimony on oath before the trial court. The law is firmly settled that where strong circumstantial evidence is led against an accused person in a criminal trial and this gives rise to the drawing of a presumption or inference irresistibly warranted by such evidence, the trial court will not hesitate to draw such a presumption or inference so long as it is so cogent and compelling as to convince the Jury that on no rational hypothesis other than the inference can the facts be accounted for. See *Uwe Idighi Esai and Ors. v. The State* (1976) 11 S. C 39 and *Peter Eze v. The State* (1976) 1 S.C. 125.

G In the same vein, where the circumstantial evidence adduced by the prosecution cogently, irresistibly, positively, unequivocally, unmistakably and conclusively points to the accused as the perpetrator of the offence alleged to have been committed, a court of law would be entitled to infer H from such evidence and surrounding circumstances that the accused committed the offence and convict him on such evidence. See *Kalu v. The State* (1993) 6 NWLR (Pt. 500) 385 at 396, *Ibina v. The State* (1989) 5 NWLR (Pt. 120) 238, *Omogodo v. The State* (1981) 5 S. C. 5, *Ukorah v. The State*

(1977) 4 S. C. 167 etc. It will not matter that there was no real eye witness to the commission of the offence.

The facts found established by the trial court and affirmed by the Court of Appeal have already been set out meticulously earlier on in this judgment. There can be no doubt, in my view, that from those established B facts and all the surrounding circumstances of the case, both courts below were right in finding the appellant guilty of the murder of the deceased, Nwaosuagwu Ojo, on the 5th day of March, 1992, at Ntigha Nvosi. The appellant after the commission of this offence at the scene of C crime in the bush took to his heels with the machete with which he committed the murder and the climbing rope, part of which was used to tie both legs of the deceased. From the compound of Christopher Nwamuo into which the appellant first ran, he escaped through the back yard and fled to D another town called Itunta, where he was subsequently arrested and taken to the Police. Apart from the overwhelming circumstantial evidence led against the appellant at the trial which conclusively pointed at his guilt in respect of the offence charged, there is also the appellant's admission that he macheted the deceased to death but pleaded the defence of provocation, E self-defence and accident. The appellant's version of the incident from which he invoked the defences he raised was considered by the learned trial Judge and rejected as false. Those defences, therefore, cannot now be available to him. The trial court, in particular, had the opportunity of seeing and F watching the prosecution witnesses and the appellant as they testified in the witness box and was perfectly entitled to decide which facts it found proved and the appellate courts should not interfere with such findings unless, of course, they are found to be perverse. On the accepted evidence G of the learned trial Judge, it is plain that the defence of accident, self-defence and provocation cannot be available to the appellant.

In this respect, the court below after thorough consideration of the decision of the trial court was of the view that the findings of the learned trial Judge were unimpeachable and could not be faulted. It said - H

*“The Judge did consider the evidence before him and he gave his reasons for disbelieving the appellant. At page 49, he observed that most of the evidence before him was circumstantial. He however, noted that the*

appellant himself corroborated some of this..... What is more, the observations by the learned Judge are amply supported by the evidence and are, therefore, valid. He did not believe that the fight happened as the appellant claimed it did. As he noted, if the deceased had really overpowered and beaten him as he claimed, how come he came out of the fight unscathed? The Judge was, in my view, quite justified in believing that the appellant “never got a scratch” from the fight. The appellant obviously lied when he testified in cross-examination that during his struggle with the deceased for possession of the latter’s machete, he (appellant) received a machete cut on the leg. Pressed whether he showed the wound to the police upon his arrest, he answered that he did not because “before the police arrested me the wound had healed.” *From his own account, he was arrested on 28/04/92, one month twenty-three days from 05/03/92, when the incident occurred. Even if the wound had healed, was that reason enough not to show the police the scar? Or, had the scar also healed and disappeared? Was that reason enough not to even inform the police about it at all?”*

It continued -

“..... In the instant case, the appellant himself provided the evidence that he caused the death of the deceased in circumstances that would amount to murder, if he did not establish mitigating circumstances. The judge considered the appellant’s conflicting recount of the mitigating circumstances and rejected it in favour of the earlier fact established by the appellant. It was not disputed that the deceased died of wounds he had received from machete cuts. The appellant himself had stated in Exhibits A and B, made when the matter was still fresh in his memory, that he inflicted at least one of the machete cuts. The judge accepted this and waited for the appellant to show mitigating circumstances. In his attempt to do so the appellant was caught out in lies. In the circumstances, it is my view that the judge was justified in using the lies against the appellant and accepting the established fact that the latter had killed the deceased with murderous intentions”.

