

SUPREME COURT OF NIGERIA
14TH JULY, 2006 SC. 199/2004
CORAM:- I. L. KUTIGI, N. TOBI, G.A. OGUNTADE,
M. MOHAMMED, W.S.N. ONNOGHEN, JJSC

IHEANYIGHICHI APUGO APPELLANT

V.

THE STATE RESPONDENT/
CROSS-APPELLANT

COURTS - Murder - Findings of fact - And the judgment of Court of Appeal - As cause of death was not proved - To be traceable to appellant's act - And it was found as fact - That he had no intention to kill - Conviction for manslaughter is not supportable (H1)

COURTS - Murder - Orders - Propriety of - Where cause of death - Is not traced to act of accused - In a charge of murder - Proper order to make - Is for discharge and acquittal (H2)

CRIMINAL LAW - Defences - Self defence - On the facts as found by trial court - Self defence plea availed appellant - As held by the Court of Appeal - Consequently that court was in error - Not to have discharged and acquitted him (H3)

CRIMINAL LAW - Manslaughter - Proof - Burden of - Once commission of crime is in issue - It must be proved beyond reasonable doubt - It is the duty of the prosecutor - To adduce evidence to prove manslaughter - And he has failed to do so (H4)

FACTS

Appellant was arraigned on a charge of murder at the Imo State High court. The case of the prosecution was that on 30th March, 1983,

Appellant accosted the deceased, for whom he had done some masonry work and who was still owing him. According to the Prosecution, Appellant attacked the deceased by hitting him with first blows causing the deceased to fall. Appellant then marched on the deceased inflicting injuries on him whereupon on-lookers raised an alarm as a result of which Appellant was arrested. Both the deceased and the Appellant were taken to Police station from where deceased was taken to the Hospital, where he died the next day. The Medical Doctor who performed postmortem testified as P.W.1 and stated that death was as a result of breaking of the bone of the skull causing extensive bleeding inside the head. Further, that the injuries are constant with extensive blow with a hard object.

The case of the Appellant was that the deceased had severally promised to pay him the debt but severally failed to do so. And that on the fateful day, he had gone to deceased's house on yet another invitation by the deceased to collect the said debt. But when he arrived he was told the deceased had left earlier. So he collected his tools and set out to his home. He met the deceased on the way and told him that he would discontinue working for him until he paid what he owed. Deceased then grabbed his tools and a struggle ensued whereupon deceased slapped him. Appellant therefore hit back with first blows in self defence at which the deceased fell down. Appellant tried to lift up the deceased but deceased's relatives came to the scene and attacked him. Appellant eventually found a vehicle which took him and deceased to Police Station and later took deceased to the hospital. At trial, in view of the testimony of P.W.1 as to the nature of the deceased's injuries and the weapon that must have caused them, no evidence was led tracing cause of death to the act of Appellant. Nonetheless, at close of trial, trial judge found Appellant guilty. Appellant's appeal to Court of Appeal was partly successful in that his conviction for murder was substituted with manslaughter. Court of Appeal also found that self defence availed the Appellant. Both parties were dissatisfied. Appellant has appealed against the conviction for manslaughter to the Supreme Court while respondent cross-appealed against the finding that self defence availed Appellant.

ISSUE FOR DETERMINATION

Whether the defence of self-defence was made out or not. If it was made out, the sub-issue becomes the proper order to make under the circumstance. If it was not, the consequence of the failure or absence of that defence on the conviction and sentence of the appellant for murder.

HELD (Unanimously allowing the appeal and dismissing the Cross-appeal per ONNOGHEN JSC)

Murder - Findings of fact

1. The lower court held that there was no evidence of intention to kill against the appellant. From the record, the lower court held that it was the fist blows given to the deceased by the appellant that caused the devastating head injuries resulting in the death of the deceased. This finding is clearly contrary to the expert evidence of the P.W.1 who conducted the post mortem examination and the finding of the trial court. There is no evidence on record from which it could be inferred that the fist blows were of such a nature as to cause the extensive damage revealed by the post mortem examination neither is there evidence indicating that when the blows were inflicted on the deceased he fell down and hit his head on a hard object resulting in the extensive damage particularly as there is no evidence that appellant used any hard object in giving the blows. However, the lower court went on to hold that the blow was administered by the appellant with no intention to kill the deceased - *“The intention to kill in this case depends on the circumstances and none has been shown in the case to warrant the inference that the appellant intended to kill the deceased.”* Despite the above the lower court still found appellant guilty of manslaughter!! It must be noted that the finding that appellant is guilty of manslaughter was made despite that court’s finding that appellant had no intention to kill the deceased nor was it proved that the cause of death was traceable to the act of the appellant. (p. 3034 H)

Murder - Orders - Propriety of

2. The lower court having found that the finding of fact as to the cause of death being traceable to the act of the appellant was speculative having regards to the evidence and having earlier found that the blow was inflicted without intention to kill the deceased, the proper order to be made at that stage would have been that the prosecution failed to prove the charge of murder against the appellant and as a result allow the appeal and discharge and acquit the appellant but that court erroneously did not do so. In the circumstance I hold the view that there was no evidence before the court to connect the appellant either directly or indirectly with the hard object that caused the injuries, that according to P.W.1, undoubtedly resulted in the death of the deceased. It must be noted that the evidence of P.W.1 was accepted by the learned trial judge. (p. 3036 A)

CRIMINAL LAW - Defences - Self defence

3. Having regards to the findings of fact by the lower court based on the evidence on record I agree with the lower court that:

“Self-defence as a plea in law therefore availed the appellant, contrary to the view of the trial judge. In short I hold the view that there was a fight and the appellant acted in self-defence, which cannot be said to be disproportionate to the assailant’s attack. The trial court was therefore wrong to have rejected that defence.”

So far so good. The problem with the judgment of the lower court and which resulted in the further appeal to this court lies in the fact that after rightly finding that the defence of self-defence availed the appellant having regards to the facts of the case, the lower court made a somersault by proceeding to find the appellant guilty of the offence of manslaughter arising from the same facts.

