

SUPREME COURT OF NIGERIA
11TH APRIL 2008 SC. 221/2006
CORAM :-A. I. KATSINA-ALU, S. A. AKINTAN,
M. MOHAMMED, W. S. N. ONNOGHEN,
M. C. CHUKWUMA-ENEH , JJSC

FRANK UWAGBOE APPELLANT
V.
THE STATE RESPONDENT

EVIDENCE - Witnesses - Testimony of - Conflicts - Issue of conflicts
- Between testimony of a witness - And his statement to police - Is not
to be raised for the first time on appeal - Without necessary foundation
(H1)

CRIMINAL LAW - Defences - Provocation - Ingredients of - Provoca-
tive act must be seen - To have deprived accused of self control - Force
used in response must be proportionate and instantaneous - Without
time for passion to cool (H2)

CRIMINAL LAW - Self defence - Ingredients of - Act must be in
response to unprovoked assault - Causing imminent fear of danger -
Force used must be reasonable and immediate (H3)

CRIMINAL LAW - Self defence - Issue of - Court has a duty to consider
defence of self defence - Only when the available evidence - Suggests
possibility of the defence - Such was not the case herein (H4)

ACCIDENTS - Definition of - It is the result of an unwilling act - An
event which occurs without the fault of the person - Alleged to have
caused it (H5)

FACTS

The appellant was the accused person at the Benin High Court
on a one count charge of murder punishable under section 319 (1)
of the Criminal Code Law, of Bendel State, 1976, as applicable to
Edo State. The particulars of the offence were that the appellant, on

or about 4th April, 1994, at Erua village, Ehor in the Benin Judicial division, unlawfully killed one Asha Uwagboe by cutting him with a cutlass. The story of the appellant was that the deceased had accused him of stealing the sum of N60.00 which money was reported missing by the appellant's father. Appellant also says that it was the deceased that brought a cutlass into their quarrel and that he was only trying to dispossess the deceased when the deceased sustained the machet cut. Moreover, it is not in dispute that medical attention was not immediately available to the deceased until the next day due to lack of transportation and medical facilities at the village. At this time, it was already too late to save the man from dying.

However, it was the prosecution's case that the appellant had openly threatened to kill the deceased when he heard of the accusation of the deceased against him. It was not until the deceased had retired for the night with his family that the appellant, armed with a machet, broke into the deceased house and inflicted a fatal wound on him. At the end of hearing, trial judge found for the prosecution, convicted the appellant as charged and sentenced him to death by hanging. Appellant's appeal to the Court of Appeal was dismissed, hence, he has brought the instant appeal to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the lower court was right in affirming that the prosecution proved its case beyond reasonable doubt?"

2. Whether the learned Justice of the Court of Appeal adequately considered the defences available to and or raised by the appellant?"

HELD (Unanimously dismissing the appeal per **AKINTAN JSC**)
Witnesses - Testimony of - Conflicts

1. Although each of the three prosecution witnesses made a statement to the Police shortly after the incident, none of them was cross-examined as to the contents of the statement they made to the Police. None of them was confronted with any presumed conflict between what was contained in their statement to the police and their evidence in court. None of their said statements was tendered at the trial and in fact no allusion or reference to such statements was made at the trial. It is therefore totally erroneous to raise the question of alleged conflicts

or conspiracy between the three prosecution witnesses as a result of any perceived conspiracy.

Furthermore, the defence failed to lay the necessary foundation or raise the issue of conflict between the statements made to the Police by the three witnesses and the evidence they gave at the trial. There is therefore no merit in the appeal as it relates to that issue.

(pp. 1664 F/1665 H)

Provocation - Ingredients of

2. The law is settled that defence of provocation is only available to an accused person who did the killing in the heat of passion before there is time to cool down. In law, for the defence of provocation to succeed, it must be shown by the accused person: (1) that the act relied on by the accused is obviously provocative; (2) that the provocative act deprived the accused of self-control; (3) the provocative act came from the deceased; (4) the sudden fight between the accused and the deceased was instantaneous and continuous with no time for passion to cool down; and (5) the force used by the accused in repelling the provocation is not disproportionate in the circumstance.

It follows therefore that the defence was not available to an accused person who although there was a provocative incident which angered the accused person at first but the evidence was that by the time he stabbed his victim later he was acting with calculation and no longer in the heat of passion. Although the accusation of stealing N60 could amount to provocation, the stabbing of the deceased did not follow instantaneously. (p. 1666 B)

Self defence - Ingredients of

3. The defence of self-defence is open only to an accused person who is able to prove that he was a victim of an unprovoked assault causing him reasonable apprehension of death or grievous harm. But he is even entitled to use such force to defend himself as he, believes on reasonable grounds to be necessary to preserve himself from the danger and this he is entitled to do even though such force may cause death or grievous harm. If the act of self-defence is committed after all danger from the assailant is past and by way of re-

venge, the defence will not be available to such an accused person.
(p. 1667 C)

When court will be duty bound to consider self defence

B 4. The position of the law is that where an accused person has not expressly raised issue of self-defence, this issue could only be considered if from the available evidence the defence avails him so that the court will advert to it: See Ehot v. State (1993) 4 NWLR (Pt. 290) 644. In the instant case, although the defence of self-defence was raised by C the appellant; but the evidence before the court did not suggest that the defence was available to him. The appellant was clearly the aggressor. The knife said to be found on the deceased was probably picked up in the room when the appellant had appeared with the cutlass. It was probably meant to be used for self-defence by the D deceased. (p. 1667 E)

