

SUPREME COURT OF NIGERIA
12TH JANUARY, 2007 SC. 220/2005
CORAM:- S. U. ONU, D. MUSDAPHER, A. M. MUKHTAR,
W. S. N. ONNOGHEN, F. F. TABAI, JJSC

ADEGBOYE IBIKUNLE APPELLANT
V.
THE STATE RESPONDENT

PRACTICE & PROCEDURE - Issues - Raised for determination - But not argued upon - Effect - Where an issue though raised for determination - Is not argued upon by the party raising it - It is deemed abandoned (H1)

CRIMINAL LAW - Defences - S.33 (2)(b), 1999 Constitution - The provisions of that section - Is not a licence to the appellant - To summarily execute deceased - Extrajudicially as he did (H2)

CRIMINAL PROCEDURE - Arrest - Use of force to effect arrest - S.7(1) and (2), CPL - The provisions of the section - Do not permit appellant - To execute any person - Who refuses him ingress - Into a place a suspect has entered (H3)

APPEALS - Briefs - Arguments - Canvassed on appeal - Contrary to findings of fact not appealed against - Have no basis in law - And cannot be countenanced - By appellate court (H4)

CRIMINAL LAW - Murder - Constitutional defence - Under s.33(2)(b), 1999 Constitution - The defence avails only those whose presence at scene of murder - Is in furtherance of lawful arrest - In circumstances permitted by law (H5)

CRIMINAL PROCEDURE - Police powers - Reasonable use of force - Deceased having been surrounded with no means of escape - Appellant

acted unreasonably - When he fired into the room - Occupied by both the deceased - And other family members (H6)

CRIMINAL LAW - Murder - Intention to kill - This should be inferred - From the circumstances - Where probability of death is high - In view of the intentional act of injury committed - By the accused (H7)

PRACTICE & PROCEDURE - Submissions of counsel - Contrary to evidence - Submissions of counsel - Cannot be substituted - For evidence - They should be based on evidence - Or be discountenanced (H8)

FACTS

The Appellant was accused, arraigned before and convicted by the High Court of Delta State, sitting at Asaba on a charge of murder. The facts are that the Appellant, a Sergeant attached to the Marine Division, Nigerian Police, Asaba, was one of the Police officers engaged in operations against armed robbers terrorizing Asaba township at the material time. Appellant had informed P.W.10, the D.P.O that one ‘Nonso’ a suspected notorious armed robber, who recently escaped from police custody, was hiding at No 12B Oritshe Street, Cable point, Asaba. Acting on the information, the D.P.O led a team of armed police officers including the appellant, to raid the premises on the night of that fateful day. Unknown to the D.P.O and his men, Nonso and his brother had only two weeks earlier, moved out of the premises which, as a matter of fact, belonged to their late father. The apartment they vacated was now occupied by the deceased and his family.

When the police got to the premises that night, Appellant pointed out the apartment which was supposed to be Nonso’s, and they knocked at the door but the male voice emanating therefrom was not Nonso’s. The occupants of the apartment would not open the door to the police even after being informed that it was the police. Appellant posits that the voice within did not emphatically deny being Nonso but it was given in evidence for the prosecution, that the voice not only denied being Nonso but gave details of his identity. Appellant fired warning shots into the air,

yet the occupants would not open the door. He proceeded to break open the outer windows of the apartment, firing tear gas inside, yet the occupants would not budge. Rather they moved into the bedroom and barricaded themselves inside. It is in evidence that at some point, the D.P.O tried to restrain the trenchant manners of the Appellant to no avail.

Upon the tear gas failing to flush out the occupants, Appellant jumped into the parlour through the broken window. It was while there that he fired a shot through the bedroom door purportedly to incapacitate 'Nonso' and effect his arrest. That shot killed the deceased who was, to the knowledge of the Appellant, behind that door. When the police brought out the deceased, lo and behold he was not "Nonso". Appellant argues that his use of force, even lethal force, was justified in the circumstances of the case. Trial court thought otherwise and so convicted him as charged. His appeal to the Court of Appeal was dismissed. Hence he brought this further appeal to the Supreme Court.

ISSUE FOR DETERMINATION

Whether in the circumstances of this case, the Appellant who admitted that he killed the deceased, used such force beyond the extent and contrary to the circumstances permitted by law.

HELD (Unanimously dismissing the appeal per **ONU JSC**)

Issues - Raised for determination

1. The Constitutional and statutory defences implied in section 33(2)(b) of the 1999 Constitution, Section 7(1) and (2) of the Criminal Procedure Law and Section 4 of the Police Act were submitted for determination of the court by the Appellant. Be it noted that the Appellant not having advanced any argument on Section 4 of the Police Act must be deemed to have abandoned it. Argument in Appellant's brief was limited to the two defences embodied in section 33(2)(b) of the Constitution and Section 7(1) and (2) of Criminal Procedure Law. (p. 67 H)

CRIMINAL LAW - Defences

2. I am in agreement with the Respondent that these statutory defences implied in these provisions set out above cannot avail the Appellant, more

so that none of them granted him a licence to summarily execute the deceased extra-judicially. Even if the deceased were to be a thief or a person of dubious character, which the evidence on record does not disclose him as one, the provisions of the Constitution and Criminal Procedure Law (ibid) quoted above did not license the Appellant to be the complainant, investigator, Judge as well as executioner, all rolled into one. The finding of the trial court and affirmed by the lower court is that the presence of the Appellant in the apartment of the deceased on that fateful day was not shown to be in furtherance of any lawful criminal report against the deceased. The presence of the Police at the home of the deceased was strictly and entirely a response to the information supplied and dictated by the Appellant's findings which are damning to his claim to the defence under section 33(2) (b) of the Constitution.

D (p. 68 H)

Use of force to effect arrest

3. It is a misconception of the provisions of Section 7(1) and (2) of the Criminal Procedure Law (CPL) for the Appellant to contend that the use of firearm was reasonable in the circumstances of this case.

The provisions of the CPL permit the Police to break the outer door or inner door or window of a place in order to effect entry into such a place in which the police has reason to believe that the person sought to be arrested has entered. In the case at hand, the Appellant successfully broke open the outer window of the premises and after gaining ingress into the apartment of the deceased he fired the gunshots into the bedroom of the deceased.

G In this regard, I reject the submission that the act of the Appellant who had already secured ingress into the apartment of the deceased before shooting into the deceased's bedroom with a lethal weapon, cannot reasonably be described as seeking entrance under the provisions of section 7(1) and (2) of the C.P.L. Succinctly put, the provisions of the section do not permit the Appellant to summarily execute any person who refuses to allow him free ingress into an apartment that he believes a suspect has entered. (p. 69 D)

APPEALS - Briefs - Arguments

4. At paragraphs 3.2.6 to 3.2.7 titled “the Record shows that:” running from pages 3 to 5 of his (Appellant’s brief of argument), learned counsel for the appellant made a fruitless effort to enumerate the pieces of evidence which he considered relevant to the defence and drew his own conclusions that ran counter to the findings of fact of the lower court that he did not appeal against. I agree with the Respondent that such conclusions which run contrary to the unchallenged concurrent findings of the trial court and the lower court, do not have a foundation in law in the appeal herein and that is because the Appellant failed to appeal against the findings. A decision of a lower court can only be set aside on a proper appeal challenging same and strictly not otherwise. The findings of the two courts not having been challenged by way of an appeal, must not be disturbed for the purposes of this appeal and the Appellant cannot be heard to canvass argument based on facts other than facts as found by the courts below. (p. 70 D)

Murder - Constitutional defence

5. The reply to the Appellant’s assertions is that he (Appellant) can only claim his constitutional defence under section 33(2)(b) if it can be shown that his (Appellant’s) presence in the deceased’s apartment on that fateful night was in furtherance of a lawful arrest and in circumstances permitted by law.