It is my considered view that the lower court erred in law in so holding particularly as it is settled law that a defence of self-defence, where it avails an accused person, justifies or excuses by law the act of the accused thereby rendering him not liable for the offence charged. It is usually a complete defence to the charge where it is upheld, as in the instant case. (p. 3037 G)

Manslaughter - Proof - Burden of

4. The law is settled that where the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt. It is therefore the duty of the prosecution to adduce sufficient evidence in proof of the offence of manslaughter. The question is whether there is such evidence on record to sustain the offence as defined in the Criminal Code sections 317, 315 and 308. B

In the case of *Amayo v. State* [2001] 18 N.W.L.R. (pt. 745) 251 C at 285 this court held that “*An accused is guilty of manslaughter if it is proved that he intentionally did an act which was unlawful and that that act inadvertently caused death.*”

In the instant case, the lower court found that “*the intention to kill in this case depends on the circumstances and none has been shown in the case to warrant the inference that the appellant intended to kill the deceased*” and that the defence of self-defence availed the appellant thereby rendering the killing, if any, lawful because it is justified or excusable in E law. So either way appellant cannot legally be found liable of the death of the deceased either under a charge for murder or manslaughter and I so hold. (p. 3038 D)

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NOTABLE POINTS OF INTEREST

TOBIJSC

1. Self defence may avail even when there is no actual attack

The plea of self-defence may afford a defence where the party raising it G uses force, not merely to counter an actual attack, but to ward off or prevent an attack which he has honestly and reasonably anticipated. In that case, the anticipated attack must be imminent.

In *Owena v. HM Advocate* [1946] JC 119, Lord Normand said: H

“*In our opinion self-defence is made out when it is established to the satisfaction of the jury that the panel believed that he was in imminent danger and that he held that belief on reasonable grounds.*”

Grounds for such belief may exist though they are founded on a genuine mistake of fact.” (p. 3045 C)

2. Effect of plea of self defence differ from that of provocation

B There is a world of difference between the effect of a successful plea of self-defence and that of provocation. While a plea of self-defence, if successfully raised, completely absolves the offender from criminal responsibility. A plea of provocation if successful, reduces the offence of murder to manslaughter. Let us not mix up the two. They are different.

C I have made this distinction because of the decision of the Court of Appeal by reducing the sentence of murder to manslaughter, although the court held that the defence of self-defence was successful. Where the defence of self-defence succeeds, the accused must be discharged and acquitted because he was at the time of the killing in reasonable apprehension of death or grievous harm and that it was necessary at the time to use the force which resulted in the death of the deceased in order to preserve himself from danger. (p. 3045 F)

E

REPRESENTATION

Mrs. M.A. Essien, for the appellant/cross-respondent with her is Benjamin Ogbaini, Esq.

F O. Wali, Esq. For the respondent/cross-appellant.

CASES REFERRED TO

Baridam v. The State [1994] 1 N.W.L.R. (pt. 320) 250

Ajunwa v. The State [1988] 4 N.W.L.R. (pt. 89) 380

G R. v. Chisam [1963] 47 Cr. App. R. 130 at 134

Owena v. HM Advocate [1946] JC 119

Adekunle v. The State [1989] 5 N.W.L.R. (pt. 123) 505

Onyenana Keyo v. The State [1964] N.M.L.R. 34

H Adamu v. Kano NA [1956] S.C.N.L.R. 65

STATUTES REFERRED TO

Evidence Act, s. 138(1)

Criminal Code of Eastern Nigeria, 1963, ss. 32(3), 286, 308, 315 and 317

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the Port Harcourt Division of the Court of Appeal in appeal No. CA/PH/151/2001 delivered on 9th December 2003 in which the court substituted a conviction of manslaughter for that of murder earlier handed down by the trial court. Appellant is dissatisfied with the said judgment and has therefore appealed to this court while the respondent cross appealed on the finding of the lower court to the effect that appellant acted in self defence.

The charge against the appellant reads thus:

“AT THE SESSION HOLDING at Umuahia on the 16th day of January 1984 the court is informed by the Attorney-General of Imo State of Nigeria on behalf of the State that IHEANYIGHICHI APUGO is charged with the following offence:

STATEMENT OF OFFENCE

MURDER, contrary to section 319(1) of the Criminal Code Cap E 30 Vol. II Laws of Eastern Nigeria 1963 as applicable to Imo State.

PARTICULARS OF OFFENCE

IHEANYIGHICHI APUGO, on the 1st day of April, 1983 at Amuzunta village old Umuahia in the Umuahia Judicial Division murdered one Sunday Odoemelam.”

The case of the prosecution is that on 30th March, 1983 the appellant who is a builder accosted the deceased who was indebted to the appellant on account of masonry work and allegedly attacked him by hitting him with fist blows as a result of which the deceased fell. The prosecution further contends that appellant then marched on the deceased inflicting injuries on him; that the relatives of the deceased raised an alarm and appellant was arrested. Both the deceased and appellant were taken to the Police Station while the deceased was subsequently rushed to the hospital for treatment but he died on 1st April, 1983. The medical Doctor who performed the post mortem testified as P.W.1 and stated that the injuries were inflicted by a blow with a hard object.

On the other hand, appellant stated that the deceased was indebted to him for work done and for which the deceased made several promises but failed to pay; that on 30/3/83 the appellant went to the deceased to demand for payment in response to an invitation by the deceased. Appellant stated that on getting to the house of the deceased and finding the deceased absent, he (appellant) decided to collect his tools of trade and return home; that on his way home, he met the deceased and informed him that he (appellant) would not continue with the work until paid for work already done but the deceased held on to appellant's tools of trade resulting in a struggle whereupon the deceased allegedly slapped the appellant and the appellant hit back with fist blows in self-defence, and the deceased fell down; that he tried to lift the deceased but his (deceased's) relations came to the scene and attacked the appellant with sticks or clubs; that appellant subsequently found a vehicle which took him and the deceased to the Police Station and later took the deceased to the hospital, where he subsequently died.