ACCIDENTS - Definition of

E 5. An accident is the result of an unwilled act, an event which occurs without the fault of the person alleged to have caused it : See Oghor v State (1990) 3 NWLR (Pt.139) 484 and Thomas v. State (1994) 4 NWLR (Pt.337) 129. A willed deliberate act, therefore, negatives the defence of accident. For the defence of accident to avail the appellant in the instant case, it must be shown that the blow to the deceased by F the appellant occurred independently of the exercise of his will. That was not the situation in the instant case. Consequently, the defence of accident is definitely unavailable to the appellant. (p. 1667 H)

NOTABLE POINTS OF INTEREST

G ***MOHAMMED JSC***

1. *To prove murder, it must be shown that accused intentionally caused death of the deceased*

H The law is indeed well settled that to succeed in a charge of murder as the appellant was charged in the present case, the prosecution must prove:-

“1. *that the deceased died.*

2. *that the death of the deceased resulted from the act of the accused.*

3. *that the act of the accused in causing the death of the deceased was done intentionally with the knowledge that death or grievous bodily harm was its probable consequence.*”

To establish that the accused caused the death of the deceased, the prosecution is required to produce evidence linking the accused with the death of the deceased. This means that there must be evidence of some positive act or negative omission of the accused which caused injury to the deceased and that the death of the deceased was the direct result of the injury inflicted by the accused.
(p. 1669 C)

ONNOGHEN JSC

2. *Minor discrepancies in detail do not destroy the credibility of witness*
On the issue of contradictions in the evidence of the prosecution witnesses particularly P.W.1, P.W.2 and P.W.3 as against their statements to the Police, it is settled law that “*two pieces of evidence contradict one another when they are by themselves inconsistent*” and that... “*a discrepancy may occur when a piece of evidence stops short of or contains a little more than what the other piece of evidence says or contains, some minor differences in detail.... On the other hand, minor discrepancies between a previous written statement and subsequent oral testimony.... do not destroy the credibility of witness*”
(p. 1675 F)

REPRESENTATION

Oladipo Okpeseyi, (with him; Ngozi Onwuka), for the Appellant.
O.S. Uwuigbe, DPP, Edo State, for the Respondent.

CASES REFERRED TO

Oladejo v. The State (1987) 3 NWLR (Pt. 61) 419
Onubogu v. The State (1974) 9 S.C. 1; (1974) 9 S.C.
Queen v. Joshua (1964) 1 All NLR 1 at 3
Nwede v. State (1985) 3 NWLR (Pt. 13) 444
Akalezi v. State (1993) 3 NWLR (Pt.273) 1
Okonji v. State (1987) 1 NWLR (Pt.52) 659
Ekpenyong v. State (1993) 5 NWLR (Pt. 395) 513
Oghor v State (1990) 3 NWLR (Pt.139) 484

Thomas v. State (1994) 4 NWLR (Pt.337) 129

Alonge v. Attorney-General of Western Nigeria (1964) 1 All NLR 115

Laoye v. The State (1985) 2 NNLR (Pt.10) 832

Ogunye v The State (1999) 4 S.C. 30

B The Queen v. Eguabor (1962) 1 All NLR 541

Essien v. The State (1984) 3 S.C 15

Ayo Gabriel v. The State (1989) 12 S.C. 129

C **STATUTE REFERRED TO**

Criminal Code Law, Cap. 48, Vol. 11, Laws of Bendel State of Nigeria 1976, ss. 24, 319 (1)

LEAD JUDGMENT BY AKINTAN JSC

D This is an appeal from the judgment of Benin Division of the Court of Appeal delivered on 25th May, 2006. The appellant was the accused person at the trial court. He was arraigned at Benin High Court on one count charge of murder punishable under Section 319(1) of the Criminal Code, Law of Bendel State, 1976, applicable
E to Edo State. The particulars of the offence are that the said accused, on or about the 4th day of April, 1994, at Erua Village, Ehor in the Benin Judicial Division, unlawfully killed one Asha Uwagboe.

The appellant pleaded not guilty to the charge and the prosecution led evidence in support of its case against the appellant. At
F the end of the trial, the learned trial Judge, Itua, J., held, in his reserved judgment delivered on 5th August, 2004, that the prosecution had proved its case against the appellant. He accordingly found him guilty as charged and sentenced him to death by hanging. His
G appeal to the Court of Appeal was dismissed, hence the present appeal.

The parties filed their respective Briefs of Argument in this court.

The appellant formulated the following two issues as arising for determination in the appellant's Brief: -

H "1. *Whether the lower court was right in affirming that the prosecution proved its case beyond reasonable doubt?*

2. *Whether the learned Justice of the Court of Appeal adequately considered the defences available to and or raised by the*

appellant?”

Two similar issues are formulated in the respondent’s Brief. I therefore need not reproduce them.