It concluded -

“Considering the evidence before the learned trial Judge, I can find



nothing with which to fault his conclusion as it relates to the appellant alone that -

*‘From the totality of the evidence before me, therefore, I hold that the prosecution has proved its case beyond reasonable doubt against the first and second accused persons. I accordingly find them guilty as charged’.* B

I am therefore satisfied that the court below was right in affirming the conviction of the appellant for the murder of the deceased. Issue 1 is accordingly resolved in the affirmative.

Turning now to issue 2, the question raised is whether there was a valid arraignment of the appellant; The relevant passage of the court’s proceedings on the date the appellant’s plea was taken reads thus - C

*“Charge No: HIN/12C/92: The State v. Sunday Amala & Anor.*

*The accused persons are present.*

*MR. N. U. NWACHUKWU for the State.* D

*Chief J.E.C. NWOSU for the accused.*

*PLEA OF THE ACCUSED: MURDER contrary to*

*Section 319 of the Criminal Code, Cap. 30, Vol. 2, Laws of*

*Eastern Nigeria, 1963 applicable in Abia State, in that on* E

*5th March, 1992, at Ntigha Nvosi in Isiala Ngwa Judicial*

*Division murdered one Nwaosuagwu Ojo.*

*Charge read and explained to the two accused persons in*

*Igbo language and both pleaded not guilty to the charge.”* F

The appellant has attacked this arraignment on the ground that the record of proceedings does not indicate that the charge, apart from being read over to the appellant, was also explained to him to the satisfaction of the court. The appellant has further contended that where, as in the present case, more than one accused person is arraigned, the plea of each accused person is to be separately recorded against each count of the charge or information. In these submissions, reliance, was placed on the decisions of Court of Appeal in *Dike v. The State* (1996) 5 NWLR (Pt 450) 553 at 561 and *Nwankwo v. The State* (1990) 2 NWLR (Pt.134) 527 at 638. Learned H G

counsel for the appellant therefore submitted that there is nothing in the printed record to show that the mandatory provisions of Section 215 of the Criminal Procedure Law, Cap. 31, Laws of former Eastern Nigeria appli-

cable in Imo State and Section 33(6) of the 1979 Constitution were strictly complied with.

Learned counsel for the respondent, for his own part, submitted that there was strict compliance with the provisions of Section 215 of the Criminal Procedure Law of former Eastern Nigeria, 1963, which are in *pari materia* with those of Section 215 of the Criminal Procedure Act, Cap. 80, Laws of the Federation of Nigeria, 1990.

It has been repeated times without number by this court that a close study of Section 215 of the Criminal Procedure Act discloses that for a valid arraignment of an accused person before a trial court, three essential requirements must be satisfied. These are as follows -

1. The accused person shall be placed before the court unfettered unless the court shall see cause otherwise to order.

2. The charge or information shall be read over and explained to him to the satisfaction of the court by an appropriate officer of such a court and;

3. The accused person shall then be called upon to plead instantly thereto (unless, of course, an objection in respect of want of service of a copy of the information is successfully taken).

See *Sunday Kajubo v. The State* (1988) 1NWLR (Pt. 73) 721 at 731, *Onuoha Kalu v. The State* (1998) 11-12 S.C. 4 (1998) 13 NWLR (Pt. 583) 531 etc. I should perhaps observe that the above three requirements are essentially the same with the five set out in *Samuel Erekanure v. The State* (1993) 5 NWLR (Pt. 294) 385. This is because a dose study of the five requirements set out in the Erekanure case clearly reveals that the 2nd, 3rd and 4th requirements thereof are rolled into one and jointly constitute the 2nd requirement in the *Sunday Kajubo* case which simply prescribes that the charge shall be read over and explained to the accused person to the satisfaction of the court. Having set out the three requirements that must be satisfied for a valid arraignment, I will now examine the appellant's plea before the trial court.