On the 25th day of May, 1985 the learned trial Judge held that the prosecution proved the case against the appellant beyond reasonable doubt and found him guilty of murder. Appellant was consequently sentenced to death by hanging.

Upon appeal to the Court of Appeal, the court set aside the conviction for murder and substituted one of manslaughter and sentenced the appellant to 20 years imprisonment with hard labour.

Upon further appeal to this court, learned counsel for the appellant, Miannaya A. Essien (Mrs.), in the appellant's brief of argument filed on 20/10/04 and adopted in argument of the appeal, submitted a single issue for determination to wit:

"Whether or not there was sufficient evidence of manslaughter before the learned justices of the Court of Appeal which warranted a substitution of a conviction for manslaughter instead of an outright acquittal and discharge."

As stated earlier in this judgment, the respondent has cross appealed against the aspect of the decision of the Court of Appeal on the issue of the defence of self defence being available to the appellant, and in

the respondent/cross-appellant's brief deemed filed and served on 9/11/05, learned counsel for the respondent/cross-appellant has formulated the following issue for determination of the cross-appeal:

"Whether the defence of self defence will avail the appellant/cross-respondent."

Looking closely at the issues in the two appeals, it is very clear that whereas the effect of the appellant's issue is whether having found that the defence of self-defence availed the appellant, the proper order is not that of discharge and acquittal instead of substitution of conviction of man-slaughter for murder, that of the cross-appellant is simply that the defence of self defence does not avail the appellant and as such the conviction of murder by the trial court ought not to have been disturbed by the Court of Appeal. Whether we look at the matter from the perspective of the appellant or cross-appellant the substratum of the appeals is the defence of self-defence as applicable to the facts of this case. I therefore intend to treat the two issues together to determine whether the defence of self-defence was made out or not. If it was made out, the sub-issue becomes the proper order to make under the circumstance. If it was not, the consequence of the failure or absence of that defence on the conviction and sentence of the appellant for murder.

In arguing the appeal, learned counsel for the appellant submitted that the learned Justices of the lower court failed to adequately consider whether the standard of proof for manslaughter was attained before convicting the appellant for same; that having conceded that there was no direct evidence connecting the appellant to the hard blow sustained by the deceased the lower court erred in law by convicting the appellant for manslaughter.

Learned counsel then referred to section 315 of the Criminal Code and submitted that for the appellant to be held liable for manslaughter pursuant to section 315 of the Criminal Code his act must have been proved by the prosecution to be directly or indirectly responsible for the act that led to the death of the deceased, relying on *Amayo v. The State* [2001] 18 N.W.L.R. (pt. 745) 251 at 285; *Oforlete v. State* [2000] 12 N.W.L.R. (pt. 681) 415 at 434.

Submitting further and in the alternative, learned counsel referred to sections 32(3) and 286 of the Criminal Code on the defence of self-defence and the finding of the lower court at page 124 in which that court held that the trial court was in error in rejecting the defence of self-defence and submitted that having found that the said defence availed the appellant, the court erred in substituting a conviction for manslaughter instead of acquittal, particularly as the effect of a successful plea of self-defence is acquittal relying on Brett and MacLean's *The Criminal law and Procedure of the Southern States of Nigeria* paragraph 1860; *The Criminal Procedure of the Southern States of Nigeria* 1st Edition by T. Akinola Aguda at paragraph 1672; *Criminal Law in Nigeria* by Okonkwo and Naish, 2nd Edition at page 222; *Akpan v. State* [1994] 9 N.W.L.R., (pt. 363; *R. v. Knock* 1877 14 CoxC.C.1.

Learned counsel then urged the court to resolve the issue in favour of the appellant and allow the appeal.

On his part learned counsel for the respondent/cross-appellant, Okey Wali, Esq., submitted that manslaughter is the unlawful killing of another in such circumstances as not to constitute murder, relying on section 317 of the Criminal Code Eastern Nigeria 1963; *Omini v. State* [1999] 12 N.W.L.R. 25 (pt. 630) 168 at 182; *Ejeka v. State* [2003] 7 N.W.L.R. (pt. 819) 408 at 423; that the lower court found that the appellant killed the deceased. Learned counsel further made the following submission:

"The only error, with utmost respect to their lordships, was the conclusion that the defence of self-defence availed the appellant hence the cross-appeal..... The fact that the appellant slapped the deceased and the deceased collapsed on 30/3/83 and died on 1/4/ 1983 is not in dispute. All that was in dispute was whether the appellant had the intention to kill the deceased. Since their Lordships found that the appellant lacked such intention (which is very debatable), the least they could do in the circumstance was to reduce the murder charge to manslaughter which was what they rightly did."

Learned counsel then urged the court to resolve the issue against the appellant and dismiss the appeal.

On the cross appeal, learned counsel submitted that the defence of self-defence is not available to the appellant, relying on section 286 of the Criminal Code and stated that for the defence to avail the appellant, appellant must show:

(a) that his life was in danger by the act of the deceased so that the only option that was open to him to save his life was to kill the deceased;

(b) that he did not want to fight the deceased, and

(c) that he was at all times prepared to withdraw; relying on *Chugwom Kirn v. State* [1992] 4 N.W.L.R. (pt. 233) 17 at 49; *Ahmed v. The State* [1999] 7 N.W.L.R. (pt. 612) 641 at 683.

Learned counsel then submitted that appellant failed to satisfy the above requirements because it cannot be “said that the life of the appellant was so much endangered by the mere slap from an elderly man (deceased) that the only option open to him to save his life was to kill the deceased:” neither can it be said that appellant did not want to fight the deceased since appellant went with the intention of dealing with the deceased that day and that the fist blows from the appellant resulted in the collapse of the deceased and his subsequent death which follows are not proportionate to the ‘mere’ slap from the deceased. Finally learned counsel urged the court to resolve the issue in favour of the cross appellant and allow the cross appeal.

