

SUPREME COURT OF NIGERIA

11TH MARCH, 2005. SC. 55/2004

**CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE, S. U. ONU,
D. MUSDAPHER, I. C. PATS-ACHOLONU, JJSC**

SAMPSON NKEMJI UWAEKWEGHINYA APPELLANT

V.

THE STATE RESPONDENT

CRIMINAL PROCEDURE - Irregular procedure - Effect on the trial - Allegation that interpreter was denied - Need to show failure of justice (H1)

CONSTITUTIONAL LAW - Criminal trial - Interpretation to accused - When it may be dispensed with (H2)

CRIMINAL PROCEDURE - Interpretation - Statement to Police - Omission of interpretation of at time of tendering - Did not cause any failure of justice (H3)

CRIMINAL PROCEDURE - Murder - Provocation - Defence raised by the evidence - Should be adequately considered by the court - Even if not raised by the accused (H4)

CRIMINAL PROCEDURE - Provocation - Elements of - It should be a natural and justifiable reaction - Not done in self revenge (H5)

CRIMINAL LAW - Defences - Provocation - Avails the appellant - In the murder charge against him - As he acted in the heat of passion (H6)

CRIMINAL PROCEDURE - Contradictions - That do not affect the substance - Are not relevant (H7)

CRIMINAL LAW - Self defence - Disengagement - Where appellant had no opportunity to withdraw - And was under danger of death - His use of cutlass unto death of deceased - Is in lawful self defence (H8)

CRIMINAL LAW - Murder - Self defence - Where the plea is upheld - Accused will be absolved from criminal liability (H9)

FACTS

Before the Umuahia High Court appellant was arraigned for the offence of murder. He was alleged to have murdered one Gabriel Ejiofor on the 4th day of June, 1986. The prosecution called six witnesses in proof of the charge, but none of them was an eye witness. Appellant was the only witness for the defence and his evidence provided the only guide to the court as to what happened. It was when the deceased did not return from his farm work on the day in question that his son, senior brother and other members of the community organized a search party for him. The body of the deceased was eventually discovered in a bush (farm land belonging to appellant) with several matchet cuts. Appellant was the nephew of the deceased. It was alleged that he had a negative attitude towards the deceased and members of his family.

The Police arrested the appellant and he made a statement to the Police. Appellant stated that he inflicted matchet cuts on the deceased when the deceased armed with matchet and iron rod hit him two times with a stick unto loss of his self control and fear of death if he did not defend himself. The trial court held that self defence and provocation do not avail the appellant, convicted him and sentenced him to death in a judgment delivered on 17-12-1987. Appellant's appeal to the Court of Appeal was dismissed in judgment delivered on 4-12-2003. Appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal was right in affirming that the trial court's admission of and reliance on an alleged confessional statement of the appellant in a language which the appellant does not understand, and without interpretation did not lead to denial of fair hearing and occasion a miscarriage of justice in the case.

2. Whether the Court of Appeal was right in affirming that there was no evidence before the trial court to avail the appellant of the alter-

native defences of provocation and self defence.

3. *Whether the Court of Appeal was right in confirming and affirming the conviction and sentence of the appellant by the trial court.”*

HELD (Unanimously allowing the appeal per **MUSDAPHER JSC**)

Irregular procedure - Effect on the trial

1. There is a distinction between a matter of procedure that affects substantial justice in the trial of a case and matter of procedure which in no way affects the justice of a trial of a case. It is settled law, that an accused person who acquiesced to an irregular procedure that did not lead to a miscarriage of justice cannot complain on the procedure on an appeal. In the case of *Ajayi v. Zaria N. A.* (No. 2) (1964) NNLR 61, this court, allowing the appeal, held that an appellant discharges the burden of showing that a failure of justice has taken place for want of interpretation or adequate interpretation by showing “*that a reasonable person who was present at the trial might have supposed that the interpretation was defective to such an extent as to deny the appellant a fair trial.*”

(p. 784 G)

Criminal trial - Interpretation to accused

2. Although it is a constitutional requirement that there shall be adequate and free interpretation to the accused of anything said in a language which he does not understand, the procedure may, however, be dispensed with where the accused so wishes and the trial Judge is of the opinion that the accused does not require any interpretation of the proceedings. The right of the accused to an interpreter cannot however be raised on appeal, unless he claimed the right during his trial and was denied it. (p. 785 B)

Interpretation - Statement to Police

3. As mentioned above, the appellant should have complained on the question of non-interpretation at the time the statement was tendered in evidence, he did not do so, he cannot now complain at the appeal stage. See *Queen v. Eguabor supra*. Although the appellant gave evidence in Ibo at the trial, there was no indication that he did not speak or understand

English. In any event, it has not been shown that the non-interpretation of the statement has occasioned any failure of justice. What the appellant said in Exhibit “E”, the confessional statement, is not different from his evidence in open court. In any event, the investigating police office, B P.W.6 stated that the appellant spoke to him in English and the appellant never stated he did not understand English language. In a situation such as this, it is not necessary to interpret the proceedings when the appellant understood the language of the court. (p. 786 E)

C ***Defence raised by the evidence***

4. Now, it is settled law that in a trial of murder, it is the duty of the court to consider all the defences raised by the evidence whether the person charged specifically put up such defences or not See *Apishe v. The State* (1971) 1 All NLR 50. And no matter how weak or stupid a defence raised D by an accused may appear, it must be properly and adequately considered. See *Takida v. The State* (1969) 1 All NLR 270 where it was held that it is the duty of the court to consider the defence of provocation once there is evidence even if not raised specifically.