The facts of the case are that the appellant unlawfully murdered one Asha Uwagboe at Erua village, Ehor on 4th April, 1994, by using a cutlass to cut the right hand of the deceased. The appellant fled after the incident and was only arrested about three years after at the Auchu Motor Park. The appellant denied that he intentionally used the cutlass to cut the hand of the deceased which eventually caused the man’s death. His case was that the deceased appeared with a matchet and in an attempt to dispossess him of same, the matchet, cut the man’s hand. Medical attention was not immediately available until the next day due to lack of transportation and medical facilities at Erua village, Ehor. It was then too late to be able to save the man from dying.

The appellant made a written statement to the Police under caution after his arrest. It was admitted at the trial as Exhibit 1. He denied therein that he intentionally cut the deceased with the cutlass. He said, inter alia, in the statement that the deceased was his uncle and that they were living in the same house. His account of the incident was given, inter alia, as follows in the said statement:-

“.....On 4/4/94, at about 9 p.m in the night, I heard that Asha now late said I am the person who stole my father’s money. Then my father was looking for N60. I now went to meet Asha whether he saw the money with me. Asha did not say anything. I then swear that if I am the person that took the money let the night be bad with me and if I am not the person let the night be a bad one to you Asha who is telling lies. From there my real father came out and told everybody that he had never seen me in this house since morning. From there Asha’s son called Monday came out and we started fighting. The fighting did not last long then Asha came out with a cutlass, he wanted to use it, from there I drew the cutlass from his hand. I cannot remember which hand the cutlass cut his hand at the palm. It was then I saw him injured. I then decided to go and carry my goods because I had already planned to travel that day.”

Monday Asha is the son of the deceased. He was an eyewitness of the incident and he testified at the trial as PW.1. He told the

trial court, inter alia, as recorded on pages 20 to 21 of the record, that the deceased was his father and that the appellant was his uncle. He then said as follows:-

"On 4/4/94, I was living at Erua village. At about. 11.30 p.m my grandfather, Uwagboe, was crying saying that the accused has stolen his N60. So my grandfather went to my father's door, we were all living in a family house at the time. My father told my grandfather, Pa Uwagboe, to go and wait till tomorrow. When the accused heard that my father mentioned his name, he said he was going to kill my father this night. My father locked his door. The accused took a cutlass and broke the door. Myself, my wife Stella, Patient, my father's wife and my father the deceased, were in the same room and parlour. He broke the door and came inside the room and parlour. My father was begging the accused. The accused cut the deceased with a cutlass. The knife my father held fell. I ran away. All the others in the room ran away. The right hand of my father was cut by the accused.

Only the skin held the hand. The neighbours gathered. They took my father to another house and tied the hand.

I took my father to Ehor Maternity Hospital on a motor-cycle. The inmates of the maternity said they were not going to be able to treat the injury. In the following morning they took my father, the deceased, to Suyi Hospital, 3rd East Circular Road, Benin City.

The doctor said there was shortage of blood. I got the blood but before he could take the blood he died on 6/4/94, at about 4.30 a.m. I then reported the matter to Ehor Police Station. I was given 2 police men who took the corpse to the Central Hospital Benin City."

Two other eye-witnesses who testified at the trial are Stella Asha, the wife of P.W.1. She testified as P.W.2. The other witness is Patience Asha, the wife of the deceased who testified as P.W.3. The two witnesses' evidence was in line with the evidence of P.W.1.

The appellant gave evidence in line with the account of the incident as narrated in his statement to the Police. But he called no other witness.

It is submitted in the appellant's Brief in issue 1 that both the trial court and the Court of Appeal failed to take into consideration the possibility of the three key prosecution witnesses (P.W.1, P.W.2 and P.W.3) conspiring against the appellant particularly for reason

rooted in Bini Customary system of inheritance by which male children are by inheritance the beneficiary of the deceased father's estate. It is said that by eliminating the appellant, P.W.1. would be the only male child left to inherit the family land and properties.

It is also argued that the evidence given at the trial by each of the three witnesses was in conflict with the account of the incident in their respective statements to the Police. It is then submitted that where a witness makes a statement which is inconsistent with his testimony, such testimony should be treated as unreliable while the statement is not regarded as evidence upon which the court can act. The decisions in *Oladejo v. The State* (1987) 3 NWLR (Pt. 61) 419, *Onubogu v. The State* (1974) 9 S.C. 1; (1974) 9 S.C. (Reprint) 1 and *Queen v. Joshua* (1964) 1 All NLR 1 at 3, are cited in support of this submission. It is therefore submitted that the evidence of the 3 witnesses should be discountenanced.

It is submitted in issue 2 that the defences of provocation, accident and self defence opened to the appellant were not properly considered by the two lower courts in arriving at their decisions in the case. The allegation by the deceased that the appellant stole his N60 without justification, an allegation which was announced to the hearing of all is said to be provocation in itself. It is argued that the onus of proving absence of provocation lies on the prosecution. The prosecution is said to have failed to satisfy that requirement in this case.

Similarly, the defence of self defence is said to be clearly made out from the facts available in the case. The same is said in respect of the defence of accident. It is submitted that where on the state of the evidence on record it is found that only one cutlass was introduced or otherwise, the doubt ought to have been resolved in favour of the appellant.

It is submitted in Reply in the respondent's Brief in issue 1, that the court below was right when it held that the charge against the appellant was proved beyond reasonable doubt. It is submitted that the weapon used, a sharp cutlass, clearly showed that the appellant intended to inflict grievous wound on the deceased which eventually resulted in the death of the deceased.