It is on record that the appellant was placed before the court at the time of his arraignment with his counsel also present. There is no suggestion from any quarters that the appellant at the time his plea was taken was

in any way fettered. It is also on record that the charge was read over and explained to the appellant in the Igbo language and that he pleaded not guilty thereto. Learned counsel for the appellant, however, argued that although the charge was read over and explained to the appellant as stated above, the absence of record that this was done to the satisfaction of the court is fatal to the arraignment. B

With the greatest respect to learned appellant's counsel, I am not prepared to accept that failure on the part of the trial Judge to record expressly that he was satisfied that the appellant understood the charge before his plea was taken was either fatal to the proceedings or implied that the appellant did not understand the charge which was read over and explained to him in his own language before he pleaded thereto. In this connection, I need to stress that there is no provision of Section 125 of the Criminal Procedure Act which stipulates or makes it mandatory that a note shall be made expressly in the record of proceedings to the effect that a charge was read over and explained to an accused person to the satisfaction of the trial court before his plea was taken. What the law enjoins the trial court to do is to satisfy itself that the accused on the charge being read over and explained to him understands the nature thereof before he pleads thereto. In my opinion, the test with regard to this requirement is subjective and not objective. C D E

Without doubt, it is good practice for trial courts to record specifically that a charge was read over and explained to the accused to the satisfaction of the court and that he understood the same before pleading thereto. Where, however, the trial court has recorded that a charge was read over and explained to the accused person in the language he understood before he pleaded thereto, failure to add that this was done to its satisfaction cannot vitiate the proceedings or render the plea defective and null and void. See *Ogunye v. The State* (1999) 4 S.C. 30; (1999) 5 NWLR (Pt.604) 548. F G

In *Eyisi v. The State* (2000) 12 S.C (Pt. 1)24; (2000) 15 NWLR (Pt.691) 555, the arraignment of the accused was recorded thus- H

*“Charge dated 9/11/83 read over to the accused persons in English and translated into lbo and each pleads not guilty to the charge”.*

Strenuous argument by learned counsel for the 2nd appellant to the

effect that the arraignment was invalid for non-compliance with Section 215 of the Criminal Procedure Act was dismissed by this court as untenable. Ogundare, JSC., succinctly put the matter as follows -

B *“While it may be good practice for the trial Judge to record that the charge was read and fully explained to the accused to the satisfaction of the court, I am not prepared to say, however, that the judge’s failure to so record is fatal to the proceedings. Such a conclusion cannot take cognisance of Section 150(1) of the Evidence Act”.*

C See, too, Idemudia v. The State (1999) 5 S.C. (Pt. II) 110; (1999) 7 NWLR (Pt. 610) 202 where the arraignment of the accused/appellant was recorded as follows -

D *“The accused is present in court. Esowe (Mrs.) for the State. Charge read to the accused. On the 1st count, the accused pleads as follows:- I am not guilty. Accused says his counsel is not in court”.*

It will be observed from the above notes that all the trial court recorded was that the charge was read over to the appellant to which he entered the plea of not guilty on the 1st count. The record did not expressly E indicate that the charge apart from being read over to the appellant was explained to him to the satisfaction of the court. On appeal, this court, per Karibi-Whyte, JSC., in dismissing learned appellant counsel’s arguments as to the invalidity of the arraignment observed as follows -

F *“.....it does not seem to me that the requirement that the judge should be satisfied that the charge has been read and explained to the accused is one which needs to appear on record and the non-appearance of which affects the justice of the case. It is good practice to so indicate. It is sufficient on the record as a whole if it could be gathered that the accused G understood the nature of the charge”.*