E Premeditated intention is incompatible with the defence of provocation, so that an accused who kills another intentionally cannot be said to have been “provoked.” (p. 788 B/ 789 B)

F ***Provocation - Elements of***

5. It is also settled law that an act of revenge, not done in the heat of passion cannot successfully form the basis of a defence of provocation. See *Chukwu v. The State* (1966) NMLR 274; or where the accused had sufficient time to cool down before doing the act complained of. See *Ashimiyu v. The State* (1982) 10 S.C. (Reprint) 1; (1982) 10 S.C. 1. Provocation G which could reduce what otherwise amounted to murder to manslaughter is a legal concept made up of a number of co-existing elements. It is of paramount importance in the consideration of this concept that the act is held out as a natural and justifiable reaction of the provoked person and H was not done in self-revenge but in ventilation of a natural, sudden and contemporaneous feeling of anger caused by the circumstances of the

occasion. (p. 789 H)

Provocation - Avails the appellant

6. Now applying these principles to the undoubted facts of this case, I am of the view that the defence of provocation can avail the appellant. I think that in the circumstances and bearing in mind the station of the appellant, the appellant certainly received grave and sudden provocation and did what he did in the heat of passion before that passion had time to cool. In my view the issue of the weapon used being disproportionate to the attack on the appellant is of no moment. What the law states is that retaliation should be proportionate to the provocation. That is why in cases of insult, still provocation may avail an accused person to reduce the offence of murder to manslaughter. Calling a Muslim a pagan may amount to provocation. See Adamu Komo v. The State (1967) 1 All NLR 289. In R. v. Edache (1962) NMLR 56 it was held that there are circumstances in which words alone could amount to such provocation as to justify a verdict on a reduced offence. Thus, the issue of weapon used is not always relevant. (p. 790 C)

Contradictions - That do not affect the substance

7. The issue of the contradiction in the statement to the police and the appellant's evidence in open court is in my view of no moment. It is the law that contradictions of minor details which do not affect the substance of the issue to be decided are irrelevant. The relevant contradictions must be shown to amount to a substantial disparagement of what was said, making it unsafe to rely on either. (p. 790 G)

Self defence - Disengagement

8. For an accused to avail himself of the defence of self-defence, he must show by evidence that he took reasonable steps to disengage from the fight or make some physical withdrawal. But the issue of disengagement depends on the peculiar circumstances of each case. Sometimes it may be possible to run away from an unwarranted attack, at times it may be

impossible to physically withdraw. In the instant case, the appellant had no opportunity to withdraw and had to do something quickly in order to repel the grave assault which could cost him his life. It was evident from the statement and the evidence of the appellant, that the deceased who attacked him was armed with a cutlass, an iron rod and a stick which he used to strongly strike the appellant twice and which rendered the appellant dazed, confused and unable to think clearly because of the shock caused by the unwarranted grave and sudden attack. The statement of the appellant and his evidence in court as to what actually happened are substantially the same and uncontradicted by the prosecution. Indeed, there was no eye-witness to the tragedy except the appellant. It is manifest that the appellant defended himself against the attack on him by the deceased and it was in the cause of the defence against the attack that the deceased sustained the fatal injuries. It is also clear, as mentioned above, that the appellant had no opportunity to withdraw. See *Oka v. The State* (1975) 9-11 S.C. (Reprint) 11. Considering all the circumstances of this case, I am of the view the defence of self-defence also avails the appellant. That faced with the situation where instant and decisive action was required, the appellant did the only thing which a normal, reasonable person defending his life would do. There was no proof beyond reasonable doubt that the killing of the deceased was unlawful. (p. 791 B)

Murder - Self defence - Where the plea is upheld

9. There is nothing to show the finding is perverse. The finding is based on the voluntary admission of the appellant. It is well settled that where the circumstances of the commission of an offence are positive, direct and unequivocal and irresistibly lead to the inference that it is the accused that committed the crime, such inference ought to be drawn. See *Shazali v. The State* (1988) 12 S.C. (Pt. 11)58. I accordingly find no merit in the complaint under the Issue No.3.

But that notwithstanding, where a plea of self-defence is upheld, it will completely absolve the accused person from criminal liability. See *Ajunwa v. The State* (1988) 9 S.C 110. This appeal therefore succeeds. The conviction of the appellant for murder and the sentence of death are

set aside. The appellant is discharged and acquitted and should be set free forthwith. (p. 792 B)

NOTABLE POINT OF INTEREST

BELGORE JSC

B

1. Purport of self defence in law

The attack on the appellant was completely unprovoked. He was faced with no option but to defend himself, which he did. If he did not defend himself there certainly was the apprehension the deceased would kill him or inflict grievous harm on him. The victim of an unprovoked and unlawful attack is entitled to defend himself and in doing so to use such force as is reasonably necessary to ward off the attack. If the unprovoked attack is likely to cause him grievous harm or even death or he is reasonably in apprehension of the same, he is entitled to use such force available to him to preserve himself from such grievous harm or death.