As indeed glaringly transpired, the finding of the trial court and affirmed by the lower court, is that the presence of the Appellant in the apartment of the deceased on that fateful day not being in furtherance of any lawful criminal report against the deceased but rather as a result of the un-induced presence of the police at the home of the deceased strictly and entirely a fortuitous response to the information supplied and dictated by the Appellant, these findings, in my firm view, are damning to the Appellant’s claim to the defence under section 33(2)(b) of the Constitution. (p. 71 A)

Police powers - Reasonable use of force

6. The Appellant contended in argument that his use of firearm was ‘reasonable force’ in the circumstances. If, however, it is noted that the deceased was behind the door inside his bedroom and the Appellant, moved by the intent to kill, fired into the bedroom, where the deceased, his wife and a young female relative were cringing in fear, there is the evidence from PW5 and PW10 that the apartment of the deceased had been completely surrounded and overwhelmed by the policemen to prevent any escape by the deceased, the use of the firearm was totally unreasonable, highly intimidating and uncalled for in the circumstances of this case. This is because as found by the court below, the deceased did not pose any scintilla of danger to the Appellant. (p. 72 H)

Murder - Intention to kill

7. Section 316(1) and (2) of the Criminal Code Cap.48, Laws of the defunct Bendel State applicable to Delta State provides:

“316. Except as hereinafter set forth a person who unlawfully kills another under any of the following circumstances that is to say:

1. If the offender intends to cause the death of the person killed or that of some other person.
 2. If the offender intends to do to the person killed or to some other person grievous harm.
- is guilty of murder.....”

In the case in hand, the Appellant has never denied the fact that he shot through the door with the knowledge that the deceased was behind the door. He has also never denied the fact that he intended to cause the death or inflict grievous bodily harm to the deceased. Whatever part of the door he shot at, by shooting the deceased through the door, there can be no doubt that the Appellant intended to cause the death or inflict on him grievous bodily harm.

In Garba v. The State (supra) per Mohammed, JSC at p. 1459 held:

“If from the intentional act of injury committed the probability of death resulting is high, the finding should be that the accused intended to

cause death or injury sufficient in the ordinary cause of nature to cause death.”

In the case in hand, the probability of death resulting from the act of the Appellant was high in view of the fact that the weapon used is a gun which by nature is lethal. It is trite knowledge that the result of shooting a person with a gun is either to cause the death of the victim or cause him grievous hurt. The conclusion arrived at by the trial court in respect of the Appellant’s intention to kill the deceased can be found at page 139 lines 23 - 26 as follows:

“In my view, from all the facts of the case, the reasonable man will conclude that the accused was intentionally out to kill the deceased. I hold that the prosecution proved the case of murder against the accused beyond reasonable doubt.” I cannot agree more. (pp. 73 G/74 F)

Submissions of counsel - Contrary to evidence

8. On the assertion by the learned counsel for the Appellant that in his brief he asserted that he fired only one bullet. That cannot be true if placed side by side with what Appellant himself said at page 90 lines 21- 25 of the record, to wit;

“I shot at the door twice. The number of times I fired was at my discretion. I booked for 15 rounds of ammunition. I expended 7 out of the 15 bullets.”

Also contrary to Appellant’s counsel’s submission is the fact that the Appellant from the clear evidence on record, did not claim that he merely intended to incapacitate the deceased by shooting him through the bedroom door. It ought to be stressed that counsel’s address must be based on evidence on record and the legal submission of counsel ought not to be substituted for evidence on record.

Accordingly, I uphold the inevitable conclusion arrived at by the lower courts which is the culmination of the concurrent findings of both these courts which ought not to be reversed. (p. 75 B)

NOTABLE POINT OF INTEREST

ONNOGHEN.JSC

1. Intention to kill is obvious from Appellant's change in style of force

It is very clear that the appellant who gained ingress into the apartment of
 B the deceased by smashing his way with cement blocks through the door
 but decided to shoot his way into the locked bedroom with his rifle in-
 stead of the earlier mode of breaking and entry intended to cause the
 death or inflict grievous bodily harm on the deceased because that is the
 C natural consequence of his act particularly as the probability of death
 resulting from the act of the appellant was very high in view of the weapon
 used. (p. 86 C)

REPRESENTATION

D Dr. A. I. Layonu for the Appellant.
 Professor A. A. Utuama, Hon. Attorney General, Delta State, with him E.
 Ohwovoriole Esq. for the State.

E CASES REFERRED TO

Effiom v. The State (1995) 1 NWLR (Pt.373) 507 at 640
 Irek v. The State (1976) 4 S.C 65 at 68
 Inakeru v. The State (1984) 9 S.C 17 at 19
 F Oshodi v. Eyifunmi (2000) 13 NWLR (Pt.684) 298 at 332
 Arabamen v. The State (1972) 4 SC 35 at 44 - 45
 Eric Uyo v. A-G Bendel State (1986) 1 All NLR 106 at 112
 Garba v. The State (2000) FWLR (Pt.24) 1448 at 1460
 Osuigwe v. Nwihi (1995) 3 NWLR (Pt.386) 752
 G Musa v. State 1993 NWLR part 277 page 550
 Farrel v. Secretary of State 1980 1 All ER. 166
 Enang v. Adu 1981 11 - 12 SC 25
 Theophilus v. State 1996 1 NWLR part 423 page 139
 H Igbi v. The State 2000 3 NWLR part 648 page 169

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999, s.33 (2)(b)

Criminal Procedure Law of Delta State, s.7(1) and (2)

Criminal Code, Cap.48, Laws of Bendel State, s.316(1) and (2)

Police Act s. 24

LEAD JUDGMENT BY ONU JSC

B

The appeal herein emanates from the dismissal of the Appellant's appeal by the Court of Appeal, Benin Division on 8th April, 2004. This was sequel to his conviction and being sentenced to death for the murder of one Godspower Edeha by the Delta State High Court sitting at Asaba coram: Umukoro, J. on 26th September, 2001. C

The facts of the case briefly stated, are that the Appellant, a Police Sergeant attached to the Marine Division, Nigerian Police, Asaba, Delta State on 21/5/01 was one of the Police officers engaged in operations against armed robbers terrorizing Asaba township. That the Police after successfully arresting some of the suspected armed robbers at two hotels, the Divisional Police officer (DPO) who testified in the trial court as 10PW, led some of the Police officers including the Appellant to No.12B Oritshe Street Cable Point, Asaba in search of one "Nonso" a suspected notorious armed robber who recently escaped from Police custody and was suspected to be at that address that night. Unknown to 10PW, the DPO and his men, Nonso and his brother, Ibe, had only two weeks earlier, moved out of the premises which belonged to their late father and the apartment they vacated was now occupied by a different person who turned out to be the deceased. When the Police officers got to the premises that night, they knocked at the door of the apartment which they thought was Nonso's but the male voice emanating therefrom did not emphatically deny that he was Nonso but he would not open the door in spite of the fact that the Police officers identified themselves. D E F G

Still believing foolhardily that the man inside was Nonso, as he refused to state that he was not Nonso, and he was not prepared to open his door even after firing warning shots into the air, the Police officers forced the window open and fired tear gas inside the apartment. The man still did not open the door but instead was warning the Police officers to leave or else he would kill any Police officers who dared to come inside H

with the cutlass he was holding.