It is also submitted that the fact that the witnesses are related and live in the same household do not make them incompetent to

testify for the prosecution or that their evidence could not be credible.

On the contention of possible conspiracy between P.W.1. P.W.2 and P.W.3 aimed at eliminating the appellant to prevent him from inheriting his father's property, it is said that the submission is totally
B extraneous to the appeal because the point was not canvassed at the trial court and in the Court of Appeal. The submission on behalf of the appellant of that point is therefore said to be based on speculation and not on any evidence on record.

C Similarly, on the contention that there were material contradictions in the evidence of P.W.1. P.W.2 and P.W.3 and their extrajudicial statements made to the Police, it is said that the minor discrepancies are not fundamental as they do not affect the substance of the case.

D In Reply to the submissions made in issue 2 that the court below failed to consider the defences of self-defence, provocation and accident, it is submitted that such allegation is not correct. This is because the defence of accident under Section 24 of the Criminal Code is said not to be available to the appellant. The learned trial
E Judge and the Justices of the court below found as a fact that the accused did not injure the deceased accidentally. The deceased was said to have struck intentionally. The same is said of the defence of provocation and self-defence. They are said to have been duly considered by the court below.

F The facts of the case have been fully set out earlier above.
Although each of the three prosecution witnesses made a statement to the Police shortly after the incident, none of them was cross-examined as to the contents of the statement they made to the Police. None of them was confronted with any presumed conflict between what was contained in their statement to the police and their evidence in court. None of their said statements was tendered at the trial and in fact no allusion or reference to such statements was made at the trial. It is therefore
G ***totally erroneous to raise the question of alleged conflicts or conspiracy between the three prosecution witnesses as a result of any perceived conspiracy.***
H

The point was well dealt with by the court below in its leading

judgment written by Alagoa, JCA. The learned Justice said thus at page 132 of the record:

“The evidence given by the 1st, 2nd and 3rd prosecution witnesses, Monday Asha, Stella Asha and Patience Asha, are undoubtedly similar unequivocal and direct and were not punctured by cross-examination and are to the effect that the appellant had been accused of the theft of a missing N60 (Sixty naira) and having heard the deceased mention his name as the culprit said he was going to kill the deceased that night. He then left and came back with a cutlass and broke open the door of the deceased who on seeing that the appellant was probably bent on carrying out his threat began to beg the appellant who nevertheless cut his (the deceased) right hand so severely that only a little flesh still held the cut hand in place. None of these eye witnesses testified that there was a fight, between the appellant and the deceased or that both had earlier had a quarrel before the incident. The learned trial Judge in my view was right in the assessment of the evidence of these witnesses that it was the appellant who attacked the deceased with a cutlass and that it was the injury sustained that caused the death of the deceased.”

Heavy weather has been made of the fact that the three witnesses are related to the deceased. Interestingly, the same witnesses are also related to the appellant which cancels out the possibility that the witnesses may have been tainted. With respect to the actual intention of the appellant at the time he inflicted cuts on the deceased there can be no doubt as found by the learned trial Judge that the nature of the weapon used - a cutlass which is a sharp object and the severity of the injury caused by the use of the cutlass meant that the appellant either intended to kill the deceased or cause him grievous bodily harm. This is further buttressed by the fact that the witnesses had independently testified that the appellant had said he would kill the deceased on the night of the incident. There is the legal aphorism that the devil himself does not know the intention of man. Intention is inferred from overt acts.”

It is clear from the above passage that it is not correct that the lower court failed to consider the conspiracy issue. **Furthermore, the defence failed to lay the necessary foundation or raise the issue of conflict between the statements made to the Police**

by the three witnesses and the evidence they gave at the trial. There is therefore no merit in the appeal as it relates to that issue.

Again the question whether any of the defence of provocation, accident or self-defence was available to the appellant and whether the court below failed to consider them is also not true.

The law is settled that defence of provocation is only available to an accused person who did the killing in the heat of passion before there is time to cool down. In law, for the defence of provocation to succeed, it must be shown by the accused person: (1) that the act relied on by the accused is obviously provocative; (2) that the provocative act deprived the accused of self-control; (3) the provocative act came from the deceased; (4) the sudden fight between the accused and the deceased was instantaneous and continuous with no time for passion to cool down; and (5) the force used by the accused in repelling the provocation is not disproportionate in the circumstance: See Nwede v. State (1985) 3 NWLR (Pt. 13) 444, Akalezi v. State (1993) 3 NWLR (Pt.273) 1, Okonji v. State (1987) 1 NWLR (Pt.52) 659 and Ekpenyong v. State (1993) 5 NWLR (Pt. 395) 513.