The purport of self-defence in law is to negative the existence of an offence so that where a person kills another in self-defence the killing, unlike in provocation as a defence, does not amount to an offence but total exoneration of the accused. Thus, the accused is discharged and acquitted of any offence. That is the provision of Section 286 Criminal Code Law and its proviso (supra). (p. 794 E)

F

REPRESENTATION

Chief C. A. B. Akparanta, (with him, R. M. Emem), for the Appellant.
J. J. Nwosu (Mrs.), (with her, Dr. J. N. Ijiomah, Private Legal Practitioner), for the Respondent.

G

CASES REFERRED TO

Egbedi v. The State (1981) 10 S.C. (Reprint) 190; (1981) 11-12 S.C. 98
Queen v. Imadebhor Equador (1962) 1 All NLR 287
Ajayi v. Zaria N. A. (No. 2) (1964) NNLR 61
Apshe v. The State (1971) 1 All NLR 50
Samuel Erakanure v. The State (1993) 5 NWLR (Pt. 294) 385, 393
Idemudia v. The State (1999) 5 S.C. (Pt. II) 110; (1999) 5 NCSJ 47

H

Takida v. The State (1969) 1 All NLR 270

Ekpeyong v. The State (1993) 5 NWLR (Pt. 295) 513 at 522

R v. Edache (1962) NMLR 56

Enahoro v. The State (1965) NSCC (Vol. 4) 98 at 113

B

LEAD JUDGMENT BY MUSDAPHER JSC

In the High Court of Justice of the former Imo State in the Umuahia Judicial Division (now in Abia State), the appellant herein was arraigned for the offence of murder contrary to and punishable under Section 319 (1) of the Criminal Code Cap. 30, Laws of the former Eastern Nigeria applicable to Imo State. It was alleged that the appellant did murder one Gabriel Ejioforon the 4th day of June, 1986, at Ndi Eheugo, Bende, in the said Umuahia Judicial Division. At the trial, the prosecution called six witnesses in proof of the charge, while the appellant was the only witness for the defence. After the address of counsel and in his judgment, delivered on 17th of December, 1987, Maranzu, J., convicted the appellant for the offence of murder and sentenced him to death. The appellant appealed to the Court of Appeal where the following issues were submitted for the determination of the appeal:-

“(1) Whether the admission by the learned trial Judge of the appellant’s alleged confessional statement written in a language which the appellant does not understand, and without interpretation led to a denial of fair trial and occasioned a miscarriage of justice in the case.

(2) Whether there was evidence before the trial court to avail the appellant of the defences of provocation and self-defence.

(3) Whether the prosecution proved the charge of murder against the appellant beyond reasonable doubt as required by Section 138 (1) of the Evidence Act.”

In its judgment delivered on the 4th day of December, 2003, the Court of Appeal dismissed the appellant’s appeal and affirmed the conviction and sentence of the trial court. This is a further appeal to this court.

The Notice of Appeal contains 3 grounds of appeal and they read:-

1. The learned Justices of the Court of Appeal erred in law in af-

firming the decision of the trial court to admit and rely on the confessional statement of the appellant recorded in a language which the appellant did not understand and without interpretation did not lead to a denial of fair hearing and occasion a miscarriage of justice in the case.

Particulars of Errors

“(i) *The investigating police officer who recovered the alleged confessional statement in the English language did not translate the same in Ibo language understood by the appellant.*

(ii) *The said statement was similarly tendered and received in evidence in court without translation in the Ibo language understood by the appellant.*

(iii) *The appellant is a stark illiterate who can neither write nor speak the English language.*

(iv) *This obvious failure had denied the appellant a fair hearing and had let to a miscarriage of justice.”*

2. The learned Justices of the Court of Appeal erred in law in holding with the trial court that the alternative defences of provocation and self defence were not available to the appellant.

Particulars of Error

“i. *There was sufficient evidence from the circumstances and facts of the case to support either or both.*

ii. *There was no adequate evaluation of the appellant’s evidence with regard to these two defences.*

iii. *The cultural background and station in life and the susceptibilities of the appellant were not adequately considered.*

3. *The decision of the Court of Appeal is unreasonable having regard to the evidence before the trial court.”*

In compliance with the Rules of this court, the parties herein caused to be filed briefs of argument. At the hearing of the appeal, learned counsel proffered oral submissions in addition to the argument contained in their written briefs. In his brief for the appellant, the learned counsel has submitted to this court for the determination of the appeal, the following issues:-

“1. *Whether the Court of Appeal was right in affirming that the trial*

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*court's admission of and reliance on an alleged confessional statement of
the appellant in a language which the appellant does not understand, and
without interpretation did not lead to denial of fair hearing and occasion
a miscarriage of justice in the case.*

B 2. *Whether the Court of Appeal was right in affirming that there
was no evidence before the trial court to avail the appellant of the alter-
native defences of provocation and self defence.*

3. *Whether the Court of Appeal was right in confirming and
affirming the conviction and sentence of the appellant by the trial court."*

C The learned counsel for the respondent identified and submitted
to this court almost identical issues for the determination of the appeal.
Before discussing the issues, it is convenient to set out the facts in this
matter. The facts are:-