The Appellant summoned courage and jumped into the apartment through the window but the man who had been talking to the Police officers had quickly moved into the bedroom and locked it up. After over two hours, the Appellant, in an effort to incapacitate the deceased and effect his lawful arrest, fired a single shot from a rifle (Exhibit “E”) at the downward end of the bedroom door in order to gain access and effect his arrest, but the gunshot turned out to be fatal. When the Police officers brought out the deceased from the apartment, it dawned on them that the deceased was hit in the abdomen and that he was not the notorious “Nonso” who they were in search of.

The Appellant’s trial ended in his conviction and sentence to death by hanging. His conviction and sentence were affirmed by the lower court.

Dissatisfied with the decision of the lower court, the Appellant appealed to the Supreme Court. By his Notice of Appeal, the Appellant formulated three grounds of appeal.

ISSUE FOR DETERMINATION

The sole issue the Appellant formulated for determination from the three grounds is as follows: -

Was the lower court right in affirming the decision of the trial court that the defences provided for in S.33 (2) (b) of the 1999 Constitution and section 7(1) and (2) of the Criminal Procedure Law of Delta State and S.4 of the Police Act Cap. 19 2004 Laws of the Federation of Nigeria, were not available to the Appellant on the facts and on the circumstantial evidence before the court? (Emphasis supplied by me).

The Respondent for its part also proffered one issue as arising, for determination, to wit:

Whether in the circumstances of this case, the Appellant who admitted that he killed the deceased, used such force beyond the extent and contrary to the circumstances permitted by law.

In my consideration of this appeal, the Respondent’s lone issue I think will do to dispose of the case.

The Record in the case in hand depicts that:

The Policemen at Asaba were on a mission that day to apprehend criminals at different locations in the town which at the material time was under siege of armed, notorious and dangerous armed robbers.

The mission to the deceased's house at 12B Oritshe Street, Cable Point, Asaba, was in the belief that a notorious armed robber named "Nonso" who escaped from custody was held up there. Albeit, it is immaterial that the source of the information was the Appellant, there being no evidence that the Appellant and the policemen had another motive or reason for going to Oritshe Street other than for the apprehension of this notorious criminal. The important and material fact is that the DPO (PW¹⁰), as leader, agreed to proceed to 12^B Oritshe Street to apprehend the said "Nonso." Factual and undisputed foundation had been laid in the evidence of this witness for the reasonable belief that "Nonso" was living at No.12^B Oritshe Street at the material time. Undoubtedly, Nonso had lived there before or used to occasionally do so. Indeed, the deceased and his family had just moved into the premises barely two weeks before the unfortunate incident; thus strengthening the belief that "Nonso" was believed to be still living there or was coming there. So revealed the evidence of PW³, Shola Oyewale, the neighbour who testified that the deceased and his family had just moved into the premises barely two weeks before the incident. Thus, at the deceased's house it was deposed by PW² that the deceased, in spite of several entreaties, had refused to identify himself or disclaim the belief of the Police that he was "Nonso". All the prosecution witnesses, except PW2 (understandably being the spouse of the deceased) confirmed the above. In their evidence PW4 and PW5 illustrated how the deceased as even though fully aware that it was the Police who were asking him to open the door or surrender himself, refused to do so and even went on to state that his body was bullet proof and was even shown to have bragged scornfully thus:

"Police go way. I know you have a gun but that gun is ordinary water in my body.

The deceased was shown to be armed with a machete and to have made consistent threats to kill anyone who attempted to enter the room in which he was.

From the evidence of PW4 and PW10 it was demonstrated how the Appellant was apprehensive of his safety and indeed expressed his anxiety to PW10. Further, that Appellant refused to enter the parlour without being armed since he knew, as they all did, that the deceased B who they all reasonably believed was “Nonso” the fugitive dangerous criminal, was therein armed and an attempt to force him out with tear gas had earlier failed.

The findings of the court below affirming the findings of fact made by the trial court as unassailable are as follows:

- C 1. The death of the deceased at about 2am on 21st May, 2000, was caused by the Appellant who fired a gunshot that hit the deceased in the thoracic cavity.
- D 2. The previous day, being 20th May, 2000 the Appellant informed PW10 that some notorious armed robbers were present within the Asaba metropolis;
- E 3. PW10 led a team of policemen, with the Appellant acting as a pointer, in search of the suspected armed robbers to No.12B, Orishe Street, Cable Point, Asaba;
- F 4. It was the Appellant who pointed out the apartment occupied by the deceased at No.12^B Orishe Street as the residence of the suspected armed robber.
- F 5. There was no report against the deceased in any Police Station.
6. There was nothing to suggest that a crime was committed in the residence of the deceased.
7. That the time was about 2am and it was the Appellant who knocked on the door of the deceased’s apartment and asked for “Nonso”.
- G 8. The deceased was frightened and he said that he was not the person being sought by the Police;
9. Tear gas was thrown into the room of the deceased;
- H 10. The policemen were not threatened with any injury nor did they sustain any form of injury;
11. The Appellant used cement block to damage the window and jumped through the damaged window into the apartment of the deceased, despite repeated attempts by PW10 to disarm and control him.

12. The Appellant fired a gun shot through the door into the room where the deceased was and the shot hit the deceased in the abdomen causing his death.

13. PW10 did not order the Appellant to shoot the deceased.

14. The deceased died from the injuries he sustained from the B
gunshot fired by the Appellant.

15. The shooting was intentional and not accidental.

16. The deceased who remained in his room throughout did not provoke the Appellant while the Appellant could not rely on the defence C
of provocation.

17. The Appellant's life was not in danger of imminent death and there was no evidence to support the defence of self defence.

I take the view that the lower court was perfectly right and entitled to accept and affirm the findings of the learned trial Judge which D
have not been shown to be perverse or unsupported by the evidence. See *Durugo v. State* (1992) 7 KWLK (Pt.255) 525 at 535. para. F.