On her part, learned counsel for the appellant/cross respondent in the cross respondent’s brief filed on 5/12/05 submitted that the lower court was correct when it held that self-defence availed the appellant; that it is not disputed that the deceased slapped the appellant while the appellant retaliated with fist blow and that there was a struggle between them; that to retaliate with fist blows is proportionate to the initial assault by the deceased; that the cases cited and relied upon by learned counsel for the respondent/cross appellant do not support his case particularly as they are distinguishable on the facts; that unlike in those cases where the act of the accused persons had been found to be cause of death of the deceased persons, the appellant in the instant appeal had persistently maintained that he was not responsible for the death of the deceased.

Learned counsel then urged the court to resolve the issue against the cross appellant and dismiss the cross-appeal.

It is important to note that three issues were submitted to the Court of Appeal for determination. The issues are as follows:

B *“2.1 Whether the essential elements of murder and the guilt of the appellant were established beyond reasonable doubt as laid down by s. 138(1) of the Evidence Act.*

C *2.2 Whether the prosecution disproved the defences of self-defence, provocation and accident and if the learned trial Judge properly considered same such as to exculpate the appellant for liability.*

2.3 Whether the conviction and sentencing to death of the appellant was done in accordance with the law.”

D For the purpose of this appeal, it is the resolution of issues 2.1 and 2.2 that is relevant. It is not disputed that the lower court resolved the said issues 1 & 2 in favour of the appellant. In resolving issue 1, the court at 10 pages 122 to 123 held, inter alia, as follows: -

E *“To hit the deceased with fist blow might not be indicative of intention to kill for that is normal in combat. The intention to kill in this case depends on the circumstances and none has been shown in the case to warrant the inference that the appellant intended to kill the deceased.*

F *It is true that P.W.2 testified to the effect that the appellant marched on the deceased. That can be described as act of aggression and that he wore a shoe while doing so could also be true but the type of shoe he wore is not in evidence. If it was the heavy, hard sole type, then it could cause serious bodily harm as described but there was no evidence whatsoever on the type of shoes worn by the appellant and the favourable inference is that he did not wear a shoe with hard sole. See the cases of*
 G *(1) Bob Daniels v. The State [1991] 8 N.W.L.R. (pt. 212) p. 715 at p. 732 paragraphs E - F; (2) The Queen v. Anyiam [1961] All NLR 46; 1 SCNLR 78.*

H *To my mind the intention to kill has not been proved beyond reasonable doubt. There is no doubt that there was a scuffle but that death resulted is not ipso fact to prove that the appellant intended to kill the deceased. Mens rea, an important element must be present and that*

cannot be inferred from the said freedom allegedly given to the appellant to deal with the victim if he reneged on his promise to pay on the given date. In that regard, I again disagree with the lower court. I therefore resolve issue No. 1 in favour of the appellant."

On issue 2, the court found and held at page 124 as follows: B

"In this case there was the allegation that the deceased first pushed and slapped the appellant who then retaliated in self-defence by giving the deceased a blow (not gun shot or machet cut going by the illustration of Adio, J.S.C.). That cannot by any stretch of imagination be said to be disproportionate to the assailants attack on the appellant. Self-defence as a plea in law therefore availed the appellant, contrary to the view of the trial Judge. In short, I hold the view that there was a fight and the appellant acted in self-defence, which cannot be said to be disproportionate to the assailant's attack. The trial court was therefore wrong to have rejected that defence Issue No. 2 is therefore resolved in favour of the appellant." C D

However, after making the above findings/holding the lower court still went ahead to substitute a conviction for manslaughter in place of that of murder and sentenced the appellant to 20 years imprisonment with hard labour. E

The offence of manslaughter is defined in section 317 of the Criminal Code as follows: -

"A person who unlawfully kills another in such circumstances as not to constitute murder is guilty of manslaughter." F

The term "killing" is defined in section 308 of the Criminal Code as follows: -

"Except as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person." G

On the other hand, the term unlawful homicide is defined in section 315 also of the Criminal Code thus: H

"Any person who unlawfully kills another is guilty of an offence which is called murder or manslaughter, according to the circumstances of the case."

From the above provisions, it is very clear that for a killing to amount to manslaughter it must not only be unauthorised or unjustified or not excused by law, it must also result from the direct or indirect act of the accused person. In short the death must be caused by the unlawful act of the accused person.

The question that follows is whether from the findings of the lower court in relation to issue No. 1 which had earlier been reproduced in this judgment it can be said that the lesser offence of manslaughter was established by the evidence on record.

There is no dispute that there was a fight between the appellant and the deceased which started when the deceased slapped the appellant who retaliated with fist blows resulting in the collapse of the deceased. Also not disputed is the fact that the deceased died a few days later in the hospital without regaining consciousness.

P.W.1, who is the medical doctor who conducted a post mortem examination on the body of the deceased testified as follows in examination-in-chief:

"I found as follows: the deceased was an elderly man of about 58 years and about 5ft 4ins tall. I found extensive subdural and subperiosteal haemorrhage on the skull. Comminuted fracture extended transversely through both parietal bones of the skull. Linear fracture of the posterior edge of the frontal bone. This means there was extensive bleeding inside the head and the bone of the skull were shattered in more than two places. There was the fracture of the front bone. These injuries are constant with extensive blow with an object or if the deceased was pushed and he hit his head on object. The blow must be very severe. The object must be a hard one. In my opinion I certify the cause of death to be due to head injury as a result of the above mentioned factors."

Under cross-examination, the witness stated thus: -

"If there was a fall from a height, the neck region will be involved. It is not the case in the present case. If sideways the face region would be affected, which is not also the case here."