D On the morning of the 4/6/1986, Gabriel Ejiofor as usual went
to his farm. He did not return in the evening as he usually used to do. His
son, his senior brother and other members of the community organized
a search party for him but could not find him up to the early hours of the
following morning. They contacted neighbouring villages to form a posse
E to help them track down Gabriel Ejiofor. Gabriel Ejiofor's dead body was
eventually discovered in a bush with several machete cuts all over his
body. The appellant was the nephew of the deceased and it was common
ground that the appellant had a negative attitude towards members of their
family including his uncle, the deceased. It was also alleged that the body
F of the deceased was found in a farm land belonging to the appellant and
that the appellant refused to take part in the search for his uncle when all
neighbours and relations learnt of his failure to return home from the farm.
After due investigation by the police, the appellant was arrested and made
an alleged confessional statement to the police. In his evidence at the trial,
G the appellant stated that he inflicted machete cuts on the deceased when the
deceased attacked him and hit him with a stick. In his cautioned statement
to the police aforesaid, the appellant made statement to the same effect,
i.e., that he feared that the deceased would kill him if he did not stop him
by using his machete on the deceased. He also claimed to have lost his
H self control when the deceased hit him. At the trial and as confirmed by
the Court of Appeal, the defences of self-defence and alternatively prov-

ocation did not avail the appellant, hence his conviction by the trial court and affirmation of the conviction by the Court of Appeal. I shall now deal with the issues submitted to this court for the determination of the appeal.

Issue No. 1

This issue is concerned with the question of the non-interpretation of the alleged confessional statement of the appellant, when it was admitted at the trial and when it was relied upon to find the appellant guilty. It is submitted that the non-interpretation of the statement amounted to a denial of fair hearing and had occasioned a miscarriage of justice. Learned counsel referred to and relied on Sections 33 (1) and 33 (6) of the 1979 Constitution. It is submitted that since the investigating police officer (P.W.6) recorded the said statement in English, which the appellant did not understand, the admission of the statement in evidence without interpretation was in breach of the provisions of the 1979 Constitution aforesaid. It is again submitted that it was necessary and in the interest of justice, not only to read out in open court and interpreted from Ibo to English and vice versa but also the evidence of P.W.2, P.W.4 and P.W.5 who gave evidence in Ibo language were similarly not interpreted. Learned counsel referred to and relied on the case of *Ogba v. State* (1992) 2 NWLR (Pt. 222) 164 at 205-207. *Samuel Erekanure v. The State* (1993) 5 NWLR (Pt. 294) 385, 393 B-C, 9; *Gozi Okeke v. The State* (2003) 2 S.C. 63; (2003) 15 NWLR (Pt. 842) 25. It is further argued, that the statement remained inadmissible in law, notwithstanding the fact that the appellant signed it and did not object to it when tendered in evidence and even though he was represented by counsel.

The learned counsel for the respondent on the other hand submitted that, the proper time for an accused to object to the admissibility of a statement was when the statement was tendered in evidence and not after when it was admitted in evidence without objection. Learned counsel referred to the case of *Abdu Mohammed v. The State* (1991) 5 NWLR (Pt. 192) 438; *Kenneth Ogoala v. The State* (1991) 2 NWLR (Pt. 175) 509 at 523-524. It is also submitted that in law, a voluntary confession of guilt, if fully consistent and probable and coupled with proof that a crime has been committed is usually accepted as satisfactory evidence in which the court can convict. It is again submitted that at no occasion did the appellant

complain that he did not understand English language. It is submitted that when the investigating Police Officer took the appellant to the superior police officer who read the statement to the appellant in English language, the appellant should have at that occasion told the superior officer that he did not understand English language, rather the appellant agreed that it was the statement he voluntarily made that was read to him. It is also argued that there was no breach of fair hearing nor any occasion of miscarriage of justice.

Now, by the provisions of Section 33 (6) (e) of the 1979 Constitution, now Section 36 (6) (e) of the 1999 Constitution every person who is charged with a criminal offence shall be entitled to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence. The law requires that there shall be adequate interpretation to the accused person of anything said in a language which he does not understand. See *Ajayi v. Zaria N. A.* (1963) 1 All NLR 169. *State v. Gwonto* (1983) 1 SCNLR 142.

The former Federal Supreme Court in the case of *Queen v. Imadebhor Equabhor* (1962) 1 All NLR 287, stated that if the accused does not ask for an interpreter, the failure to supply one would be treated as a matter of procedure and a conviction may only be set aside if the failure to supply an interpreter had led to a miscarriage of justice and that if the accused is represented by counsel, the objection must be taken at the trial in the first instance, and not on appeal. **There is a distinction between a matter of procedure that affects substantial justice in the trial of a case and matter of procedure which in no way affects the justice of a trial of a case.** See *Egbedi v. The State* (1981) 10 S.C. (Reprint) 190; (1981) 11-12 S.C. 98. **It is settled law, that an accused person who acquiesced to an irregular procedure that did not lead to a miscarriage of justice cannot complain on the procedure on an appeal. In the case of *Ajayi v. Zaria N. A.* (No. 2) (1964) NNLR 61, this court, allowing the appeal, held that an appellant discharges the burden of showing that a failure of justice has taken place for want of interpretation or adequate interpretation by showing “that a reasonable person who was present at the trial might have supposed that the interpretation was**

defective to such an extent as to deny the appellant a fair trial.”

Although it is a constitutional requirement that there shall be adequate and free interpretation to the accused of anything said in a language which he does not understand, the procedure may, however, be dispensed with where the accused so wishes and the trial Judge is of the opinion that the accused does not require any interpretation of the proceedings. The right of the accused to an interpreter cannot however be raised on appeal, unless he claimed the right during his trial and was denied it. See Queen v. Eguabor (supra).

