

SUPREME COURT OF NIGERIA
3RD JULY, 2009. SC. 323/2006
CORAM:- M. MOHAMMED, F. F. TABAI, P. O. ADEREMI,
J. A. FABIYI, O. O. ADEKEYE, JJSC

GAMBO MUSA APPELLANT
V.
THE STATE RESPONDENT

EVIDENCE - Culpable homicide - Punishable with death - Ingredients
- It must be proved that a person's death - Was caused by accused -
With prior intention of causing death (H1)

EVIDENCE - Evaluation - Role of trial court - Evaluation is preemi-
nently the business of trial court - Appeal court will not lightly interfere
with same - Unless for compelling reason (H2)

CRIMINAL PROCEDURE - Prosecution evidence - Minor contradic-
tions - Effect - Where it did not affect credibility of witnesses - It cannot
vitiate the case of the prosecution (H3)

CRIMINAL LAW - Defences - Provocation - Availability - There is no
evidence that deceased uttered any word - To provoke appellant to
a state of rage - Before he stabbed the deceased to death (H4)

CRIMINAL LAW - Defences - Self defence - Availability - To avail
accused person - He must not have been the aggressor in the first
instance - Unlike appellant herein who was the aggressor (H5)

CRIMINAL LAW - Defences - Sudden fight - Applicability - Penal
Code, s. 222 (4) - For the provision to apply there must be sudden
fight - In the heat of passion - Which was not the case herein (H6)

CRIMINAL PROCEDURE - Proof beyond reasonable doubt - Pur-
port - Once all essential ingredients of an offence - Have been
satisfactorily proved - The charge is proved beyond reasonable doubt
(H7)

FACTS

The appellant was arraigned and tried for the offence of culpable homicide punishable with death. The case of the prosecution was that appellant caused the death of one Umaru Alhaji Idrisa by stabbing him on the chest with a knife. Appellant variously relied on the defences of provocation, self defence and sudden fight in the heat of passion. But it was in evidence, as testified by two eyewitnesses that appellant had attacked the deceased unprovoked. Appellant was not only the aggressor but was so from the first instance.

After trial, the learned trial judge found appellant guilty as charged and sentenced him to death by hanging. Aggrieved, appellant appealed to Court of Appeal, which appeal was dismissed. Still dissatisfied, appellant has come on a further and final appeal to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the defence of self-defence was not made out by the appellant.

2. Whether the contradictions in the evidence of PW1 and PW2 were not so material as to render it unreliable to support conviction.

3. Whether the defence of provocation was not made out by the appellant."

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

Culpable homicide - Punishable with death - Ingredients

1. It is now well settled that the ingredients for the offence of culpable homicide punishable with death which must be proved beyond reasonable doubt by the prosecution as variously pronounced by this court are:

1. That the death of a human being has actually taken place.
 2. That such death was caused by the accused.
 3. That the act was done with the intention of causing death.
 4. That the accused knew or had reason to know that death would be the probable and not only the likely consequence of his act.
- (p. 1936 D)

EVIDENCE - Evaluation - Role of trial court

2. Certainly, ascription of probative value to the evidence of witnesses is pre-eminently the business of the trial court which saw and heard the

witnesses. An appeal court will not lightly interfere with same unless for compelling reason.

The learned trial judge watched PW1 and PW2 when they testified. They were found to be truthful witnesses on the material fact that it was the appellant who stabbed the deceased with a knife on the chest on the fateful day. The appellant admitted that much. I do not for one moment see how one can fault the learned trial judge when it was found that it was the act of stabbing done by the appellant that caused the deceased's death as confirmed by DW5 the medical officer who gave his expert opinion. (p. 1938 G)

Prosecution evidence - Minor contradictions - Effect

3. It is necessary at this juncture to point out that contradiction in the evidence of the prosecution that will be fatal must be substantial. It is not every miniature contradiction that can vitiate the case of the prosecution. Minor contradiction which did not affect the credibility of witnesses will be of no avail to the appellant. Contradiction, to be worthy of note, must relate to the substance and indeed the vital ingredients of the offence charged. Trivial contradiction should not vitiate a trial. (p. 1939 B)

CRIMINAL LAW - Defences - Provocation - Availability

4. The utterance or action of the deceased to the accused must be such that would cause a reasonable person and actually caused the accused a sudden and temporary loss of self-control, so much so that for the moment he is not a master of his mind. The act of killing must have been done in the heat of passion and before there was time for temper to cool and it must be proportionate to the provocation.