The lower court held that there was no evidence of intention to kill against the appellant. From the record, the lower court

held that it was the fist blows given to the deceased by the appellant that caused the devastating head injuries resulting in the death of the deceased. This finding is clearly contrary to the expert evidence of the P.W.1 who conducted the post mortem examination and the finding of the trial court. There is no evidence on record from B which it could be inferred that the fist blows were of such a nature as to cause the extensive damage revealed by the post mortem examination neither is there evidence indicating that when the blows were inflicted on the deceased he fell down and hit his head on a C hard object resulting in the extensive damage particularly as there is no evidence that appellant used any hard object in giving the blows. However, the lower court went on to hold that the blow was administered by the appellant with no intention to kill the deceased - *“The intention to kill in this case depends on the circumstances and D none has been shown in the case to warrant the inference that the appellant intended to kill the deceased.”* Despite the above the lower court still found appellant guilty of manslaughter!! It must be noted that the finding that appellant is guilty of manslaughter was made E despite that court’s finding that appellant had no intention to kill the deceased nor was it proved that the cause of death was traceable to the act of the appellant - see pages 126 to 127 where the court found inter alia as follows: -

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“..... The finding of the court that the appellant hit the deceased on the head with an object and he fell.”

See page 26 lines 2 - 7 where the court held thus:

G

“..... Accused admitted giving the deceased a blow which made the deceased to fall down. He did not admit marching on him or using any object. I do not believe him. I find as a fact that he gave the fatal blow to the deceased with a hard object and the deceased fell down.....”

H

The above must account for the view of the appellant’s counsel that the court in its handling of the case made mere speculations. Honestly I do not see where that bit was given in evidence throughout the trial. It was imported into the proceedings may be inadvertently. The

truth is that the P.W.2 who was an eyewitness on whose evidence the prosecution depended and he never said so."

The lower court having found that the finding of fact as to the cause of death being traceable to the act of the appellant was speculative having regards to the evidence and having earlier found that the blow was inflicted without intention to kill the deceased, the proper order to be made at that stage would have been that the prosecution failed to prove the charge of murder against the appellant and as a result allow the appeal and discharge and acquit the appellant but that court erroneously did not do so. In the circumstance I hold the view that there was no evidence before the court to connect the appellant either directly or indirectly with the hard object that caused the injuries, that according to P.W.1, undoubtedly resulted in the death of the deceased. It must be noted that the evidence of P.W.1 was accepted by the learned trial judge.

On the issue of self defence sections 32(3) and 286 of the Criminal Code provide as follows:

"32. A person is not criminally responsible for an act or omission if he does or omits to do the act under any of the following circumstances:-

(3) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to him, or to another person in his presence. but this protection does not extend to an act or omission which would constitute an offence punishable with death, or an offence of which grievous harm to the person or another, or an intention to cause such harm, is an element, nor to a person who has by entering into an unlawful assistance or conspiracy rendered himself liable to have such threats made to him...."

"286. 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 apprehen-

sion 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.”

There is evidence accepted by the lower court that the deceased was the aggressor who first slapped the appellant resulting in the appellant giving the deceased fist blows. The lower court also found that appellant, in so acting, acted in self-defence following the assault by the deceased. There is no evidence on record to show that appellant, in so reacting acted disproportionately to the force used by the deceased or that appellant used more force than was necessary to defend himself. The attempt made by learned counsel for the cross appellant to show that appellant marched on the deceased after he collapsed and must thereby have caused the extensive damage to the skull of the deceased out of proportion to the slap by the deceased is negated by the finding by the lower court at pages 122 to 123 thus:-

“It is true that P.W.2 testified to the effect that the appellant marched on the deceased. That can be described as act of aggression and that he wore a shoe while doing so could also be true but the type of shoe he wore is not in evidence. If it was the heavy hard sole type, then it could cause serious bodily harm as described but there was no evidence whatsoever on the type of shoe worn by the appellant and the favourable inference is that he did not wear a shoe with hard sole. See the cases of (1) Bob Daniels v. The State [1991] 8 N.W.L.R. (pt. 212) p. 715 at p. 732 paragraphs E-F; (2) The Queen v. Anyim [1961] All N.L.R. 46; 1 S.C. N.L.R. 78.”

Having regards to the findings of fact by the lower court based on the evidence on record I agree with the lower court that:

“Self-defence as a plea in law therefore availed the appellant, contrary to the view of the trial judge. In short I hold the view that there was a fight and the appellant acted in self-defence, which cannot be said to be disproportionate to the assailant’s attack. The trial court was therefore wrong to have rejected that defence.”

So far so good. The problem with the judgment of the lower court and which resulted in the further appeal to this court lies in the fact that after rightly finding that the defence of self-defence availed the appellant having regards to the facts of the case, the lower court made a somersault by proceeding to find the appellant guilty of the offence of manslaughter arising from the same facts.

It is my considered view that the lower court erred in law in so holding particularly as it is settled law that a defence of self-defence, where it avails an accused person, justifies or excuses by law the act of the accused thereby rendering him not liable for the offence charged. It is usually a complete defence to the charge where it is upheld, as in the instant case. I must confess that I have been unable to find any authority in support of the action of the lower court in substituting a conviction for manslaughter for that of murder where the defence of self-defence is upheld by the court.

The law is settled that where the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt - see section 138(1) of the Evidence Act, 1990. It is therefore the duty of the prosecution to adduce sufficient evidence in proof of the offence of manslaughter. The question is whether there is such evidence on record to sustain the offence as defined in the Criminal Code sections 317, 315 and 308. That apart, the absence of evidence is further compounded by the finding of the lower court that the defence of self-defence availed the appellant. In the case of *Amayo v. State* [2001] 18 N.W.L.R. (pt. 745) 251 at 285 this court held that “*An accused is guilty of manslaughter if it is proved that he intentionally did an act which was unlawful and that that act inadvertently caused death.*”

In the instant case, the lower court found that “*the intention to kill in this case depends on the circumstances and none has been shown in the case to warrant the inference that the appellant intended to kill the deceased*” and that the defence of self-defence availed the appellant thereby rendering the killing, if any, lawful because it is justified or excusable in law. So either way appellant

cannot legally be found liable of the death of the deceased either under a charge for murder or manslaughter and I so hold.