Now, in the instant case, the appellant who was represented by counsel, when he first appeared in court on the 15/7/1987, the charge was read to the appellant in “*English language*” and interpreted in Ibo to the hearing and understanding of the accused and he pleaded as follows:-

Accused: “*I am guilty with reason.*” Whereupon, the prosecution opened its case by calling on P.W.1, Ngosi Wosu Ezi who testified in English and his evidence was not interpreted into Ibo and there was no complaint by the appellant or his counsel. Similarly, P.W.2, P.W.3 and P.W.6 testified in English and no interpretation was demanded by the appellant and none appeared on the record. P.W.4 and P.W.5 testified in Ibo because they could not speak English and their evidence was interpreted into English. But the complaint of the appellant is only concerned with the “*admission of and reliance on*” the alleged confessional statement of the appellant in English, the language the appellant did not understand and without interpretation. It alleged that it had led to a denial of fair hearing and had occasioned a miscarriage of justice. Now, P.W.6, the investigating Police Officer, in his evidence stated:-

“*I invited the accused to the police station where I arrested the accused and charged him with the offence of murder; cautioned him in English language and he volunteered a statement in English language which I recorded same in English language and read it over to him and he stated that it was his voluntary statement and he then signed his statement. I countersigned the statement of the accused as the recorder.*”

When the prosecution tendered the statement in evidence, the following appeared in the record of proceeding:-

“*Ejeleonu now seeks to tender ID-A, B & C (The three sheets*

forming the statement of the appellant put in for identification earlier in the proceedings by the superior police officer who attested to the confessional statement.)

B “Uchendu Esq., for the accused then took the documents to the accused and after showing the same to the accused and conferring with him stated that he had no objection to the statement being received in evidence.”

C Whereupon the statement was admitted and marked as Exhibit E and was read in court. Similarly, the attestation form signed by the superior police officer was also admitted without objection as Exhibit F.

D **As mentioned above, the appellant should have complained on the question of non-interpretation at the time the statement was tendered in evidence, he did not do so, he cannot now complain at the appeal stage. See Queen v. Eguabor supra. Although the appellant gave evidence in Ibo at the trial, there was no indication that he did not speak or understand English. In any event, it has not been shown that the non-interpretation of the statement has occasioned any failure of justice. What the appellant said in Exhibit “E”, the confessional**
 E **statement, is not different from his evidence in open court. In any event, the investigating police office, P.W.6 stated that the appellant spoke to him in English and the appellant never stated he did not understand English language. In a situation such as this, it is not necessary to interpret the proceedings when the appellant understood the**
 F **language of the court. See also Erakarune v. The State (supra), Kajubo v. The State (1998) 1 NWLR (Pt. 73) 721; Idemudia v. The State (1999) 5 S.C. (Pt. II) 110; (1999) 5 NCSJ 47. I accordingly find no merit in the complaint under issue one. It is rejected by me and resolved against the**
 G **appellant.**

Issue No.2

H This is concerned with the question whether the alternative defences of provocation and self-defence did not avail the appellant. It is submitted on behalf of the appellant, that the learned trial Judge did not sufficiently evaluate the evidence in the case and the Court of Appeal acted in error when it affirmed the trial Judge’s findings in respect of the defences raised by the appellant. It is argued that the appellant being the only eye-witness

stated that there was a fight between himself and the deceased and that each of them was armed with machete. It was also evident that it was the deceased who first attacked the appellant by repeatedly hitting him hard with a long stick. It is claimed the attack was sufficient to provoke the appellant to retaliate with the only weapon he was holding. It is argued B that the use of a machete under the circumstances when the deceased was also armed with a machete was not disproportionate. This is more so, when the deceased was attacking the appellant, which stunned the appellant. On the issue of provocation, learned counsel referred to and relied on the case of Ekpenyong v. The State (1993) 5 NWLR (Pt. 295) 513 at 522. Learned C counsel also referred to Section 284 of the Criminal Code.

It is also submitted that on a proper evaluation of the evidence, it is also possible that the appellant can avail himself with the defence of self-defence under Section 286 of the Criminal Code. It is submitted that D the unprovoked assault by the deceased caused the appellant to have a reasonable apprehension of death or grievous bodily harm, and that the appellant's reaction as is expected of a person of such lowly and uneducated background was to protect himself from being killed by the deceased. It E is argued that the appellant really believed that the deceased wanted to kill him. The use of the matchet was only to prevent the deceased from killing him.

The learned counsel for the respondent on the other hand submitted F that there was no available evidence adduced to avail the appellant of the defence of provocation or self-defence. It is argued that the weapon used to retaliate was dangerous and not of proportion to the stick used by the deceased. It is further argued that the appellant failed to show that he sustained any serious injury. Learned counsel referred to Sections 286 G and 287 of the Criminal Code and the case of R v. Nwanjoku 3 WACA 208. It is further submitted that the appellant did not use the opportunity which he had to retreat or draw back and there was nothing to show that he was in imminent danger of his life. See Abara v. State (1951) 2 NLR H 110.

Now, it is settled law that in a trial of murder, it is the duty of the court to consider all the defences raised by the evidence whether the person charged specifically put up such defences or not See Apishe

v. The State (1971) 1 All NLR 50. And no matter how weak or stupid a defence raised by an accused may appear, it must be properly and adequately considered. See Takida v. The State (1969) 1 All NLR 270 where it was held that it is the duty of the court to consider the defence of provocation once there is evidence even if not raised specifically.