Despite his failure to appeal against these concurrent findings of fact, Appellant made a submission seeking to impugn the evaluation of E
the evidence by the lower courts and their findings of fact. In this regard, I am mindful of the fact that it is settled law that the Supreme Court will not reverse concurrent findings except special circumstances can be shown by the Appellant. See *Eholor v. Osayande* (1992) 6 NWLW (Pt.249) F
524 at 548, para. D-F. In the instant case, the Appellant has not been able to show from the angle of the trial court that it had not pre-eminently the privilege to see and hear the witnesses which the court believed, cannot have their testimony treated lightly since his conclusion thereon is G
presumed to be correct and ought not to be disturbed. It is against that background that the Appellant's argument of the sole issue for determination will have sway thus:

Constitutional and Statutory Defences Not Available to the Appel-
lant. H

The Constitutional and statutory defences implied in section 33(2)(b) of the 1999 Constitution, Section 7(1) and (2) of the Criminal Procedure Law and Section 4 of the Police Act were submitted

for determination of the court by the Appellant. Be it noted that the Appellant not having advanced any argument on Section 4 of the Police Act must be deemed to have abandoned it. See Effiom v. The State (1995) 1 NWLR (Pt.373) 507 at 640, para D-E. **Argument in**
B Appellant's brief was limited to the two defences embodied in section 33(2)(b) of the Constitution and Section 7(1) and (2) of Criminal Procedure Law. These provisions set out in full provide thus:

Section 33(2) of the Constitution:

C “(2) A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary -

(a) XXXXXXXXXXXXXXXXXXXXXXXXXX

D (b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained.

(c) xxxxxxxxxxxxxxxxxxxxxxxxx”

E “7(1) If any person or Police officer acting under a warrant of arrest or otherwise having authority to arrest, has reason to believe that the person to be arrested has entered into or is within any place, the person residing in or being in charge of such place shall, on demand of such person acting as aforesaid or such police officer, allow him free
 F ingress thereto and afford all reasonable facilities to search therein for the person sought to be arrested.

(2) If ingress to such place cannot be obtained under sub-section (1), any such person or police officer may enter such place and search therein for the person to be arrested, and in order to effect an entrance
 G into such place may break open any outer or inner door or window of any house or place, whether that of the person to be arrested or any other person or otherwise effect entry into such house or place, if after notification of his authority and purpose, and demand of admittance duly
 H made, he cannot otherwise obtain admittance.”

I am in agreement with the Respondent that these statutory defences implied in these provisions set out above cannot avail the Appellant, more so that none of them granted him a licence to

summarily execute the deceased extra-judicially. Even if the deceased were to be a thief or a person of dubious character, which the evidence on record does not disclose him as one, the provisions of the Constitution and Criminal Procedure Law (ibid) quoted above did not license the Appellant to be the complainant, investigator, Judge as well as executioner, all rolled into one. See Irek v. The State (1976) 4 S.C 65 at 68 and Inakeru v. The State (1984) 9 S.C 17 at 19. The finding of the trial court and affirmed by the lower court is that the presence of the Appellant in the apartment of the deceased on that fateful day was not shown to be in furtherance of any lawful criminal report against the deceased. The presence of the Police at the home of the deceased was strictly and entirely a response to the information supplied and dictated by the Appellant's findings which are damning to his claim to the defence under section 33(2) (b) of the Constitution.

Extent of the force used by the Appellant

It is a misconception of the provisions of Section 7(1) and (2) of the Criminal Procedure Law (CPL) for the Appellant to contend that the use of firearm was reasonable in the circumstances of this case.

The provisions of the CPL permit the Police to break the outer door or inner door or window of a place in order to effect entry into such a place in which the police has reason to believe that the person sought to be arrested has entered. In the case at hand, the Appellant successfully broke open the outer window of the premises and after gaining ingress into the apartment of the deceased he fired the gunshots into the bedroom of the deceased.

In this regard, I reject the submission that the act of the Appellant who had already secured ingress into the apartment of the deceased before shooting into the deceased's bedroom with a lethal weapon, cannot reasonably be described as seeking entrance under the provisions of section 7(1) and (2) of the C.P.L. Succinctly put, the provisions of the section do not permit the Appellant to summarily execute any person who refuses to allow him free in-

gress into an apartment that he believes a suspect has entered. See *Irek v. The State* (supra) and *Inakeru v. The State* (supra).

The reliance by Appellant on section 24 of the Police Act without indicating the relevance of the provisions of the section to the determination of the issue at hand, would, in my view serve no useful purpose to reproduce the provisions thereof. Suffice it to say, that the section gives the Police power to arrest without warrant in specified cases.

Even if the deceased were to be a thief or a person of dubious character, a fact not disclosed on the record, the provisions of the Constitution and the Criminal Procedure Law (ibid), did not licence the Appellant to be the complainant, investigator, as well as the Judge and executioner, all rolled into one. See *Irek v. The State* (supra) and *Inakeru v. The State* (supra).

At paragraphs 3.2.6 to 3.2.7 titled “the Record shows that:” running from pages 3 to 5 of his (Appellant’s brief of argument), learned counsel for the appellant made a fruitless effort to enumerate the pieces of evidence which he considered relevant to the defence and drew his own conclusions that ran counter to the findings of fact of the lower court that he did not appeal against. I agree with the Respondent that such conclusions which run contrary to the unchallenged concurrent findings of the trial court and the lower court, do not have a foundation in law in the appeal herein and that is because the Appellant failed to appeal against the findings. A decision of a lower court can only be set aside on a proper appeal challenging same and strictly not otherwise. The findings of the two courts not having been challenged by way of an appeal, must not be disturbed for the purposes of this appeal and the Appellant cannot be heard to canvass argument based on facts other than facts as found by the courts below: vide Oshodi v. Eyifunmi (2000) 13 NWLR (Pt.684) 298 at 332, para C - E.

Besides, the fact that the Appellant could not show at all that the concurrent findings of fact are perverse also means that the question of whether or not the Appellant can avail himself of the defence raised in this appeal is a question to be decided on the settled facts as found by the

lower courts. **The reply to the Appellant's assertions is that he (Appellant) can only claim his constitutional defence under section 33(2)(b) if it can be shown that his (Appellant's) presence in the deceased's apartment on that fateful night was in furtherance of a lawful arrest and in circumstances permitted by law.** B

As indeed glaringly transpired, the finding of the trial court and affirmed by the lower court, is that the presence of the Appellant in the apartment of the deceased on that fateful day not being in furtherance of any lawful criminal report against the deceased but rather as a result of the un-induced presence of the police at the home of the deceased strictly and entirely a fortuitous response to the information supplied and dictated by the Appellant, these findings, in my firm view, are damning to the Appellant's claim to the defence under section 33(2)(b) of the Constitution. C D

EXTENT OF THE FORCE USED BY THE APPELLANT

I am in entire agreement with the submission canvassed on behalf of the Respondent that it is a misconception of the provisions of section 7(1) and (2) of the Criminal Procedure Law (CPL) for the Appellant to have argued in his paragraphs 3.3.1 to 3.3.6 at pages 6 to 7 of his brief of argument, that the use of a firearm was reasonable in the circumstance of this case. In my respectful view, the provisions of Section 7 of the CPL permit the police to break the outer door or inner door or window of a place in order to effect entry into such a place in which the police has reason to believe that the person sought to be arrested has entered. In the case at hand, the Appellant successfully broke open the outer window of the premises and effected ingress into the apartment of the deceased before he fired the gunshots into the bedroom of the deceased. That being so, the act of the Appellant, who had already secured free ingress into the apartment of the deceased before shooting into the bedroom of the deceased with a lethal weapon cannot, in my view, reasonably be described as seeking entrance under the provisions of section 7(1) and (2) of the C.P.L. Succinctly put, the provisions of the section do not permit the Appellant to summarily execute any person who refuses to allow him free ingress into an apartment that he believes a suspect has E F G H

entered. See *Irek v. The State* (supra) *Imakeru v. The State* (supra). Reliance by the Appellant on section 24 of the Police Act without indicating the relevance of its provisions to the issue at hand would, in my view, serve no useful purpose. This is because, while the section gives the
 B police power to arrest suspects without warrant in specified cases, the issue at hand is not covered by the provisions of the said section, more so that it cannot serve to justify the death of the deceased.