What happened in this case is very unfortunate. The fight was unfortunate so also is the death of the deceased as a result. The conviction and sentence of the appellant for murder is equally unfortunate. It is also unfortunate that appellant has had to spend many years in jail based on a conviction on the facts of the case. I only hope that the appellant and all of us would learn from this case and realise that it pays to be tolerant and patient. A business relationship for the mutual benefit of the parties resulted, out of anger, frustration and impatience, in the unfortunate situation in this case. The conviction and sentence of the appellant for murder or manslaughter cannot remedy the situation, let alone the number of years spent in prison.

Therefore having regards to the facts of this case and the principles of law applicable thereto, I come to the conclusion that the issue for determination in the main appeal be and is hereby resolved in favour of the appellant while that in the cross-appeal be and is hereby resolved against the cross-appellant.

In conclusion, I find merit in the main appeal which is hereby allowed while the cross-appeal is hereby dismissed for lack of merit. It is further ordered that the judgment of the lower court delivered on 9th December, 2003 be and is hereby set aside as well as the judgment of the trial court in charge No. HU/27C/83 delivered on 25/5/85 convicting and sentencing the appellant to death for murder. In their place it is hereby substituted an order dismissing charge No. HU/27C/83 for lack of merit. It is further ordered that appellant be and is hereby discharged and acquitted.

Appeal allowed while the cross-appeal is dismissed.

KUTIGIJSC

I read in advance the judgment just delivered by my learned brother, ^Onnoghen, J.S.C. I agree with him to allow the appellant's appeal and dismiss the respondent's cross-appeal. In my view there was

clearly no evidence to show or establish that it was the act of the appellant that caused the death of the deceased. There could therefore not have been a conviction for murder in the first place. That being the case, the appellant must be discharged and acquitted of the murder charge. He is so discharged and acquitted. The cross-appeal is dismissed as it lacked merit.

TOBI JSC

C The appellant is a builder. It is the case of the prosecution that the appellant did some masonry work for the deceased. The appellant accosted the deceased for the payment the work done. The appellant made several efforts to get his money, but to no avail, despite the promises of the deceased.

D The appellant again demanded for the payment on 30th March, 1983. A quarrel ensued when the deceased failed to pay the money. Appellant gave the deceased fist blows on the head of the deceased. The deceased fell down and collapsed. P.W.2 Anthony Odemelam, raised an alarm. Appellant tried to run away but he was apprehended and taken to the police station, along with the deceased in an unconscious state. The deceased later died in a hospital.

F The appellant's case is that the deceased was indebted to him for work done and he demanded for payment. The deceased made several promises but to no avail. On 30th March, 1983, he went to the deceased for the money on the invitation of the deceased. As the deceased could not pay the money, the appellant held on to his tools. There was a struggle between them. In the process, the deceased slapped the appellant wherein the appellant hit him with his fist in self-defence and the deceased fell. The appellant tried to lift the deceased but the relations of the deceased came to the scene and hit the appellant with heavy sticks or clubs. He subsequently ran to a vehicle that took him and the deceased to the hospital. The appellant raised self-defence.

The learned trial judge did not believe the evidence of the appellant. He convicted the appellant for murder. On appeal, the Court of Ap-

peal reduced the sentence from murder to manslaughter. This is a further appeal to this court by the appellant. He thinks that the appeal should be allowed and a verdict of discharge and acquittal be entered for him. There is also a cross-appeal.

Briefs were filed and duly exchanged. The appellant formulated the following issue for determination:

“Whether or not there was sufficient evidence of manslaughter before the learned justices of the Court of Appeal which warranted a substitution of a conviction for manslaughter instead of an outright acquittal and discharge.”

The respondent formulated the following issue for determination in the main appeal:

“Whether or not there was sufficient evidence of manslaughter before the learned justices of the Court of Appeal which warranted a substitution of a conviction for manslaughter.”

The cross-appellant has formulated the same issue in the cross-appeal.

The crux of the submission of learned counsel for the appellant, Mrs. Essien, is that there was insufficient proof of manslaughter and that even if there was proof of manslaughter, the appellant would have been exculpated by reason of self-defence. She cited the following cases: *Oforlete v. State* [2000] 12 N.W.L.R. (pt. 681) 415 at 442; *Amayo v. State* [2001] 10 18 N.W.L.R. (pt. 745) 251 at 285; *Akpan v. State* [1994] 9 N.W.L.R. (pt. 368) 347 at 363 and *R. v. Knost* [1877] 14 Cox CCI. She also cited Brett and Maclean’s *The Criminal Law and Procedure of the Southern States of Nigeria*, paragraph 1850; *The Criminal Procedure of the Southern States of Nigeria*, 1st edition, by Akinola Aguda, paragraph 1672 and *Criminal Law in Nigeria* by Okonkwo and Naish, 2nd Edition at page 222. She urged the court to allow the appeal.

The crux of the submission of learned counsel for the respondent is that the defence of self-defence, if successful, is a complete answer to the charge of murder or manslaughter. He cited the following cases: *Baridam v. State* [1994] 1 N.W.L.R. (pt. 320) 250 at 262; *Kirn v. State* [1992] 4 N.W.L.R. (pt. 233) 17 at 49; *Duru v. State* [1993] 3

N.W.L.R. (pt. 281) 283 at 292; Okoro v. State [1997] 4 N.W.L.R. (pt. 497) 109 at 114; Adepetu v. State [1996] 6 N.W.L.R. (pt. 452) page 90 at page 104; Ahmed v. State [1999] 7 N.W.L.R. (pt. 612) 641 at 672 and 673; Ejeka v. State [2003] 7 N.W.L.R. (pt. 819) 419 at 405 408; Omini v B State [1999] 12 N.W.L.R. (pt. 630) 108 at 182. He also cited section 286 of the Criminal Code. Counsel urged the court to dismiss the appeal and allow the cross-appeal.

This appeal centres on the defence of self-defence which is provided for in section 286 of the Criminal Code.

C “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 D cause death or grievous harm.”