I have given a most careful consideration to the decisions of this court in the Eyisi and Idemudia cases (supra) and entertain no doubt that they represent the true position of the law. In my view, it will be stretching H the provisions of Section 215 of the Criminal Procedure Act to a point of absurdity by reading into it that the trial Judge must, or indeed, shall expressly record that the charge was explained to the accused to his satisfaction before taking his plea. This is because it seems to me inconceivable that

any judge stall proceed to take the plea of an accused person arraigned before him if he is not satisfied that the charge was read over and explained to the accused person and that he understood the contents thereof. Courts of law must therefore guard against over-stretching the provisions of Section 215 of the Criminal Procedure Act by reading into them what, evidently, they have not stipulated either expressly or by necessary implication. B

In this connection, reference may be made to the provisions of Section 150(1) of the Evidence Act which state as follows -

*“When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with”*. C

The arraignment of the appellant before the trial court was not only a judicial and an official act, it was ex facie also carried out ‘in a manner which was substantially regular. In these circumstances, it seems to me that the legal maxim, omnia praesumuntur rite et solemniter esse acta donec probetur<sup>2</sup> in contrarium pursuant to which there is a legal presumption that judicial and official acts have been done rightly and regularly until the contrary is proved seems to me fully applicable in this case. See too Peter Lockman and Anor v. The State (1972) 5 S. C. 22 and James Edun and Anor v. Inspector General of Police (1966) 1 All NLR 17 at 21. In-as-much as it may be desirable that a trial court expressly records that a charge was read over and explained to the accused person to its satisfaction before he pleaded thereto, the law is not that unless this is done, the arraignment ipso facto becomes invalid and null and void. D E F

In the present case, there is nothing on record to establish that the learned trial Judge was not satisfied that the appellant fully understood the charge before he pleaded thereto. I think that this is a proper case where the presumption of regularity must dislodge the speculation and conjecture upon which the appellant’s submission in this regard hangs. G

Learned counsel further submitted that where, as in the present case H, more than one person is charged, the plea of each accused person must be separately recorded in each count of the charge. He contended that composite or block recording of pleas is not envisaged by Section 215 of the

Criminal Procedure Act. Citing the decision of the Court of Appeal in *Nwankwo v. The State* (1990) 2 NWLR (Pt. 134) 627 at 638, learned counsel submitted that failure to record the plea of each accused person separately rendered the appellant's trial a nullity.

B It seems to me, as was rightly pointed out by the court below, that what learned counsel for the appellant is quarrelling with is the way or manner the learned trial Judge had recorded the proceedings or events that legitimately took place before him. Instead of recording the pleas of the accused persons separately and in the direct speech, he did so in indirect  
C or reported speech thus describing the events in one single sentence. There is no suggestion that the charge was not read over and explained to the two accused persons. There is also no suggestion that they did not understand the same or that they did not plead thereto. Learned counsel did not  
D attack the correctness of the proceedings to the effect that the charge was “*read over and explained to the two accused persons in Igbo language and that both pleaded not guilty to the charge*”. There can be no doubt that from the record, what the learned trial Judge did was to paraphrase the account of what transpired before him without pretending to be making a  
E verbatim report thereof. The charge having been read over and explained to both accused persons in the Igbo language and each of them pleaded not guilty thereto, I find it difficult to conceive how the arraignment of the  
F accused persons can be faulted. Without doubt, it would have been preferable for the learned trial Judge to have recorded the plea of the two accused persons separately in the direct speech; however, failure to do this cannot be fatal to their plea so long as the charge was read over and explained to them, whether jointly or separately, and they both understood the same and each  
G of them individually entered his plea thereto. It would not matter, in my view, whether the court's record which described the event was written in direct or reported speech. See *Udeh v. The State* (1999) 5 S.C. (Pt. 1) 87; (1999) 7 NWLR (Pt. 609) 1.