Nor is it correct to say as alleged by the Appellant's counsel that there is undisputed evidence that the deceased threatened to kill the po-
 C licemen and refused to deny the police's claim that he was Nonso, an alleged armed and dangerous fugitive. Rather, contrary to the Appellant's assertion on this score, is the testimony of PW2 (wife of the deceased who was present in the room with him) which was believed by the learned
 D trial judge and affirmed by the lower court. She testified that the deceased identified himself as Godspower Edeha, a driver, an Isoko from Ozoro as can be seen in the pertinent portion of the judgment copied at Page 123, lines 21 to 31 of the records:

E *"The 2PW narrated how knocks were made on the door accompa-*
nied with the statement - open the door, open the door or else we fire.
That the deceased said I am Godspower Edeha, a driver, am Isoko from
Ozoro. The deceased stood beside the door. All of a sudden a shot came
 F *into the parlour hitting the deceased. He fell and his breathing changed*
immediately."

Appellant's assertion is quite diametrical to the facts on record as found by the two lower courts. So also is the postulation that the Appel-
 G lant had to use teargas to "smoke" the deceased out of the room when the deceased refused to avail himself of the opportunity to surrender have no relationship one to the other. This is because throwing tear gas into the room of the deceased cannot come within the provisions of section 7 of the CPL which merely permits the breaking of doors or
 H windows of a house in order to affect ingress by the police.

USE OF FIREARM NOT REASONABLE FORCE

The Appellant contended in argument that his use of firearm was 'reasonable force' in the circumstances. If, however, it is noted

that the deceased was behind the door inside his bedroom and the Appellant, moved by the intent to kill, fired into the bedroom, where the deceased, his wife and a young female relative were cringing in fear, there is the evidence from PW5 and PW10 that the apartment of the deceased had been completely surrounded and overwhelmed B by the policemen to prevent any escape by the deceased, the use of the firearm was totally unreasonable, highly intimidating and uncalled for in the circumstances of this case. This is because as found by the court below, the deceased did not pose any scintilla of danger C to the Appellant. It was mischievous and unreasonable for the Appellant to break the window of the deceased's apartment, threw teargas into the room and then jumped into the apartment to callously release or pump bullets into the deceased.

ALLEGED INTENTION OF THE APPELLANT TO MERELY IN- D
CAPACITATE THE DECEASED.

In his brief of argument the Appellant's argument that he fired only one shot at "the downward end of the door" and that it was the Appellant's intention to shoot towards the lower part of the deceased's E body by directing his shot toward the downward end of the door with the intention of incapacitating the deceased person, certainly not to kill him, can only be accepted with a pinch of salt. In the same aforesaid paragraphs, the Appellant also alleged that the lower courts did not fully F consider the alleged fact that the Appellant fired only one bullet. The foregoing assertions on behalf of the Appellant are not only misplaced in law and additionally fly in the face of the credible evidence on record and the findings of fact made thereto are not only preposterous but concomi- G tant with twisted falsehood.

Section 316(1) and (2) of the Criminal Code Cap.48, Laws of the defunct Bendel State applicable to Delta State provides:

"316. Except as hereinafter set forth a person who unlawfully kills another under any of the following circumstances that is to say: H

1. If the offender intends to cause the death of the person killed or that of some other person.

2. If the offender intends to do to the person killed or to some

other person grievous harm.

3. XXXXXXXXXXXXXXXXXXXXXXXXXXXX

4. XXXXXXXXXXXXXXXXXXXXXXXXXXXX

5. XXXXXXXXXXXXXXXXXXXXXXXXXXXX

B 6. XXXXXXXXXXXXXXXXXXXXXXXXXXXX

is guilty of murder.....”

In the case in hand, the Appellant has never denied the fact that he shot through the door with the knowledge that the deceased was behind the door. He has also never denied the fact that he intended to cause the death or inflict grievous bodily harm to the deceased. Whatever part of the door he shot at, by shooting the deceased through the door, there can be no doubt that the Appellant intended to cause the death or inflict on him grievous bodily harm.

See *Arabamen v. The State* (1972) 4 SC 35 at 44 - 45; see also *Eric Uyo v. A-G Bendel State* (1986) 1 All NLR 106 at 112 and *Garba v. The State* (2000) FWLR (Pt.24) 1448 at 1460. Katsina-Alu, JSC in *Eric Uyo* (supra) stating the legal presumption held that:

“*The law presumes that a man intends the natural and probable consequences of his acts. And the test to be applied in these circumstances is the objective test namely, the test of what a reasonable man would contemplate as the probable result of his acts*”

(Underlining is mine for emphasis).

And in *Garba v. The State* (supra) per Mohammed, JSC at p. 1459 held:

“*If from the intentional act of injury committed the probability of death resulting is high, the finding should be that the accused intended to cause death or injury sufficient in the ordinary cause of nature to cause death.*”

In the case in hand, the probability of death resulting from the act of the Appellant was high in view of the fact that the weapon used is a gun which by nature is lethal. It is trite knowledge that the result of shooting a person with a gun is either to cause the death of the victim or cause him grievous hurt. The conclusion

arrived at by the trial court in respect of the Appellant's intention to kill the deceased can be found at page 139 lines 23 - 26 as follows:

"In my view, from all the facts of the case, the reasonable man will conclude that the accused was intentionally out to kill the deceased. I hold that the prosecution proved the case of murder against the accused beyond reasonable doubt." I cannot agree more. B

On the assertion by the learned counsel for the Appellant that in his brief he asserted that he fired only one bullet. That cannot be true if placed side by side with what Appellant himself said at page 90 lines 21-25 of the record, to wit; C

"I shot at the door twice. The number of times I fired was at my discretion. I booked for 15 rounds of ammunition. I expended 7 out of the 15 bullets." D

Also contrary to Appellant's counsel's submission is the fact that the Appellant from the clear evidence on record, did not claim that he merely intended to incapacitate the deceased by shooting him through the bedroom door. It ought to be stressed that counsel's address must be based on evidence on record and the legal submission of counsel ought not to be substituted for evidence on record vide *Osuigwe v. Nwihi* (1995) 3 NWLR (Pt.386) 752. E

Accordingly, I uphold the inevitable conclusion arrived at by the lower courts which is the culmination of the concurrent findings of both these courts which ought not to be reversed. F

1. It being an undisputed fact that the Appellant caused the death of the deceased with the knowledge that his act would cause death or grievous bodily harm to the deceased. G

2. That the presence of the Appellant in the deceased's apartment was not in furtherance of a lawful arrest in the circumstances permitted by law.

3. That the force used by the Appellant was beyond the extent and not in circumstances permitted by law.

4. That the use of firearms after ingress had been effected into the apartment of the deceased was unreasonable in the circumstances of the

case.

In sum, my answer to the lone issue formulated against the Appellant is accordingly resolved against him and his appeal fails. It is dismissed.