By the section, for the defence of self-defence to avail an accused, there must be an unlawful assault and the unlawful assault was not provoked by the accused.

E The appellant said in his evidence in-chief at page 15 of the Record:

“On 30/3/83 I went to the deceased to collect the money as he instructed me. I did not meet the man who had left some minutes before I arrived there. I collected my tools and as I was going home I met the F deceased and told him I had been in his house and as I could not collect the money that I could not continue with the work. He held my tools and as we were struggling for it he slapped me and hit me with a stick which he was holding. I was hurt and in defending myself I hit the deceased with my fist and he fell down. I tried to lift up the deceased but relations G rushed to the scene and one of them hit me with a club and I had to run to a vehicle which conveyed me, the deceased and P.W.3 to the Police Station and later to the Hospital. I did not murder the deceased and had no intention to do so.”

H The learned trial judge did not believe the evidence of the appellant. He rather believed the evidence of the P.W.2. He said at page 27 of the Record:

“I am inclined to believe P.W.2 that he met the accused and the

deceased quarrelling when suddenly the accused gave the deceased a blow which sent the deceased down and the accused marched on him before he attempted to escape, on hearing the alarm of P.W.2. It is the action of the accused that was the direct cause of the deceased's death... I do not believe the accused that the deceased slapped him and hit him B with a stick the deceased was holding. In my finding, the deceased held no stick at the time he was in his house and did not attack the accused."

The learned trial judge accordingly convicted the appellant of murder.

The Court of Appeal did not agree with the finding of the learned trial judge that there was no fight between the deceased and the appellant. Relying on Exhibit A, the statement of P.W.2 to the police, the Court of Appeal said at pages 121 and 122 of the Record:

"In that regard, I respectfully hold a different view. The court D held that there was no fight when in actual fact there was one, going by the evidence of P.W.2 and the appellant... I therefore hold that on the fateful day, there was a quarrel, that is, a fight between the appellant and the deceased resulting in the fatal blow the appellant gave the deceased." E

In Exhibit A, P.W.2 stated inter alia:

"I was returning from the neighbouring village called Okwu when I saw one Iheanyighichi Apugo (m) quarrelling with Sunday Odoemelam (m). Then all of a sudden I saw Iheanyighichi Apugo giving F Sunday some fist blows over his body and he fell down and Iheanyighichi Apugo started marching on him with his foot."

The Court of Appeal took pains to examine the colloquial meaning of the word quarrel as used by P.W. 2. The court said at page 122 of the Records:

"In some instances the word quarrel may be used colloquially, that is, to describe a disagreement leading to a fight or a fight itself. That inference favourable to the accused in this instance is to construe the word quarrel to mean a fight; that I now do. I therefore hold that on H the fateful day, there was a quarrel, that is, a fight between the appellant and the deceased resulting in the fatal blow the appellant gave the deceased."

I realise that I have repeated the last sentence. It is intentional as it is useful for emphasis. I entirely agree with the construction placed by the Court of Appeal on the word quarrel. While the expressions, “quarrel” and “fight” are different in the English language, there are instances
 B when the two are wrongly used interchangeably as if they are synonyms. I see such an instance in the use of the word quarrel by P.W.2. The interpretation of the Court is more consistent with the evidence before the learned trial judge. It is curious that P.W.2 hid away from the court the evidence of quarrel in Exhibit A. I think he deliberately did so and for
 C a purpose. After all, the deceased was his half brother. See General Adekunle v. The State [1989] 5 N.W.L.R. (pt. 123) 505.

On whether the appellant had the intention to kill the deceased, the court did not see any such intention:

D “To my mind the intention to kill has not been proved beyond reasonable doubt. There is no doubt that there was a scuffle but that death resulted is not ipso factor proof that the appellant intended to kill the deceased. Mens Rea, an important element, must be present and that
 E cannot be inferred from the said freedom allegedly given to the appellant to deal with the victim if he reneged on his promise to pay on the given date. In that regard, I again disagree with the lower court. I therefore resolve Issue No. 1 in favour of the appellant.”

F I entirely agree with the Court of Appeal. In a murder case, the prosecution has a duty to establish the cause of death with certainty and show that it was the act of the accused person that caused the death. However, cause of death can be inferred in a murder case from the circumstances of the case. See Adekunle v. The State [1989] 5 N.W.L.R.
 G (pt. 123) 505; Onyenani Keyo v. The State [1964] N.M.L.R. 34; R. v. Owe [1961] 1 All N.L.R. 680; Adamu v. Kano NA [1956] S.C.N.L.R. 65.

For a court to convict an accused for murder, the prosecution must prove that the accused person did something or omitted to do some-
 H thing he had a duty to do by law and that the said act or omission resulted in harm to the deceased. See The State v. Aibangbee [1988] 3 N.W.L.R. (pt. 84) 548.

On the defence of self-defence, the Court of Appeal said at page

124 of the Record:

“In this case there was the allegation that the deceased first pushed and slapped the appellant who then retaliated in self-defence by giving the deceased a blow..... that cannot by any stretch of imagination be said to be disproportionate to the assailant’s attack on the appellant. Self-defence as a plea in law therefore availed the appellant, contrary to the view of the trial Judge. In short I hold the view that there was a fight and the appellant acted in self-defence.” B

Although the Court of Appeal held that the defence of self-defence was available to the appellant, that court convicted him for manslaughter. Can the court do that? Is the court right in doing that? C

The plea of self-defence may afford a defence where the party raising it uses force, not merely to counter an actual attack, but to ward off or prevent an attack which he has honestly and reasonably anticipated. In that case, the anticipated attack must be imminent. See R. v. Chisam [1963] 47 Cr. App. R. 130 at 134. In Owena v. HM Advocate [1946] JC 119, Lord Normand said: D

“In our opinion self-defence is made out when it is established to the satisfaction of the jury that the panel believed that he was in imminent danger and that he held that belief on reasonable grounds. Grounds for such belief may exist though they are 30 founded on a genuine mistake of fact.” E

There is a world of difference between the effect of a successful plea of self-defence and that of provocation. While a plea of self-defence, if successfully raised, completely absolves the offender from criminal responsibility. A plea of provocation if successful, reduces the offence of murder to manslaughter. See Ajunwa v. The State [1988] 4 N.W.L.R. (pt. 89) 380. Let us not mix up the two. They are different. F

I have made this distinction because of the decision of the Court of Appeal by reducing the sentence of murder to manslaughter, although the court held that the defence of self-defence was successful. Where the defence of self-defence succeeds, the accused must be discharged and acquitted because he was at the time of the killing in reasonable apprehension of death or grievous harm and that it was necessary at the G

time to use the force which resulted in the death of the deceased in order to preserve himself from danger. See *Nwuzoke v. The State* [1988] 1 N.W.L.R. (pt. 72) 529.