See also Williams v. IGP (1965) NMLR 470. Now, in the instant case, both in his statement to the police and particularly his evidence in court, the appellant stated that when he met the deceased who was his uncle, he greeted him and was ignored by his uncle. *“I then started to collect bush mango fruit for myself and as I was doing so the deceased hit me with a stick a second time. He hit me with a stick the second time by the side of my ear and again on my shoulder”*. He also stated that the deceased had with him a cutlass (Exhibit A) and an iron rod (Exhibit C). *“When the deceased used Exhibit B the stick on me I was dazed and I felt that he wanted to kill me - since the deceased hit me twice with that big stick, Exhibit B, I felt that he wanted to kill me so I picked up my cutlass Exhibit D and dealt machet blows on the deceased - I do not even know when I hit him with the machet, I cannot remember how many times - because I was in agony as a result of the blows he gave me with the big stick, Exhibit B.”* He also stated that the land upon which the bush mango tree was standing belonged to his late father. There was no other witness to what had transpired between the deceased and the appellant at the scene on that fatal day. Although the learned trial Judge accepted these pieces of evidence, he went on to negative the defences of provocation and self-defence. The learned trial Judge found that the appellant had formed the intention to kill the deceased long time ago and had indeed killed the deceased in furtherance of that malicious intent.

Now, the question is whether the learned trial Judge was right in holding that the defences of provocation and self-defence did not avail the appellant.

Premeditated intention is incompatible with the defence of provocation, so that an accused who kills another intentionally cannot be said to have been “provoked.” See Inyama v. The State (1972) 3 S.C. (Reprint) 91; (1972) 3 S.C 94. In considering the defence of provocation on a charge of murder, the trial court should consider Sections 283 and

318 together. In *Obaji v. The State* (1965) 1 All NLR 269 at 275, Ademola, CJN., stated:-

“As we have pointed out earlier Section 318 of the Criminal Code must be read together with Section 283 of the Criminal Code which defines provocation and for the purposes of Section 318 provocation includes (1) any wrongful act or insult (2) of such a nature when done to an ordinary person as is likely (a) to deprive him of the power of self control, and (b) to induce him to assault the person by whom the act or insult is done or offered.

*To avail himself of the defence in a charge of murder under Section 318 of the Criminal Code, the accused must have done the act for which he is charged (i) in the heat of passion, (ii) this must have been caused by sudden provocation and (iii) the act must have been committed before there is time for his passion to cool. There can be no doubt that the attitude of the Nigerian Courts has been to interpret Sections 283 and 318 of the Criminal Code as impliedly including the mode of resentment or, in other words, that the retaliation must be proportionate to the provocation offered. In this connection, and in consonance with this interpretation by the Nigerian Courts the doctrine has developed to the “behaviour of the average man in the community to which the accused belongs” See *R. v. James Adekanmi* (1943) 17 NLR 99 at pp 101 and 102.”*

It is also settled law that an act of revenge, not done in the heat of passion cannot successfully form the basis of a defence of provocation. See *Chukwu v. The State* (1966) NMLR 274; or where the accused had sufficient time to cool down before doing the act complained of. See *Ashimiyu v. The State* (1982) 10 S.C. (Reprint) 1; (1982) 10 S.C. 1. Provocation which could reduce what otherwise amounted to murder to manslaughter is a legal concept made up of a number of co-existing elements. It is of paramount importance in the consideration of this concept that the act is held out as a natural and justifiable reaction of the provoked person and was not done in self-revenge but in ventilation of a natural, sudden and contemporaneous feeling of anger caused by the circumstances of the occasion. See *Akang v. State* (1971) 1 All NLR 46.

Now applying these principles to the undoubted facts of this case, I am of the view that the defence of provocation can avail the appellant. I think that in the circumstances and bearing in mind the station of the appellant, the appellant certainly received grave and sudden provocation and did what he did in the heat of passion before that passion had time to cool. In my view the issue of the weapon used being disproportionate to the attack on the appellant is of no moment. What the law states is that retaliation should be proportionate to the provocation. That is why in cases of insult, still provocation may avail an accused person to reduce the offence of murder to manslaughter. Calling a Muslim a pagan may amount to provocation. See Adamu Komo v. The State (1967) 1 All NLR 289. In R. v. Edache (1962) NMLR 56 it was held that there are circumstances in which words alone could amount to such provocation as to justify a verdict on a reduced offence. Thus, the issue of weapon used is not always relevant.

The issue of the contradiction in the statement to the police and the appellant's evidence in open court is in my view of no moment. It is the law that contradictions of minor details which do not affect the substance of the issue to be decided are irrelevant. The relevant contradictions must be shown to amount to a substantial disparagement of what was said, making it unsafe to rely on either. See Enahoro v. The State (1965) NSCC (Vol.4) 98 at 113.