It follows therefore that the defence was not available to an accused person who although there was a provocative incident which angered the accused person at first but the evidence was that by the time he stabbed his victim later he was acting with calculation and no longer in the heat of passion. See Nwango v. The Queen (1963) All NLR 330. The term ‘*provocation*’ is said to include any wrongful act or insult. See Alonge v. Attorney-General of Western Nigeria (1964) 1 All NLR 115. But the established facts in this case were that the appellant heard that he was accused of stealing his father’s N60. He threatened to kill the deceased, his brother. He went to look for a cutlass. The deceased and other members of the household locked themselves up in a room in the house and started to appeal to the appellant not to carry out his threat of killing the deceased. The appellant ignored their plea, broke the door and went in to inflict the deadly wound on the deceased. ***Although the accusation of stealing N60 could amount to***

provocation, the stabbing of the deceased did not follow instantaneously. The appellant was not said to be carrying the cutlass used at the time he heard the allegation. He went for the cutlass after hearing the insulting word. This was followed by forcibly breaking the door leading to where the deceased and other members of the family had locked themselves and then inflicted the deadly wound on the deceased. The evidence definitely showed that the appellant was acting with calculation as at the time he stabbed the deceased and not an act done in the heat of passion. The defence of provocation was therefore not available to him. B

The defence of self-defence is open only to an accused person who is able to prove that he was a victim of an unprovoked assault causing him reasonable apprehension of death or grievous harm. But he is even entitled to use such force to defend himself as he, believes on reasonable grounds to be necessary to preserve himself from the danger and this he is entitled to do even though such force may cause death or grievous harm. If the act of self-defence is committed after all danger from the assailant is past and by way of revenge, the defence will not be available to such an accused person. See R. v. Dummemi (1955) 15 WACA 75. C

Also **the position of the law is that where an accused person has not expressly raised issue of self-defence, this issue could only be considered if from the available evidence the defence avails him so that the court will advert to it: See Ehot v. State (1993) 4 NWLR (Pt. 290) 644. In the instant case, although the defence of self-defence was raised by the appellant; but the evidence before the court did not suggest that the defence was available to him. The appellant was clearly the aggressor. The knife said to be found on the deceased was probably picked up in the room when the appellant had appeared with the cutlass. It was probably meant to be used for self-defence by the deceased.** D

Finally, it is necessary to consider if the defence of accident was available to the appellant, **An accident is the result of an unwilling act, an event which occurs without the fault of the person alleged to have caused it : See Oghor v State (1990) 3 NWLR** E

(Pt.139) 484 and Thomas v. State (1994) 4 NWLR (Pt.337) 129. A willed deliberate act, therefore, negatives the defence of accident. For the defence of accident to avail the appellant in the instant case, it must be shown that the blow to the deceased by the appellant occurred independently of the exercise of his will. That was not the situation in the instant case. Consequently, the defence of accident is definitely unavailable to the appellant.

In conclusion and for the reasons I have given above, there is no merit in the entire appeal. I accordingly dismiss the appeal and affirm the sentence of death passed on the appellant.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Akintan, JSC. I agree entirely with his reasoning and conclusion.

I would also dismiss the appeal and affirm the sentence of death passed on the appellant.

MOHAMMED JSC

On 4/4/94, the appellant alleged that one Asha Uwagboe now deceased accused him of stealing the sum of N60.00. The appellant who was not happy with this accusation threatened to deal with the deceased. When the deceased and members of his family retired in the room for the night, the appellant broke into the room, in the presence of witnesses, attacked the deceased with a cutlass by severely cutting the arm of the deceased resulting in the death of the deceased on 9/4/94. The appellant who fled his home after the incident, was not found and arrested until 3/8/96. On conclusion of the investigation into the case, the appellant was charged and tried for the offence of murder punishable under Section 319(1) of the Criminal Code of the Laws of Bendel State, 1976, applicable in Edo State. The High Court of Justice of Edo State sitting in Benin which tried the appellant, found him guilty as charged, convicted and sentenced him to death accordingly on 5/8/2004. The appellant's appeal to the

Court of Appeal, Benin Division, was heard and dismissed by that court in its judgment given on 25/5/2006. The present appeal by the appellant is against the confirming of his conviction and sentence of death by the Court of Appeal. The two issues raised in the appellant's Brief of Argument which were virtually adopted by the respondent in the respondent's Brief are:-

"1. Whether the lower court was right in affirming that the prosecution proved its case beyond reasonable doubt?"

2. Whether the learned Justices of the Court of Appeal adequately considered the defences available to and or raised by the appellant?"

The law is indeed well settled that to succeed in a charge of murder as the appellant was charged in the present case, the prosecution must prove:-

"1. that the deceased died.

2. that the death of the deceased resulted from the act of the accused.

3. that the act of the accused in causing the death of the deceased was done intentionally with the knowledge that death or grievous bodily harm was its probable consequence."

To establish that the accused caused the death of the deceased, the prosecution is required to produce evidence linking the accused with the death of the deceased. This means that there must be evidence of some positive act or negative omission of the accused which caused injury to the deceased and that the death of the deceased was the direct result of the injury inflicted by the accused. See *Onah v. The State* (1985) 3 NWLR (Pt.12) 236.

In the case now on appeal, the evidence led by the prosecution had clearly established that the appellant who had earlier threatened to deal with the deceased for alleging that the appellant stole N60.00, put his intention into action when armed with a cutlass, broke into the room of the deceased and in the presence of at least three eye witnesses, inflicted fatal injury on the arm of deceased, which resulted in the death of the deceased. There was therefore, overwhelming evidence before the trial court to support the conviction of the appellant of the offence of murder as charged and I am of the view that the court below was right in confirming the conviction and

sentence.