H So, in *James Edun and Ors v. Inspector-General of Police* (1966) 1 All NLR 17 at 21, the amendment of a charge was granted by a Warri Chief Magistrate on the application of the prosecution. The record of proceedings went thus:-

*“Amendment granted. Amended charge read to accused persons and they plead not guilty”*

The trial then proceeded and the appellants’ convictions were affirmed by the High Court. On appeal to this court, it was contended that the record failed to show that each of the accused persons was called upon to plead separately to the amended charge and that this irregularity was fatal to their convictions. Dismissing this submission, this court, per Brett, JSC., observed-

*“We do not regard the first submission as well founded. It would have been better if the Chief Magistrate had written-*

*‘Each pleads not guilty’*

*instead of-*

*‘They plead not guilty’*

*but they were represented by counsel who took no objection to the course adopted, and as no attempt has been made to supplement the record by any further evidence of what took place, we think it may safely be assumed that the correct procedure was followed”.*

I need only observe that the way the learned trial Judge recorded the pleas of the appellant and his co-accused in the present case is exactly the same way the plea in the James Edun and Ors. case was recorded. I cannot, in the circumstance, see my way clear to fault the same. The arraignment of the appellant in this case is, in my view, unimpeachable and issue 2 must be resolved against the appellant.

I will now dispose briefly with the submissions of learned counsel for the appellant to the effect that the appellant’s plea was also defective for non-compliance with the provisions of Section 33(6) (a) of the Constitution of the Federal Republic of Nigeria, 1979. That Section of the Constitution reads thus -

*“Every person who is charged with a criminal offence shall be entitled:*

*(a) to be informed promptly in the language that he understands and in detail of the nature of the offence”.*

I have had cause in the past to state that Section 33(6) (a) of the 1979 Constitution essentially concerns the entitlement of a person to be

informed promptly in the language that he understands and in detail of the nature of the criminal offence with which he is being charged and has nothing to do with the arraignment or plea of an accused person before a trial court which is fully covered by Section 215 of the Criminal Procedure Act. The Police at the conclusion of their investigation of a criminal offence arrest the suspect where a prima facie case is established against him, charge him with the disclosed offence or offences and caution him in the usual way whereupon the suspect may, if he so desires, volunteer a written statement in answer to the charge preferred against him. The stage at which a suspect is formally “*charged*” with a criminal offence by the Police after he has been arrested at the conclusion of the investigation of the offence levelled against him must be distinguished from the stage at which he is “*arraigned*” and his plea taken before the trial court. I think Section 33(6) (a) of the 1979 Constitution concerns the first stage at which time an accused is “*charged*” by the Police and not the stage at which he is arraigned and his plea taken before the trial court. In my view, all references by learned appellant’s counsel to Section 33(6) (a) of the 1979 Constitution in connection with the validity or otherwise of the arraignment or plea of the appellant before the trial court are, with respect, misconceived.

It is for the above and the more detailed reasons contained in the judgment of my learned brother, Ejiwunmi, JSC., that I, too, dismiss this appeal as lacking in substance. The conviction and death sentence passed on the appellant by the trial court as confirmed by the court below are hereby further affirmed.

---

G **MUSDAPHER JSC**

I have read before, now, the judgment of my Lord, Ejiwunmi, JSC., just delivered with which I entirely agree. For the same reasons contained in the aforesaid judgment which I respectfully adopt as mine, I too dismiss this appeal and affirm the majority decision of the court below.



**PATS-ACHOLONU JSC (DISSENTING)**

I have read in draft the lead judgment of my learned brother, Ejiwunmi, JSC., and with due respect to the decision arrived at I beg to dissent. The appellant was hired by someone to trim some palm trees for him. While in the course of that operation, an individual, one Nwaosuagwu who turned to be the deceased was overheard to ask him what the appellant thought he was doing up in the tree. He replied that he was hired to trim the leaves of the palm tree. Apparently not satisfied with that story, the deceased started to throw sticks at him. When the appellant was climbing down the tree, the rope he used in climbing up the tree fell down and according to his story the deceased picked it up and tried to tie him unto the tree. When he came down, a struggle ensued. It later turned into a blown up fight. It was in the melee that followed that the deceased met his death in the hands of the appellant. It is the story of the appellant that it was while they were fighting that he killed the deceased. The issue is not who killed the deceased but whether the killing by the appellant constitutes murder or a killing in self- defence or provocation or indeed an accident. I say accident because the appellant said that the knife he was carrying while they were fighting, inadvertently slashed the victim's stomach. He said in the course of the fight the deceased proved stronger and the knife he was holding cut into the deceased's stomach. In other words, the inference is that the appellant had all the while when the fight was going on, a knife. He was charged to court tried and convicted of murder. Let me critically examine the evidence of the appellant In his evidence in the court the appellant said:

*"I used climbing rope and machete to do the work ..... . He (the deceased) was holding a machete .....The deceased wanted to tie me with the climbing rope to the palm tree. He did not succeed in tying me and we started fighting..... In the course of the fighting the deceased threw me on the ground because he was stronger than me. He was still holding his machete. He held me by my throat and I could not shout. When I was struggling to free myself my machete slashed the deceased on his belly".*

In his statement to the Police, Exhibit A, he stated thus.....