B _____

MUSDAPHER JSC

I have had the opportunity to read before now, the judgment of my lord Onu JSC just delivered with which I entirely agree. For the same reasons so eloquently and comprehensively set out in the aforesaid judgment, which I respectfully adopt as mine, I too, find this appeal unmeritorious. I dismiss it and affirm the decision of the court below.

D _____

MUKHTAR JSC

I have had the opportunity of reading in advance the judgment delivered by my learned brother Onu, JSC. I would however like to highlight some points.

In the High Court of Justice of Delta State, the accused/appellant pleaded not guilty to the following count:-

"Statement of Offence: Count 1

Murder contrary to Section 319(1) of the criminal code cap 48 Vol. II laws of Bendel State of Nigeria 1975 as applicable to Delta State.

Particulars of Offence

Sergeant Adegboye Ibikunle (m) on or about the 21st day of May, 2000 at Onishe Street, Cable Point, Asaba in the Asaba Judicial Division murdered one Godspower Edeha (m)".

Ten prosecution witnesses testified and the appellant defended himself on oath. The learned trial judge evaluated the evidence before him, considered the defence of the appellant but convicted him for the offence he was charged, and sentenced him to death by hanging. Aggrieved by the conviction the appellant appealed to the Court of Appeal. The conviction was upheld by the court and a further appeal was filed in this court. Both parties exchanged briefs of argument to wit there was appellant's

reply brief of argument, which were adopted at the hearing of this appeal. The only issue raised in the appellant's brief of argument is:-

“Was the lower court right in affirming the decision of the trial court that the defences provided for in Section 33 (2) (b) of the 1999 Constitution and Section 7(1) and (2) of the Criminal Procedure Law of B Delta State and Section 4 of the Police Act Cap. 19 2004 Laws of the Federation of Nigeria, were not available to the appellant on the fact and on the circumstantial evidence before the court?”.

The respondent in its brief of argument formulated the following C issue for determination:-

“Whether in the circumstances of this case the appellant who admitted that he killed the deceased, used such force beyond the extent, and contrary to the circumstances permitted by law?”

I will adopt the appellant's issue. The pivot of learned counsel's D argument is the availability of the defence of Section 33 (2) (b) of the constitution of the Federal Republic of Nigeria 1999, which stipulates the following:-

“A person shall not be regarded as having been deprived of his E life in contravention of this Section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law of such force as is reasonably necessary.

(a) for the defence of any person from unlawful violence or for F the defence of property;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained”

Learned counsel for the appellant has argued that embedded in the G above provisions are the following requirements:-

(i) the extent of the use of force must be (a) permitted by law and (b) reasonably necessary in the circumstances.

(ii) The circumstances of the use of force must be permitted by H law.

(iii) The objective of the use of force must be to effect a lawful arrest or to prevent the escape of a person lawfully detained.

He cited the cases of *Musa v. State* 1993 NWLR part 277 page

550, and Farrel v. Secretary of State 1980 1 All ER. 166.

The learned counsel for the respondent has in reply contended that the direct and unambiguous evidence on record shows that the appellant killed the deceased using force to such extent and in such circumstances not permitted by the law, thereby disentitling him to the constitutional defence provided by Section 33(2)(b) of the constitution supra.

In fact when one looks at the overall evidence before the trial court closely, it will be very difficult for a reasonable man to discern why the appellant would think he can avail himself of the defence in the said Section 33(2) of the constitution. In the first place there was no concrete evidence that the appellant was in imminent danger of unlawful violence, or that he was defending any property. In the second place, even if there was evidence that he went to the scene of the incident to effect, lawful arrest or to prevent the escape of the deceased, there was nothing to show that the deceased was about to escape and that he was lawfully detained. Lawful arrest in the circumstance of this case cannot be given its correct connotation, because the person they went to arrest was different from the person that was in the room they went to and that was eventually killed. This fact is supported by the evidence of P.W.3 who occupies the same compound with the deceased. It reads:-

“They started hitting something at the door and still asking him to open the door saying Nonso open the door, Nonso open the door. Godspower said I am not Nonso. I am Godspower. I am an Isoko man. I am a driver. They said if you do not open the door, if we get to open the door, your life is finished.”

P.W. 2 the wife of the deceased also in her evidence testified thus:-

“My husband said if it is Nonso you are looking for, I do not know who is called Nonso. That I am Godspower Edeha, a driver an Isoko man from Ozoro.”

The above pieces of evidence were not discredited in the course of cross-examination. The learned trial judge believed the evidence of these witnesses for in his judgment he found thus:-

“There was evidence to draw the inference and conclusion that the defences of provocation, self-defence, accident and superior order can-

not avail the accused”.

There was also ample evidence that it was the appellant who fired the shot that killed the deceased.

The above is not a finding that was perverse, for it was supported by credible and unchallenged evidence upon which the learned trial judge based same. The court below was in agreement with the finding on appeal. The law is trite that findings that are borne out of credible evidence must not be disturbed by an appellate court, and an appellate court will not ordinarily interfere with such findings unless they are perverse or not supported by credible evidence. See Enang v. Adu 1981 11 - 12 SC 25, Theophilus v. State 1996 1 NWLR part 423 page 139, and Igbi v. The State 2000 3 NWLR part 648 page 169.

This appeal is on concurrent findings of facts, which deserves not to be disturbed.

I agree with the reasoning of my learned brother that the appeal has no merit whatsoever, and deserves to be dismissed. I abide by the orders made in the lead judgment and dismiss the appeal.

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal holden at Benin delivered on 8th April, 2004 in appeal No. CA/B/139/2002 in which it affirmed the conviction and sentence of the appellant in the judgment of the High Court of Delta State holden at Asaba judicial division delivered on the 26th day of September, 2001 in charge NO: A/12C/2000. for the murder of one Godspower Edeha (m).

The appellant was charged with the following offence:

“STATEMENT OF OFFENCE:

COUNT I

Murder contrary to section 319(1) of the Criminal Code cap. 49 vol II, Laws of Bendel State of Nigeria 1976 as applicable to Delta H State.

PARTICULARS OF OFFENCE

Sgt. Adegboye Ibikunle (M) on or about the 21st day of May, 2000

at Onishe Street, Cable Point, Asaba in the Asaba Judicial Division murdered one Godspower Edeha (M)."

The facts of the case which is largely undisputed, include the following:

B On the 20th day of May, 2000 the appellant informed PW.10 who
was his Divisional Police Officer, B. Division of the Nigeria Police Force,
Asaba, that some notorious armed robbers including one Nonso were in
Asaba Metropolis which resulted in a raid of some black spots on 21/5/
C 2000 led by PW.10 in company of the appellant, PW4 and PW5 as well
as one Yahaya Momodu. Some suspects were arrested but Nonso was
not one of them. Appellant later on, at the early hours of the morning
acting as pointer, led PW10 and others to the residence of the deceased
which he alleged to be the residence of the alleged armed robbers. The
D apartment of the deceased was identified by the appellant who also
knocked on the door thereof asking for Nonso but the deceased, who
was frightened at the presence of strange men banging on his door at that
time of the night, shouted back that he was not Nonso but appellant told
E PW4 and PW5 to ignore him (the deceased).