As for the complaints of the appellant on the alleged failure of the court below to consider the defences of provocation and self-defence raised by him in his defence, the story told by the appellant in his statement to the Police and evidence-in-chief at the trial court, cannot support these defences on the face of the evidence adduced by the prosecution witnesses. Although the evidence of PW.1. shows that the deceased was holding a knife at the time the appellant armed with a cutlass broke into the room to attack the deceased, the evidence is quite plain that the deceased did not even attempt to defend himself with the knife before the blow from the cutlass landed on his arm. It is certainly not the law that the possession of a knife by the deceased without any evidence of its use against the appellant, entitled the appellant, who attacked the deceased with a cutlass, to the defence of provocation or self defence. It is the use of the weapon that determines whether or not provocation was offered by the deceased to the appellant or whether the appellant's life was in danger, to warrant any self defence. In otherwords, the appellant was unable to show by evidence that his life was put in any danger by any act of the deceased justifying that the only means of saving the appellant's life, was to have killed the deceased. See *State v. John Umunu* (1968) NWLR 15 and *Nwede v. The State* (1985) 12 S.C. 32. I therefore agree with the courts below that the defences of provocation and self-defence, were not available to the appellant in the circumstance of this case having regard to the evidence on record.

With the foregoing reasons and fuller reasons given in the leading judgment of my learned brother, Akintan, JSC., which I have had the advantage of reading in advance, I am also satisfied that there is no merit whatsoever in this appeal which I also hereby dismiss.

ONNOGHEN JSC

The appellant was charged under Section 319(1) of the Criminal Code Law, Cap. 48, Vol. 11, Laws of Bendel State of Nigeria, 1976, applicable to Edo State, with a one count of murder in that the appellant is alleged to have, on the 4th day of April, 1994, un-

lawfully murdered one Asha Uwagboe at Erua Village, Ehor in the Benin Judicial Division as a result of a dispute arising from a missing N60.00 (Sixty Naira).

It is the case of the prosecution that after the incident the appellant fled the village and was arrested three years later at Auch Motor Park in Benin-City. B

The appellant denied the charge. He denied intentionally using a cutlass to cut the hand of the deceased which caused his death; that the deceased appeared with a cutlass and in attempt to dispossess the deceased of that cutlass the deceased was cut and that medical help could not reach the deceased as none was available in the village and due to transportation difficulties the deceased could not be transported to where medical facilities were available and died as a result. C

The learned trial Judge found the appellant guilty as charged, convicted and sentenced him accordingly resulting in an appeal to the Court of Appeal, Benin-City Division in appeal No.CA/B/101/2005, which appeal was dismissed by that court on the 25th day of May, 2006. The appellant is again not satisfied with that decision and has consequently appealed to this court. D E

The issues for determination, as formulated by learned counsel for the appellant, Dipo Okpeseyi, Esq., in the appellant's Brief of Argument filed on 4/10/06 and adopted in argument of the appeal on the 17th day of January, 2008, are as follows:- F

"i. Whether the lower court was right in affirming that the prosecution proved its case beyond reasonable doubt? (Distilled from grounds 1, 2 and 3 of the Notice of Appeal)

ii. Whether the learned Justices of the Court of Appeal adequately considered the defences available to and or raised by the appellant? (Distilled from ground 4 of the Notice of appeal)." G

In arguing issue 1 learned counsel for the appellant conceded that the prosecution proved that the deceased died and that the death resulted from the act of the accused/appellant. Learned counsel also conceded that the knowledge that death or grievous bodily harm was its probable consequence can be inferred in certain circumstances from the weapon deployed in an attack like cutlass, being a lethal weapon, relying on *Queen v. Eguabor* (1962) 1 All NLR 541, Essien H

v. The State (1984) 3 S.C. 15 at 16. However, learned counsel went on to submit that for knowledge that death or grievous bodily harm to be inferred from the type of weapon deployed or the severity of the attack, the intention of the appellant must be proved by credible evidence; that from the record, it is possible that both the deceased
 B and the appellant were armed at the time of the incident since P.W.1 stated at page 21 that “*the accused cut the deceased with a cutlass. The knife my father held fell*”, that it was the deceased who introduced a lethal weapon into a purely domestic dispute provoked by
 C the deceased when he falsely accused the appellant of stealing the sum of N60.00 (Sixty Naira) and that it is on record that the appellant never intended to kill the deceased; that the court must be cautious in relying on the evidence of witnesses who have their own purposes to serve in giving evidence in that there is the possibility of
 D P.W.1, P.W.2 and P.W.3 conspiring against the appellant as their evidence to the police contradicted their evidence in court and that the conspiracy is rooted in Bini Custom of inheritance which makes children beneficiary of the estate of the deceased and that in the absence of the appellant, P.W.I is the only male child to inherit the family land
 E and properties; that the evidence of P.W.I, P.W.2 and P.W.3 contradicted their statements to the Police thereby rendering same unreliable, relying on the case of Oladejo v. The State (1987) 3 NWLR (Pt.61) 419 at 437, Onubogu v. The State (1974) 9 S.C 1 at 11; (1974) 9 S.C. (Reprint) 1, The Queen v. Joshua (1964) 1 All NLR 1
 F at 3, Omogodo v. The State (1981) 5 S.C. 4 at 14; (1981) 5 S.C. (Reprint).

On issue 2, learned counsel submitted that it is the duty of the court to consider all possible defences available to an accused person
 G on the evidence before the court notwithstanding that such defences were not specifically raised by the accused person or his counsel, relying on the case of Laoye v. The State (1985) 2 NNLR (Pt.10) 832, Ogunye v The State (1999) 4 S.C. 30; (1999) 5 NWLR (Pt.604) 548 at 570-571, that from the evidence on record, the following
 H defences are open to the appellant, viz provocation, accident and self-defence.