But the defence of self-defence in my view is different. Before the defence is available, it must be shown by the person relying upon it that he reasonably believed that there was no other way of saving himself from death or grievous bodily harm other than by using such force as he did and that he tried to disengage from the event which led to the application of such force or in the instant case the use of cutlass. See Umana v. The State (1972) 4 S.C. (Reprint) 145; (1972) 4 S.C. 164, Bassey v. The Queen (1963) 1 All NLR 280. For an accused to avail himself of the defence of self-defence, he must show by evidence that he took reasonable steps to disengage from the fight or make some physical withdrawal. But the issue of disengagement depends on the peculiar circumstances of each case. Sometimes it may be possible to run away from an unwarranted

attack, at times it may be impossible to physically withdraw. In the instant case, the appellant had no opportunity to withdraw and had to do something quickly in order to repel the grave assault which could cost him his life. It was evident from the statement and the evidence of the appellant, that the deceased who attacked him was armed with a cutlass, an iron rod and a stick which he used to strongly strike the appellant twice and which rendered the appellant dazed, confused and unable to think clearly because of the shock caused by the unwarranted grave and sudden attack. The statement of the appellant and his evidence in court as to what actually happened are substantially the same and uncontradicted by the prosecution. Indeed, there was no eye-witness to the tragedy except the appellant. It is manifest that the appellant defended himself against the attack on him by the deceased and it was in the cause of the defence against the attack that the deceased sustained the fatal injuries. It is also clear, as mentioned above, that the appellant had no opportunity to withdraw. See *Oka v. The State* (1975) 9-11 S.C. (Reprint) 11. Considering all the circumstances of this case, I am of the view the defence of self-defence also avails the appellant. That faced with the situation where instant and decisive action was required, the appellant did the only thing which a normal, reasonable person defending his life would do. There was no proof beyond reasonable doubt that the killing of the deceased was unlawful. See also *Iteshi Onwe v. The State* (1975) 9-11 S.C. (Reprint) 14. I accordingly resolve the second issue in favour of the appellant.

Issue No. 3

This issue appears to me a repetition of the second issue. The appellant both in his statement to the police and his evidence in open court consistently stated how he matcheted the deceased, his uncle. There is no dispute whatever that the appellant killed the deceased. This is a finding of fact concurrently made by the lower courts. **There is nothing to show the finding is perverse. The finding is based on the voluntary admission of the appellant. It is well settled that where the circumstances of the commission of an offence are positive, direct and unequivocal and irresistibly lead to the inference that it is the accused that committed the crime, such inference ought to be drawn.** See *Shazali v. The State*

792 Uwaekweghinya v. State (2005) 3 KLR Musdapher JSC
(1988) 12 S.C. (Pt. 11)58. I accordingly find no merit in the complaint
under the Issue No.3.

But that notwithstanding, where a plea of self-defence is upheld,
it will completely absolve the accused person from criminal liability.
B See *Ajunwa v. The State* (1988) 9 S.C 110. This appeal therefore suc-
ceeds. The conviction of the appellant for murder and the sentence
of death are set aside. The appellant is discharged and acquitted and
should be set free forthwith.

C _____

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by
my learned brother, Musdapher, JSC. I agree with him that there is merit
D in this appeal. The only available evidence, which is the testimony by the
appellant, as the only witness who described the incident that happened
between him and deceased, shows that the deceased was the aggressor and
the appellant only acted in self-defence when he struck the deceased with
E a machete. It has not been submitted that the appellant used more force or
more dangerous weapon than the deceased used or had. I therefore think
that the appellant should be given the benefit of doubt in that regard.

I too will, therefore, allow the appeal, set aside the decisions of
F the courts below. I return a verdict of not guilty to the charge of murder.
The appellant is hereby acquitted and discharged.

BELGORE JSC

G The appellant went to his farm on the fateful day and met the de-
ceased there. The deceased was an uncle to the appellant but the appellant
inherited the farm on his father's death. The deceased was not supposed
to be there. However, the appellant greeted the deceased, who refused to
respond. The appellant was on the farm to pick what was described as
H "wild mangos". The appellant had with him a machete. The wild mango

is the type not plucked from the tree but picked on falling from the tree when it is ripe. The appellant was disappointed at not finding any fallen mango. He decided to go back home.

On his way back the deceased was still on the farm, where the appellant first met him. The appellant greeted him again, but like before the deceased kept mum. It was then the appellant saw some baskets full of mangos partly hidden. The deceased was asked why he picked the mangoes. The response was a violent strike with a hard stick on the head of the appellant. The appellant struggled to get up, but he met with another blow from the stick. The deceased had with him a machete and an iron rod.

In the appellant's voluntary statement under caution to investigating police officer, which was variously described in the two lower courts as "*confessional statement*," he described vividly how the deceased attacked him and how he had to defend himself. The statement, to say the least, is not a confession but clear explanation of what happened. A statement made to police under caution is a voluntary statement in the Law of Evidence and to amount to a confession, it must be clear and unqualified. Under the Evidence Act, an accused's statement which is voluntarily made could be a confession or denial, but "*confessional statement*" was coined by courts, it is not in the law.

In the present case, the only eye-witness of the events leading to the death of the deceased is the appellant. He never changed his story throughout the trial; it was a clear case of setting up defence of self-defence. The situation in the face of all the evidence before trial court is either to believe the appellant or to have no evidence at all for prosecution to prove its case. But is the evidence before the court a confession? To my mind, it is far from it. The law is clear on this type of situation by adverting to Section 286 Criminal Code Law of former Eastern Nigeria applicable to former Imo State where appellant was tried providing as follows:-

"When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make effectual defence against the assault:

Provided that the force used is not intended, and is not such as is

likely, to cause death or grievous harm. If the nature of the assault is such as to cause reasonable apprehension of death or grievous harm, and the person using force by way of defence believes, on reasonable grounds, that he cannot otherwise preserve the person defended from death or grievous harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous harm.”