What followed can best be described as the theatre of the absurd.
Appellant proceeded to fire shots from his rifle, exhibit E into the air; he
identified the voice of the deceased as that of the armed robber being
F sought and proceeded to destroy the doors and windows of the deceased's
apartment with cement blocks. Appellant proceeded further to fire shots
of tear gas canisters into the said apartment. PW10 being his superior
officer, was disturbed by the proceedings and made attempts to disarm
and control the appellant to no avail. Appellant next jumped into the
G deceased's apartment through the window which he had earlier dam-
aged, and once inside, appellant fired gunshots from his rifle, exhibit E at
the door to the bedroom of the deceased which was at this time securely
locked from the inside. The gunshots were fatal as the deceased was
H standing behind the locked bedroom door and was hit in the abdomen
thereby causing his death.

The issue as formulated for argument in the appellant's brief of
argument filed by Learned Counsel for the appellant DR. A. I. LAYONU

on the 27th day of January, 2006 and adopted in argument of the appeal on the 19th day of October, 2006 is as follows:-

“Was the lower court right in affirming the decision of the trial court that the defences provided for in S.33(b) of the 1999 Constitution and section 7(1) and (2) of the Criminal Procedure Law of Delta State and S.4 of the Police Act Cap P. 19 2004 Laws of the Federation of Nigeria, were not available to the appellant on the facts and on circumstantial evidence before the court? (Emphasis supplied)”

On the other hand, the same issue was worded in a slightly different way by Learned Senior Counsel for the respondent, PROF. A. A. UTUAMA, SAN in the respondents brief of argument filed on 11/4/06, also adopted in argument of the appeal, as follows:

“Whether in the circumstances of this case, the appellant who admitted that he killed the deceased, used such force beyond the extent and contrary to the circumstances permitted by law.”

It is very clear that while appellant’s issue tilted towards a consideration of circumstantial evidence, that of the respondent is based on direct and positive evidence of facts at the trial.

The sections of the Constitution and law relied upon by learned counsel for the appellant in his submissions are:-

Section 33(2) (b) of the Constitution of the Federal Republic of Nigeria 1999 (hereinafter referred to as the 1999 Constitution) which provides as follows:-

“A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary.

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;.....”

It is very clear that the above provision of the Constitution recognizes the following ingredients as needed for the complete defence stated therein to avail an accused person; these are:

- (a) that the extent of the use of force must be:
 - (i) as permitted by law, and,

(ii) as reasonably necessary in the circumstances of the case.

(b) that the circumstances of the use of force must be as permitted by law; and

(c) that the objective of the use of force must be to effect a lawful arrest or to prevent the escape of a person lawfully detained.

On the extent of force needed under the law, learned counsel referred to section 7(1) and (2) of the Criminal Procedure Law which inter alia, empowers the police to use reasonable force to break open:

C *“Outer door or inner door or window of any house or place if after notification..... and to arrest without warrant.”*

The question that follows is whether from the facts available on record it can be said that the defence, contemplated by section 33(2)(b) of the 1999 Constitution has been made out. To begin with there is no dispute as to the death of the deceased and the fact that his death was the result of the direct action of the accused person. The contention however is whether in the killing of the deceased by the appellant, appellant used force to such extent and in such circumstances as permitted by law thereby availing him of the Constitutional defence as provided under section 33(2) (b) of the 1999 Constitution.

I hold the view that the issue can be resolved simply by looking at the proven facts on record and as concurrently found by the lower courts.

F The facts include the following:-

(a) The appellant caused the death of the deceased at about 2a.m on 21st May, 2000 by gunshot wounds to the thoracic cavity.

G (b) Appellant had on 20/5/2000 informed PW10 of the presence of some notorious armed robbers including one Nonso within Asaba metropolis.

(c) PW10 consequently led a team of police men in search of the suspected armed robbers at NO. 12B Onishe Street, Cable Point, Asaba with appellant acting as pointer to the said team.

H (d) At the apartment of the deceased it was appellant who pointed out that apartment to the team as the residence of Nonso, a suspected armed robber.

(e) There was no report against the deceased in any Police Station

neither was there anything to suggest that a crime was committed or about to be committed in the residence of the deceased.

(f) At that time the deceased had retired to bed and it was the appellant who knocked on the door of the deceased and asked for Nonso.

(g) The deceased answered and stated that he was not the Nonso being sought by the police. B

(h) Appellant smashed the door and windows of the residence of the deceased and even threw tear gas canisters into the room of the deceased.

(i) No policeman was under any threat of injury neither did any policemen sustain any injury. C

(j) PW10 attempted to disarm the appellant who resisted same and jumped into the apartment of the deceased through the window he had earlier smashed with cement blocks. D

(k) Appellant fired a gun shot into the bedroom of the deceased through a locked door and the shot hit the deceased in the abdomen resulting in his death.

(l) The shooting of the deceased was not at the command of PW10 but the unilateral act of the appellant acting independently. E

(m) The shooting of the deceased by the appellant was not accidental.

(n) There was no evidence of provocation by the deceased resulting in the shooting. F

(o) There is no evidence of the life of the appellant being endangered by the deceased which would have suggested that the shooting was in self defence.

(p) The policemen were not at the apartment to arrest the deceased. G

It is settled law that the Supreme Court will not reverse the concurrent findings of fact except the appellant establishes special circumstances why the court should do so - see Eholor vs Osayande (1992) 6 NWLR (pt. 249) 524 at 548, where this court held that

***“..It can only be reversed upon special circumstances shown.....
But once this court is satisfied that the court of trial did not properly***

84 Ibikunle v. The State (2007) 1 KLR Onnoghen JSC
evaluate the evidence, or that it made a wrongful approach to the evidence tendered before it, or has in any way not properly utilized its advantage of seeing or listening to the witness, then a special circumstance has been shown, the confirmation of the finding by the Court of Appeal notwithstanding. So it has the right, indeed the duty, to intervene.....”

That apart, the appellant must also establish the fact that concurrent findings of fact by the lower courts has resulted in a miscarriage of justice particularly as the findings were perverse or not supported by the evidence on record; or that there was a breach of either procedural or substantive law in the process leading to the said findings.

When one looks at the evidence on record it is very clear that the findings enumerated above are supported by the evidence on record and are within the province of the trial judge to make. Appellant has also not shown how the findings have resulted in a miscarriage of justice particularly as the defence of the appellant at the trial court was that of self defence which was on the proven facts before the trial court, not available to the appellant. It must be noted that the defence under section 33(2) (b) of the 1999 Constitution only sufficed in the proceedings before this court. I had earlier in this judgment reproduced section 33(2) (b) of the 1999 Constitution. I now reproduce in full, the provisions of section 7(1) and (2) of the

Criminal Procedure Law which provide as follows:-

“7(1) If any person or Police Officer acting under a warrant of arrest or otherwise having authority to arrest, has reason to believe that the person to be arrested has entered into or is within any place, the person residing in or being in charge of such place shall, on demand of such person acting as aforesaid or such Police Officer, allow him free ingress thereto and afford all reasonable facilities to search therein for the person sought to be arrested.