On provocation, learned counsel submitted that the allegation by the deceased that appellant stole his N60.00 (Sixty Naira) which

allegation was in public and without justification constituted provocation; that the lower court agreed that there was provocation but held that the appellant was not armed at the time of the accusation but later got himself armed with a cutlass of which time tempers would have cooled, despite the fact that there is evidence that the act happened in the heat of passion, if believed, particularly the evidence that the appellant was armed when he appeared at the scene. B

On self-defence, learned counsel submitted that the onus lies on the prosecution to prove the absence of any defence; that the deceased was the aggressor as testified to by P.W.1 at page 13 of the record, as the deceased held a knife at the material time; which evidence was not explained away by the prosecution; that there was a fight before the introduction of a cutlass as testified to by P.W.4 but whose evidence was labeled hearsay; that the appellant felt threatened when he saw the deceased with a cutlass and took steps to defend himself by dispossessing the deceased. C D

On accident, learned counsel submitted that only one cutlass was involved in the dispute which cutlass was introduced by the deceased and that the appellant's act of dispossessing him of the cutlass led to the deceased's right palm being cut, which was never intentional or premeditated; that the trial court was perverse in holding that the cut was intentional which finding should be set aside by this court. Learned counsel then urged the court to resolve the issues in favour of the appellant, allow the appeal, set aside the conviction and sentence of the appellant. E F

On the respondent's part, it is submitted by learned counsel for the respondent, O. S. Uwuigbe (Mrs.) that the evidence of P.W.1, P.W.2 and P.W.3 prove beyond reasonable doubt that the deceased died and the death was caused by the act of the appellant; that the nature of the weapon used by the appellant and the severity of the injury caused by the use of the said weapon meant that the appellant either intended to kill the deceased or cause him grievous bodily harm; that an accused must be taken to intend the natural and probable consequences of his action, relying on *The Queen v. Eguabor* (1962) 1 All NLR 541, *Essien v. The State* (1984) 3 S.C 15, that there was no evidence of a fight between the appellant and the deceased on the day in question and that the evidence of P.W.I, P.W.2 G H

and P.W.3 establish beyond reasonable doubt that the appellant was the aggressor as there is no evidence that the deceased first attacked the appellant.

Learned counsel further submitted that though the witnesses are related to both the deceased and the appellant and lived together in the same house at the time of incident, that fact does not make the witnesses incompetent to testify for the prosecution neither is the court thereby precluded from acting on their evidence, particularly, where the evidence is credible, relying on *Akalonu v. The State* (2005) 4 LRCNCC 123 at 130, that the submission of learned counsel for the appellant on Bini custom of inheritance is extraneous to the case as the same does not relate to any ground of appeal nor was it raised in the lower courts; that there are no material contradictions in the evidence of P.W.1, P.W.2 and P.W.3 and their statements to the D Police.

On the defences open to the appellant, learned counsel submitted that the lower court considered the defences of self-defence, provocation and accident and found that none was available to the appellant and urged the court to resolve the issues against the appellant and dismiss the appeal and affirm the judgment of the court below.

It is settled law that for there to be a valid conviction of an accused person for the offence of murder under Section 319(1) of the Criminal Code, the prosecution must establish or prove the following ingredients beyond reasonable doubt:-

- (a) That the deceased died;
- (b) That the death of the deceased resulted from the act of the accused person, and;
- (c) That the act of the accused was intentional with knowledge that death was its probable consequence.

See *Nwachukwu v. The State* (2005) 4 LRCNIC 53 at 72, *Ogba v. The State* (1992) 2 NWLR (Pt. 164) at 198, *Bakare v. The State* (1987) 1 NWLR (Pt.52) 579 at 582-592, *Onah v. The State* (1985) 3 NWLR (Pt. 12) 236, *Abogede v. The State* (1996) 5 NWLR (Pt.448) 270 at 277.

The question that follows is whether, in the instant case on appeal, there is evidence on record in proof of the ingredients of the

offence of murder as stated above. It should be noted that the lower courts held that the said ingredients were duly established by available evidence. Are they correct? It must be noted from the onset that learned counsel for the appellant has conceded in the appellant's Brief of Argument that *"the prosecution proved that the deceased died and that the death of the deceased resulted from the act of the accused. We also concede that "knowledge that death or grievous bodily harm was its probable consequences" can be inferred in certain circumstances from the weapon deployed in an attack like cutlass being a lethal weapon"*. Learned counsel however contends that there is no credible evidence on record to prove that the act of the appellant on the date in question was intentional though he admits that *"knowledge that death or grievous bodily harm can be inferred from the type of weapon deployed or the severity of the attack"* as held by the Court of Appeal in the instant case.

It must be noted that from the evidence on record, the attack on the deceased was carried out by the appellant with a cutlass, a lethal weapon and the attack was so severe that it almost cut off the hand of the deceased in the process. The question is whether, with these undisputed facts, it can reasonably be said that the appellant, who deployed such a lethal weapon with such ferocity on the deceased, never intended to kill the deceased by causing him grievous bodily harm. I hold the considered view that the act of the appellant in the facts and circumstance of this case clearly demonstrated his intention to commit the offence of murder and that the lower courts were right in so holding.