In *Baridam v. The State* [1994] 1 N.W.L.R. (pt. 320) 250, Iguh, J.S.C, said at page 662:

“The second issue questions whether the defence of self-defence is available to the appellant and whether the same was established by him. There can be no doubt that self-defence in an appropriate case is a complete answer to a charge of murder or manslaughter. The appellant, to avail himself of this defence, however, must show that his life was so much endangered by the act of the deceased that the only option that was open to him to save his life was to kill the deceased. He must show that he did not want to fight and that he was at all material times prepared to withdraw. The defence of self-defence will only fail if the prosecution shows beyond reasonable doubt that what the accused did was not done by way of self-defence.”

It is in the light of the above reasons and the more detailed and abler reasons given by my learned brother, Onnoghen, J.S.C., in his judgment that I too allow the appeal. The cross-appeal is dismissed.

OGUNTADE JSC

This is an appeal against the judgment of the Court of Appeal, Port Harcourt Division (hereinafter referred to as the court below). The trial court had convicted the appellant for murder and sentenced him to death. Dissatisfied, the appellant brought an appeal before the court below. The court below substituted a conviction for manslaughter for that of murder as decided by the trial court. Still dissatisfied, the appellant has come on a final appeal before this court. In the appellant’s brief filed, one issue for determination in the appeal was raised. The issue reads:

“Whether or not there was sufficient evidence of manslaughter before the learned justices of the Court of Appeal which warranted a substitution of a conviction for manslaughter instead of an outright acquittal and discharge.”

The facts as found by the court below convey that the deceased died in the course of a fight with the appellant. There was no evidence that the appellant employed any weapon other than fist blows on the deceased in the course of the fight. Indeed the court below held:

“To my mind the intention to kill has not been proved beyond reasonable doubt. There is no doubt that there was a scuffle but that death resulted is not ipso facto proof that the appellant intended to kill the deceased. Mens Rea, an important element must be present and that cannot be inferred from the said freedom allegedly given to the appellant to deal with the victim if he reneged on his promise to pay on the given date. In that regard, I again disagree with the lower court.”

As to the defence of self-defence raised by the appellant, the court below held:

“In this case, there was the allegation that the deceased first pushed and slapped the appellant who then retaliated by giving the deceased a blow (not gunshot or machet cut going by the illustration of Adio J.S.C.). That cannot by any stretch of imagination be said to be disproportionate to the assailant’s attack on the appellant. Self-defence as a plea in law therefore availed the appellant contrary to the view of the trial judge. In short, I hold the view that there was a fight and the appellant acted in self-defence which cannot be said to be disproportionate to the assailant’s attack. The trial court was therefore wrong to have rejected that defence.....”

On the above findings made by the court below, one would have thought, having regard to the law governing self-defence, that the trial court would proceed to discharge and acquit the appellant.

Section 286 of the Criminal Code provides:

“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 assailant as is necessary for defence, even though such force may cause death or grievous harm."

B Once a court comes to the conclusion that the facts and circumstances of a particular case are such as would enable a defence of self-defence avail an accused, the accused should be entitled to an acquittal. The defence does not merely serve as a mitigating circumstance like provocation. See R. v. Bullard [1957] A.C. 635. It is also to be borne in
C mind, that even where an accused raises a defence of self-defence, the onus is still on the prosecution to establish that the defence in the circumstances was not available to the accused. See R. v. Onyeamaizu [1958] N.R.N.L.R. 93 and R v. Oshunbiyi [1961] 1 All N.L.R. 453.

D In the light of the above, I am satisfied that the court below having found that the appellant vividly established a defence of self-defence, should have acquitted the appellant on the charge. It was a serious error to convict him on manslaughter.

E I agree with the lead judgment of my learned brother, Onnoghen, J.S.C. I would set aside the judgment of the court below and High Court and substitute for them a verdict of not guilty. Appellant is discharged and acquitted.

F _____

MOHAMMED JSC

The judgment of my learned brother, Onnoghen, J.S.C. which he has delivered, was read by me in draft before today. I completely
G agree with his reasoning and his conclusion that the appellant's appeal has merit and therefore ought to be allowed.

The facts of this case have been fully stated in the lead judgment. I do not intend to repeat them. However, I need only to reiterate so
H much of the facts as are necessary for my consideration of the appeal.

The acts of the appellant that led to the death of the deceased arose from a fight between the appellant and the deceased in the course of which it appeared the deceased was the aggressor having first slapped

the appellant. The appellant retaliated by hitting back at the deceased with his fist on the face. The deceased fell down on the ground and was later taken to the hospital where he subsequently died. There was no evidence that the appellant hit the deceased with any hard object or that the deceased fell down on any hard object capable of inflicting fatal injuries fell down on any hard object capable of inflicting fatal injuries on him. B

On these undisputed facts upon which the case of the prosecution was built, it is quite clear that the defence of self-defence put up by the appellant at the trial court cannot be punctured. It is in the light of this that the court below having found that the appellant had validly established that defence, ought to have upheld it with the obvious result of discharging and acquitting the appellant. C

In the result, I also hereby allow this appeal. The conviction and sentence of the appellant for the offence of manslaughter are set aside. D
The appellant is accordingly acquitted and discharged.

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