*“Nwaosuagwu Ojo was flinging his machete on me and in self-defence I was using my own machete..... We fought at length and he beat me thoroughly and I had nothing in my possession except my machete.*

*B As I was defending myself with my machete, the machete cut Nwaosuagwu Ojo at his stomach and he pursued me.”*

In his second statement, Exhibit B, he said:

*C “The deceased told (me) to come down he was throwing (sic) sticks on me as a result one of my climbing ropes fell down while I came down with one rope. He tied me up with that rope and we started fighting with machete. That was the time I used my machete on him and cut him on his chest with blood”.*

*D A young man of 18 years of age who was charged along with the appellant had stated in his evidence that when the appellant and the deceased started fighting he ran away. In other words, he was not there to explain how the deceased was killed. It is important to state also that the appellant had in his own evidence said that the 2nd accused ran away and*  
*E only two of them, he and the deceased, were there fighting. In his judgment, the learned trial Judge held as follows:-*

*F “The story as told in the first and second statements by each accused materially differ and conflict with the testimony of 1st and second accused in this trial. However, there are such damning admissions by the 1st and 2nd accused in Exhibits A, B, C and D that raise very strong inference that they probably conspired and murdered the deceased. Where the previous statements are inconsistent with the testimony, the right course for a judge is to disregard them as unreliable - See the Supreme Court case of*  
*G S. 82/184 Owis v. The State (1995) NWLR (Pt. 3) p.470.” He equally referred to the view of Lord Denning MR., in Miller v. Minister of Pension (1947) AER p. 372. On appeal, the lower court considered the questions of provocation and self-defence. The lower court observed as follows in its*  
*H judgment;*

*‘The appellant himself had stated in Exhibits A and B, made when the matter was still fresh in his memory , that he inflicted at least one of the machete cuts. The Judge accepted this and waited for the appellant to*

*show mitigating circumstances. In his attempt to do so the appellant was caught out in lies. In the circumstances, it is my view that the Judge was justified in using the lies against the appellant and accepting the established fact that the latter had killed the deceased with murderous intentions. An accidental cut in the belly could not have produced the savage wounds that the Doctor found on the deceased. Nor could such wounds be said to be proportionate to provocation offered by the throwing of sticks at the appellant as he descended the palm tree. Such wounds could not be said to be necessary for the purpose of repelling the attack by the deceased on the appellant who, as the Judge observed, came out of the fight unscathed. The evidence of the Doctor was more consistent with the appellant's earlier statement in Exhibit B that "it was as a result of the fighting, that he beat me thoroughly and I killed him and ran away to Itu Nta".*

Let me examine the scenario very critically and dispassionately. It was not in dispute that the appellant did not know the deceased before the incident. From the evidence of the appellant, the person who hired him to trim the palm tree had a land dispute with the deceased. The deceased seeing the appellant on top of the tree probably was annoyed and started throwing sticks at him and even when the appellant was climbing down, attempted to use the climbing rope to tie him to the tree. They struggled and fought. The appellant had a knife. It was in his 2nd statement, Exhibit B, that he said that both had knives. There appears to my mind the ingredients of provocation laced with self - defence. A careful appraisal of the nature of his statements and his evidence will help in unraveling what happened. There being no eye witness except the ipse dixit of the appellant, even with that and assuming he is lying, would be tantamount to the prosecution - nay, the state, having discharged the burden of proof, the standard which is high when one appraises the evidence adduced that the deceased was both bigger and stronger. Assuming that the deceased had no knife (that is, that the appellant lied when he stated that the deceased had a knife) it is reasonable to assume that if he was being throttled by the deceased; indeed trying to choke or asphyxiate him and he could not breathe, and believed at that moment

that the deceased was intent in killing him, it is to my mind expected reasonable of him to defend himself, and as he was holding a knife, that was the only instrument he could lay his hand on to ward off the seeming killing menace of the deceased.