On the issue of contradictions in the evidence of the prosecution witnesses particularly P.W.1, P.W.2 and P.W.3 as against their statements to the Police, it is settled law that *"two pieces of evidence contradict one another when they are by themselves inconsistent" and that... "a discrepancy may occur when a piece of evidence stops short of or contains a little more than what the other piece of evidence says or contains, some minor differences in detail.... On the other hand, minor discrepancies between a previous written statement and subsequent oral testimony.... do not destroy the credibility of witness"* See Ayo Gabriel v. The State (1989) 12 S.C. 129; (1989) 5 NWLR 457 at 468 and 469. It must be noted that learned counsel for the

appellant had conceded the existence of certain vital ingredients of the offence of murder but only contends the issue as to whether the act of the appellant which admittedly caused the death of the deceased was intentional. It follows therefore that for whatever contradiction that may exist between the evidence of the said witnesses and their statements to the Police to be relevant so as to render same unreliable by the court, the contradictions must be material only to the ingredient of intention to cause the deceased a grievous bodily harm or death otherwise, in my view, the alleged contradiction is immaterial and therefore irrelevant. In the instant case, there is no contradiction as to the type of weapon used in the attack and the severity of the nature of the injury inflicted by the appellant on the deceased, on the day of the incident. It is also not disputed that the said vicious attack culminated in the death of the deceased. I therefore have no hesitation in coming to the conclusion that even if there exists minor contradictions or discrepancies in the evidence of the said prosecution witnesses, which I do not concede, they are not relevant or material to the issue of intention of the appellant to cause the death of the deceased or cause him grievous bodily harm as borne out of the evidence on record.

I must observe that courts are enjoined not to speculate on any possibilities not supported by evidence before it. It is in the light of the above principle of law that I hold the view that the submission of learned counsel for the appellant on the Bini custom of inheritance as influencing the evidence of P.W.1, P.W.2 and P.W.3 which submission is not supported by any evidence on record, is very speculative in the extreme and therefore dangerous. I need say nothing more on that.

On the defences open to the appellant, I have to point out from the on set that there is no evidence on record to support the contention of learned counsel for the appellant that there was a fight between the deceased and the appellant on the date of incident; if there was evidence of such a fight, it would have been reasonable to determine whether the appellant inflicted the grievous harm on the deceased in self-defence as contended. Contrary to the submission of learned counsel, there is evidence accepted by the lower courts that the appellant was the aggressor from the start to the end. Even

the severity of the injury inflicted on the deceased confirm the aggression of the appellant, it was, to say the least very savage. That apart, there is no evidence that the deceased ever attacked the appellant making it imperative for the appellant to defend himself, with such ferocity.

It is settled law that for the defence of self-defence to avail the appellant, he must establish the following:-

i. That the nature of the attack by the deceased was such as to cause a reasonable apprehension of death or grievous harm to the accused, and;

ii. That the accused in fact apprehended death or grievous harm - See Ekpenyong v. The State 1991) 7 NWLR (Pt.200) 683 at 707.

In view of the above, I agree with the lower court that *"the learned trial Judge was absolutely right in his evaluation of the defences put forward by the appellant and come to a proper finding of fact...."*

On provocation, the law is that three ingredients must be established, to wit:

(a) The act of provocation

(b) The loss of self control, both actual and reasonable, and;

(c) The retaliation being proportionate to the provocation- See Oladiran v. The State (1986) NWLR (Pt. 14) 75.

From the available evidence it is very clear that all the three elements do not co-exist in this case. It is very clear that what was considered by the appellant as constituting the provocation was the allegation of theft against the appellant by the deceased but the appellant did not act immediately the alleged provocation was made- he did so later after passion would have cooled. The appellant's retaliation was equally very disproportionate to the provocation- he reacted by using a lethal weapon on the deceased and inflicting a grievous harm on him when the alleged provocation was oral accusation of theft.

The most incongruous defence raised by the appellant in the circumstance of this case is the defence of accident. There is no evidence at all on record to suggest that the grievous harm inflicted on the deceased by the appellant was by accident. For a cutlass used in

the attack to almost cut off the hand of the deceased when there is no evidence of a fight or struggle between the deceased and the appellant cannot be said, by any stretch of imagination to be anything but intentional and vicious. An accident is an unpleasant event that happens unexpectedly and not planned in advance, it negatives
B intention to cause what happened. In the instant case, the evidence does not suggest the existence of an accident.

In conclusion, I agree with the reasoning of my learned brother, Akintan. JSC., that the appeal is without merit and should be dismissed. I accordingly dismiss same.
C

CHUKWUMA-ENEH JSC

I have had the privilege of reading in advance the judgment of
D my learned brother, Akintan, JSC., and I agree with his reasoning and conclusion that the appeal has no merit.

In this case the trial court fully considered the critical issue of provocation in defence of the accused and rightly rejected the plea.

On the facts of this case, I must emphasis that the use of a
E matchet by the accused a lethal weapon to nearly sever off the palm of the deceased from which he bled to death has no reasonable relationship to the alleged provocation in this case. The defences of accident and self-defence also raised by the accused here cannot be made
F to stand as they are founded on speculation.

I would therefore dismiss the appeal and I so dismiss it as it lacks merit.

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