The learned trial judge considered the evidence of PW1 and PW2 and found that none of them said the deceased uttered any word to provoke the appellant to a state of rage before he stabbed the deceased with a knife on the chest as a result of which he died. (p. 1941 F)

CRIMINAL LAW - Defences - Self defence - Availability

5. For the defence to avail an accused person, he must not be the aggressor in the first instance. He must have acted in good faith without premeditation and intention of doing more harm than necessary and

the act of the deceased must be sufficient to excite in the accused a reasonable apprehension of imminent danger of death or grievous harm to justify using appropriate defence.

From the evidence of PW1 and PW2 which the trial court believed, it was the appellant who caused the incident. He was the aggressor. The court below was of the same view. (p. 1943 C)

CRIMINAL LAW - Defences - Sudden fight - Applicability

6. I still desire to consider the provision of Section 222 (4) of the Penal Code so as not to leave any stone unturned in the determination of issues raised in this appeal. It provides as follows:-

“Culpable homicide is not punishable with death if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender’s having taken undue advantage or acted in a cruel or unusual manner.”

For the provision to come into play, there must be a sudden fight in the heat of passion. There must be absence of premeditation. And the accused must not take undue advantage or act in a cruel or unusual manner. The three requirements must co-exist in my opinion. (p. 1943 G)

Proof beyond reasonable doubt - Purport

7. Uwais, CJN in Nasiru v. The State (1999) NWLR (Pt. 589) 87 at 98 pronounced with force that *‘it is not proof beyond all iota of doubt.’* Let me observe that where all essential ingredients of the offence charged have been satisfactorily proved by the prosecution, as in the matter culminating in this appeal, the charge is proved beyond reasonable doubt. (p. 1944 G)

NOTABLE POINTS OF INTEREST
ADEREMI JSC

1. Reasons must be given for rejection of evidence

The principle is now well settled in our criminal jurisprudence that where prosecution witnesses have given conflicting versions of material facts in issue, the trial judge before whom such evidence was led must make specific findings on the point, and in so doing, must give reasons for rejecting one version and accepting the other. (p. 1947 G)

ADEKEYE JSC*2. Material contradictions are fatal to prosecution case*

Where there are contradictions in the testimonies of the prosecution witnesses on a material fact and the contradictions are not explained by the prosecution through any of the witnesses, the trial court must not be left to speculate or proffer explanation for such contradictions, so that it will only find itself in a position where it will pick and choose from the evidence of the prosecution which it will believe. Contradictions in the testimony of witness are inevitable but what the law frowns at is material contradictions as they are fatal to the case of the prosecution. (p. 1952 D) B
C

3. Provocative words must be shown to be such

Words can constitute provocation but such words must themselves be provocative in nature as to incite a reasonable man of the accused standing in life and education to lose his self control. In the instant case the exact insulting words were not heard by PW1 and PW2, and the Appellant himself did not disclose them, moreover he did not write them in his statement to the police. It was not possible to decide whether the words were provocative enough so as to deprive him of the power of self control. (p. 1955 A) D
E

REPRESENTATION

G. S. Pwul (with him P. H. Kyelek) for the Appellant
J. S. Okutepe (with him D. O. Onunagbo; I. Agwu; F. A. Sambo and M. A. Tsua) for the Respondent. F

CASES REFERRED TO

Aibangbee (1988) 3 NWLR (Pt. 84) 548 G
 Audu v State (2003) 7 NWLR pt 820 pg 516
 Ogba v State (1992) 2 NWLR pt 222 pg 104
 Baridam v. State (1994 1 NWLR pt 320 pg 250
 Ifejirika v. The State (1999) 3 NWLR (Pt. 593) 39
 Iseikwe v. The State (1991) 9 NWLR (Pt. 617) 46 H
 Akpan v. The State (1994) 9 NWLR (Pt. 368) 34
 Archibong v State (2004) 1 NWLR pt 855 pg 488
 Opayemi v. The State (1985) 2 NWLR (Pt. 5) 101
 Ogbechi v. Onochie (1998) 1 NWLR (Pt. 470) 370