B I do not subscribe to the view of the Court of Appeal when it said as I referred above, *“nor could such wounds be said to be proportionate to the provocation offered by the throwing of sticks at the appellant”*. With greatest respect to the opinion of the lower court, the provocation  
C does not constitute only with sticks being thrown by the deceased but much more seriously and importantly the attempt to tie the appellant to the tree and when that effect failed to throttle and choke him.

In my view, I will not associate myself with the opinion expressed in the majority judgment. The appellant fought wildly to free himself  
D from the strange-hold of the deceased.

Let me approach the critical examination from 2 angles. Was the killing in the defence of the person in accordance with the provision of Section 286 of the Criminal Code Law which provides that where an  
E unprovoked assault caused a reasonable apprehension and fear of possible death or grievous bodily harm, the accused is entitled to defend himself with any means available at that material time. In the case of R. v. Nwibo (1950) 19 NLR, the appellant was unnecessarily being provoked  
F to fight the deceased which he resisted. Thereupon, the deceased struck him with a sheathed machete but before he could unsheathe it the appellant struck him a blow from which he died, the trial Judge Hubbard, J., held that though the appellant did not run away he was of the opinion that the appellant was covered by the provision of Section 286 of the Code.  
G However, in The State v. Fatai Baiye Wunmi (1980) 1 NCR 183, the Supreme Court held that the person threatened needs not run away but should now show that he did not want to engage in the fight. To my  
H unavoidable and the accused cannot escape the probable fight due to where he was such as in this case when he was climbing down, when the unprovoked attack began, and escape was impossible, it is to my mind only reasonable for him to defend himself. In the present case, it is

difficult to understand why the deceased pounced on the appellant hired to do a yeoman's job of trimming a palm tree. It cannot be doubted that a man is entitled to defend himself from an unprovoked assault from which he has an apprehension of possible death or great violence to his person likely to result to grievous bodily harm, that he should effectively B defend himself with any weapon available to him. Thus, in R. v. Knock (1877) 14 Cox CC and affirmed in R. v. Deana (1909) 2 Cr App p. 75, Lindley, J. held as follows:-

*"If a man attacks me, I am entitled to defend myself, and the C difficulty arises in drawing the line between mere self-defence and fighting. The test is this: a man defending himself does not want to fight, and defends himself solely to avoid fighting. Then supposing a man attacks, and I defend myself, not intending or desiring to fight, but still fighting - in D one sense - to defend myself, and I knock him down, and thereby unintentionally kill him, that killing is accidental".*

Let me now consider the issue of the case of two fighting and provocation leading to the fight and the consequential death. See Section E 318 of the Criminal Code of Eastern Nigeria applicable to Abia State. The provision here is that where there has been an unlawful killing in circumstances, but for the provision of the section would have been murder, the person will be guilty only of manslaughter. Regardless of the statutory definition of what is provocation, Dublin, J., in R v. Duiffy (1949) 1 All ER F 132 defined it as follows: -

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

See R v. Afonja (1955) 15 WACA 26. In this connection, it must be reiterated that nobody could say with any degree of certainty what actually transpired except the statements and evidence of the appellant. In considering H issues of what constitutes provocation the locus classicus is still the case of Lee Chun - Chuen v. R (1962) 3 WLR 146, where the Privy Council held as follows, at 1468:

“Provocation in law consists mainly of three elements -the act of provocation, the loss of self-control, both actual and reasonable and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other - particularly in point of time, whether there was time for passion to cool - is of the first importance. The point that their Lordships wish to emphasize is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The appellant’s submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct. It cannot stand with the statement of the law which their Lordships have quoted from *Holmes v. Director of Public Prosecutions* (1946) AC 585. In *Mancini v. Director of Public Prosecutions* (1942) AC 1 the House of Lords proceeded on the basis that there was an act of provocation - the aiming of a blow with the fist - but held that it was right not to leave the issue to the jury because the use of a dagger in reply was disproportionate”.