The attack on the appellant was completely unprovoked. He was faced with no option but to defend himself, which he did. If he did not defend himself there certainly was the apprehension the deceased would kill him or inflict grievous harm on him. The victim of an unprovoked and unlawful attack is entitled to defend himself and in doing so to use such force as is reasonably necessary to ward off the attack. If the unprovoked attack is likely to cause him grievous harm or even death or he is reasonably in apprehension of the same, he is entitled to use such force available to him to preserve himself from such grievous harm or death.

The purport of self-defence in law is to negative the existence of an offence so that where a person kills another in self-defence the killing, unlike in provocation as a defence, does not amount to an offence but total exoneration of the accused. Thus, the accused is discharged and acquitted of any offence. That is the provision of Section 286 Criminal Code Law and its proviso (*supra*).

It is for the above reasons and fuller reasons in the judgment of my learned brother, Musdapher, JSC., that I allow this appeal. I enter a verdict of discharge and acquittal for the appellant.

ONU JSC

The facts of this case of murder, contrary to Section 319(1) Criminal Code, Cap. 30 Vol. 2 Laws of Eastern Nigeria 1963 as applicable to Imo State have been so elaborately and comprehensively stated and given articulate and clear treatment in the leading judgment of my learned brother, Dahiru Musdapher, JSC, to need any further delving into. Suffice it to say that the three concurrent issues formulated as arising for determination in

this appeal by either side postulate as follows:-

“1. Whether the Court of Appeal was right in affirming that the trial court’s admission of and reliance on an alleged confessional statement of the appellant in a language which the appellant does not understand, and without interpretation did not lead to denial of fair hearing and occasion a miscarriage of justice in the case.

2. Whether the Court of Appeal was right in affirming that there was no evidence before the trial court to avail the appellant of the alternative defences of provocation and self-defence.

3. Whether the Court of Appeal was right in confirming and affirming the conviction and sentence of the appellant by the trial court.”

The two courts below in resolving the identical issues, which, in my view, more than amply dispose of this appeal, proceeded to dismiss appellant’s appeal, inter alia:-

“I also see Exhibit “C”, the iron rod. It belongs to the deceased also. I came to the bush with only one cutlass Exhibit “D”. I see Exhibit “D” shown to me. It is my cutlass which I took to the bush that day. When the deceased used Exhibit “B”, the stick on me I was dazed and I felt that he wanted to kill me. Since the deceased hit me twice with that big stick Exhibit ‘B’, I felt that he wanted to kill me so I picked up my cutlass Exhibit “D” and dealt matchet blows on the deceased. I do not even know where I hit him with matchet. I cannot remember how many times I hit him with the matchet but I gave him matchet cuts all over his body because I was in agency (sic) as a result of the blows he gave me with the big stick Exhibit “B”. When I went home I did not tell any one and I now blame myself for not reporting the matter to the police. I did not want to tell anybody because I was not in good terms with members of my family including my late Uncle Gabriel Ejiofor. All of them hate me. Since 1971 when I lost my shoes during a bush mango hunt in the bush I have never been myself and none cares for me. The land where the bush mango tree is situate belongs to my father. No one has disputed the ownership of the piece of land where the bush mango tree is situate with me but my late father has other pieces of land which the deceased Gabriel Ejiofor and his brother Emmanuel Ejiofor P.W.4 have kept to themselves and which I have not yet started to ask them about”.

And in the court below in respect of the second issue, that court dismissed all three issues and a fortiori, gave other reasons as follows:

“On the second issue, counsel submitted that the appellant was entitled to the defence of provocation on the facts of this case because it was the deceased who provoked the fight by repeatedly hitting the appellant with a stick. He further argued that the force used by the appellant was not disproportionate since there was evidence that the deceased himself was armed with a machet and a heavy stick with which he hit him. Reliance was placed on the case of *Ekpeyong v. The State* (1993) 5 NWLR (Pt. 295) 513 at 522. He went further to submit that the appellant was entitled to defence of provocation under Section 284 of the Criminal Code on the facts of the case. It was also his submission that the appellant was entitled to defence of self defence against unprovoked assault under Section 286 of the Criminal Code based on the evidence before the court, stressing that the unprovoked assault by the deceased caused the appellant to have a reasonable apprehension of death or grievous harm and his reaction therefore was to preserve himself from such fate.”

The cumulative effect of the resolution of these issues being that the deceased first provoked the appellant by using Exhibit ‘B’, the stick on him twice and he (appellant) having become dazed and had a feeling that the deceased wanted to kill him, he (appellant) picked up his cutlass (Exhibit ‘D’) and with it dealt machet blows on him (deceased) many times all over his body without knowing the number of times or on which parts of his body, all in self defence for the provocation offered.

For the above reasons and the fuller ones contained in the leading judgment of my learned brother, Dahiru Musdapher, JSC., I too, allow the appeal and accordingly discharge and acquit the appellant.

PATS-ACHOLONU JSC

I have carefully read the judgment of my learned brother and noble Lord, Musdapher, JSC., and I agree that the appeal should succeed. The facts of the case are ably marshalled out and subjected to merciless

scrutiny and analysis. In my view the circumstances of the prevailing situation cannot make the killing one of murder or even manslaughter. The appeal succeeds and I abide by the consequential order in the lead judgment.

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