(2) If ingress to such place cannot be obtained under sub section (1), any such person or Police Officer may enter such place and search therein for the person to be arrested, and in order to effect an entrance into such place, may break open any outer or inner door or window of

any house or place, whether that of the person to be arrested or any other person or otherwise effect, entry into such house or place, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance.”

From the facts established in this case, I hold the considered view B that the statutory defences provided for in section 33(2) (b) of the 1999 Constitution and section 7(1) and (2) of the Criminal Procedure Law do not avail the appellant in this case. It has been earlier held in this judgment that the appellant failed to show that the concurrent findings of fact by C the lower courts are perverse or impugned same in any other known ground. The significance of that holding is that the decision as to whether the statutory defences raised by the appellant in this appeal avail the appellant must be determined within the context or confines of the proven facts as concurrently found by the lower courts. From the established facts it is D clear that it cannot be said that the presence of the appellant at the apartment of the deceased on the day in question was in furtherance of a lawful arrest in the circumstance permitted by law particularly as there was no report of any criminal activity against the deceased before the E police but on an information supplied by the appellant which turned out to be false. It has to be noted that before shooting into the bedroom of the deceased appellant had already gained ingress into the apartment and could easily and more conveniently have used the same method of cement blocks F to break into the bedroom of the deceased but decided to shoot the door open with a lethal weapon, yet appellant wants this court to hold that it was a reasonable use of force in the circumstances.

The law does not permit or licensed any person, be he a policeman G or soldier or otherwise to be the complainant, investigator, judge and executioner all at the same time. In the circumstance of this case and particularly having regard to the provisions of section 33(2) (b) of the 1999 Constitution and section 7(1) and (2) of the Criminal Procedure Law - see Irek vs The State (1976) 4 S.C 65 at 68; Enakeru vs The State H (1984) 9 S.C 17 at 19, appellant has no legal right to summarily execute any person who refuses him ingress into an apartment that he believes a suspect is hiding.

Appellant has not denied shooting the deceased through the door with the knowledge that the deceased was in the room. Section 316 (1) and (2) of the Criminal Code, Cap. 48 Laws of Bendel State as applicable to Delta State provides, inter alia, as follows: -

B “316. *Except as hereunder set forth a person who unlawfully kills another under any of the following circumstances that is to say:-*

(1) *If the offender intends to cause the death of the person killed or that of some other person.*

C (2) *If the offender intends to do to the person killed or to some other person grievous harm..... is guilty of murder.”*

It is very clear that the appellant who gained ingress into the apartment of the deceased by smashing his way with cement blocks through the door but decided to shoot his way into the locked bedroom with his rifle instead of the earlier mode of breaking and entry intended to cause the death or inflict grievous bodily harm on the deceased because that is the natural consequence of his act particularly as the probability of death resulting from the act of the appellant was very high in view of the weapon used, see *Garba vs the State (2000) FWLR (pt. 24) 1448 at 1459 to 1460*; *Eric Uyo vs A-G Bendel State (1986) 1 All NLR 106 at 112*.

I am compelled by the facts and circumstances of this case coupled with the now notorious extra judicial killings of innocent people by some members of the Nigeria Police to condemn the inability of some members of the police force to realize that the foundation of the police institution is preservation of life and property. There is the urgent need to revisit the criteria used in recruitment of policemen. The instant extra judicial killing by a member of the Nigeria Police Force is one too many. Appellant did not only fail in his duty as a policeman to protect the people but has no regard for the sanctity of human life. He was not only overzealous but extremely reckless in his actions on the day in question. Here is the deceased who was wakened up at 2 am by a bang on his door by people he could not believe to be policemen and was consequently frightened. He was obviously afraid of his safety and decided not to open his door at that time of the night. He denied being the notorious armed robber the police were allegedly seeking to arrest. Even if he were, there is no evi-

dence of the existence of any possible route of escape from the bedroom except through the locked bedroom door, which means appellant and the police could have decided to wait it out till morning or day break when the situation would have become clearer and simplified but decided not to. It is the unfortunate acts of policemen like the appellant that have B made it near impossible for Nigerians to really consider the police as their friend. The facts of this case has made it necessary for us to have a rethink about the modus operandi of our police force and may advise the wisdom in adopting the approach of investigation before arrest instead of arrest before investigation as is hitherto the vogue. If the method of in- C vestigation before arrest were to have been adopted in this case, the true facts would have been apparent before any arrest was contemplated. For instance the apartment and its occupants could have been under surveil- D lance prior to any arrest, if need be. Even after the deceased refused to open his door at that time of the night some policemen could have been posted to watch the apartment till daybreak when positive identification could have been made. Unfortunately none of these was contemplated or considered on the day in question and in consequence the deceased paid E the ultimate price.

The appellant, above all, has no business being in the Nigeria Police at all, not being disciplined enough to take orders or obey simple instructions from his superior officer. Such a character has no right to F bear arms on any assignment since he has no hesitation in using same irrespective of the need for it. Such characters as the appellant still occupy positions within the Nigeria Police and they need to be deterred from the now notorious acts of extra judicial killings and I hold the view G that the sentence of death pronounced on the appellant by the trial court and confirmed by the Court of Appeal will adequately serve that purpose.

In conclusion, I agree with the lead judgment of my learned brother ONU, JSC that this appeal is without merit and should be dismissed. I accordingly dismiss same and affirm the judgments of the lower courts. H
Appeal dismissed.

TABAI JSC

I had a preview of the leading judgment prepared by my learned brother Onu JSC and I am also of the view that the Appellant's conviction for murder was rightly by the trial court was rightly confirmed by the Court below.

The only issue for determination is whether in the circumstances of the case, the Appellant was admitted the killing of the deceased used such reasonable force as to avail him of the constitutional and statutory defence under section 33(2)(b) of the 1999 Constitution of the Federal Republic of Nigeria and section 7(1) and (2) of the Criminal Procedure Law of Delta State Section 33(2)(b) of the Constitution provides:-

"A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary.

(a) for the defence of any person from unlawful violence or for the defence of property;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained."

And sections 7(i) and (2) of the Criminal Procedure Law state:-

"7(1) If any person or police officer acting under a warrant of arrest or otherwise having authority to arrest, has reason to believe that the person to be arrested has entered into or is within any place, the person residing in or being in charge of such place shall, on demand of such person acting as aforesaid or such police officer, allow him free ingress thereto and afford all reasonable facilities to search therein for the person sought to be arrested.

(2) If ingress to such place cannot be obtained under Subsection (1), any such person or police officer may enter such place and search therein for the person to be arrested, and in order to effect an entrance into such place, may break open any outer or inner door or window of any house or place whether that of the person to be arrested or any other person or otherwise effect entry into such house or place, if after notification of his authority and purpose and demand of admittance duly made,

he cannot otherwise obtain admittance.”

The learned trial judge meticulously analyzed the evidence and found that the defences either under section 33(2)(b) of the 1999 Constitution or section 7(1) and (2) of the Criminal Procedure Law do not avail the Appellant. The court referred to the evidence of the Appellant as to the circumstances leading to his shooting of the deceased and disbelieved them for reasons stated therein in the judgment. These findings were upheld by the court below. I do not fancy any exceptional circumstances to warrant interference with these concurrent findings at the two courts below.

In view of the above and for the fuller reasons contained in the leading judgment I also dismiss the appeal.

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