Shall we merely surmise and say that because he admitted killing the deceased, the court should endeavour to try and conjecture or supply missing details in order to trap an accused person? The scenario of this case does not to my mind lend itself to any conjecture or surmise or suspicion. That would be dangerous. In my view, what happened seemed to be more in tone and consonance with self-defence and not premeditated killing or killing by provocation.

Further it is safe to assume that the appellant struck out wildly in a frenzied condition to free himself. There is a great doubt that he intended to inflict grievous bodily harm that resulted in death. On the other hand, if he believed he might die, he had no other option. Are the accounts of what took place in that bush susceptible to only one conclusion which is that of premeditated killing? I doubt that. It is important to emphasize the nature of the standard of proof described as proof beyond all reasonable doubt. It has been defined as proof that precludes any reasonable hypothesis except that which it tends to support. Therefore, as in this case, for

evidence to warrant conviction, it must exclude beyond all reasonable doubt every other hypothesis other than of the accused 's guilt and I would hold that an accused shall be entitled to an acquittal if the evidence adduced against him is susceptible to two probabilities, id est, either guilt or innocence.

This case is built on circumstantial evidence. Although it has been held that the concurrence and incidence of well authenticated circumstances have been said to be stronger evidence in some cases than a positive testimony unconfirmed by the situational premise, but for circumstantial evidence to warrant the findings of a fact, the circumstances must lead to the conclusion with reasonable certainty and must have sufficient probative value for it to constitute the basis of legal inference deducible therefore from the facts of the case. In this case, I am of the view that no proper appraisal and evaluation was made of the evidence of the appellant. There is the nagging feeling that the court of the first instance perhaps bewildered by the nature of the offence did not consider it necessary to weigh other possibilities in the case such as I have stated like the issue of the defence of a person. Circumstantial evidence is not always sufficient to establish a conclusion where the surrounding premises are merely consistent with such variable conclusion or indeed where the circumstances give equal support to inconsistent conclusions or equally consistent with what I would describe as contradictory hypothesis. It is important that in using circumstantial evidence to find a verdict, all reasonable theories other than that of the postulation claimed shall be excluded. In this case, I still hold that the circumstantial evidence is of the nature that gives equal deductions that may be contradictory to a given proposition or a stand in a given case.

It is well recognized that appraisal of evidence is the duty of the court of first instance and an appellate court has no business in intervening except when the appraisal and evaluation is perverse. See Okoye v. Kpajie (1973) NLR 84 and Fashanu v. Adekoya (1974) 6 S. C. p.83. However, in Felix H Nwosu v. The State (1986) 4 NWLR p. 348, Coker, JSC., held; “*It is illogical to accept and believe the evidence of the two witnesses who gave two different and irreconcilable conflicting accounts of the same situation. It*

*is equally wrong for a trial judge to attempt to rationalize the evidence of a witness for the purpose of arriving at a preconceived conclusion.”* In a criminal case when the liberty - nay, the life of an accused is at stake the appellate court should adopt a more liberal attitude and examine carefully the facts of the matter and should rather lean towards the accused. I find it difficult not to hold that with the deceased unprovoked bellicose attitude of throwing sticks at the appellant, his attempt to tie him while climbing down from the tree when the rope the appellant held fell and the deceased almost choking the appellant while they were fighting cannot be regarded as facts that would compel the appellant to defend himself and safeguard his own life. It is a pity that the attempt ended in death.

A careful review of all the evidence convinces me that the conviction of the appellant in the court of first instance affirmed by the court below cannot with greatest respect, stand. There was in this case essential element of self-defence and fear experienced by the appellant that if he did not defend himself he would be dead. That, to my mind should raise a reasonable doubt of the guilt of the appellant. To my mind, this was a killing done in self-defence and nothing else.

In the circumstances, I allow the appeal and set aside the judgment of the court below and acquit and discharge the appellant.

F

---

2 All things are presumed to have been rightly and dully performed until it is proved to the contrary

G

H