Ezemba v. Ibeneme (2000) 10 NWLR (Pt. 674) 61
Shande v. The State (2005) 12 NWLR (Pt. 939) 301
Dibie v. The State (2007) All FWLR (Pt. 363) 83 at 102
Alabi v. The State (1993) 7 NWLR (Pt. 307) 511 at page 5234
Usman Kaza v. The State (2008) 7 NWLR (Pt 1085) 125 at page 163

B

STATUTE REFERRED TO

Penal Code, ss. 38, 221 & 222

LEAD JUDGMENT BY FABIYI JSC

C

This is an appeal against the judgment of the Court of Appeal, Jos Division delivered on 6th July, 2006 in which the appellant's appeal against his conviction and sentence to death by hanging by the trial High Court of Justice of Borno State holden at Maiduguri on 24th February, 1994 was affirmed.

D

At the trial court, the appellant was arraigned for the offence of culpable homicide punishable with death contrary section 221 (b) of the Penal Code. The charge reads as follows:-

E

"That you Gambo Musa on or about 25th of July, 1988 at Gwange 11 primary school in Gwange ward in Maiduguri Metropolitan Area did commit culpable homicide punishable with death in that you caused the death of Umaru Alhaji Idrisa by doing an act to wit: you brought out a knife and stabbed Umaru Idrisa on the chest when you know or had reason to know that death was the probable and not only likely consequence of your act and thereby committed an offence punishable under section 221 (b) of the Code."

F

G

As manifest on page 1 of the transcript record of appeal, the charge was read out to the appellant on 7th March, 1990. He pleaded not guilty to the charge before Ogunbiyi, J. (as she then was). Thereafter, the prosecution called five witnesses and tendered four exhibits to buttress their case. The appellant testified in a bid to extricate himself. In the reserved judgment handed out by the learned trial judge on 24th February, 1994, the appellant was found guilty as charged. He was consequently convicted and sentenced to death by hanging as dictated by law.

H

The appellant felt unhappy with the stance of the learned trial judge. He appealed to the Court of Appeal (the court below) for short. Thereat, the appeal was carefully considered and in the judgment

delivered on 6th July, 2006, the appeal was found to be devoid of merit. The court below dismissed the appeal of the appellant and affirmed his conviction and sentence to death by hanging as pronounced by the trial court.

The appellant, being aggrieved by the decision of the court below has, *ex debito justitiae*, appealed to this court. His Notice of Appeal, filed on 4th October, 2006, was accompanied by four grounds of appeal. B

On 7th May, 2009 when the appeal was heard, learned counsel for the appellant adopted the brief of argument filed on 19th January, 2007 and urged that the appeal be allowed. On page 2 of the appellant's brief of argument three issues distilled from his four grounds of appeal, as it should be, read as follows:- C

"1. Whether the defence of self-defence was not made out by the appellant." D

2. Whether the contradictions in the evidence of PW1 and PW2 were not so material as to render it unreliable to support conviction."

3. Whether the defence of provocation was not made out by the appellant."

In the same fashion, on the stated date when the appeal was taken, learned counsel for the respondent adopted the respondent's brief of argument filed on 28th of January, 2009 and urged that the appeal be dismissed. In a concise manner, two issues were decoded for a due determination of the appeal on page 3 of the respondent's brief. F They read as follows:-

"(1) Whether there were material contradictions in the evidence of PW1 and PW2 capable of rendering their evidence unreliable and incapable of supporting the conviction of the appellant."

(2) Whether the defences of provocation and self defence were available to the appellant in the circumstances of this case." G

I wish to state briefly the facts that are germane to the resolution of this appeal. The case narrated by PW1 and PW2 was that both of them were resting with the deceased Umaru Alhaji Idrisa in a class room at Gwange 11 Primary School, Maiduguri after distributing H sallah meat. It was on a sallah day. When the appellant entered the class room, he asked who they were. The appellant then brought out a knife and stabbed Umaru Idrisa on the chest as a result of which Umaru Alhaji Idrisa died. PW3 and PW4 are police investigators who

tendered appellant's cautioned statements at the trial court. PW5 was the medical officer who carried out post mortem examination on the body of Umaru Aljahi Idrisa. He gave the cause of death in Exhibit D. He found stab wound of about 5 inches deep and puncturing the heart inflicted with a sharp object on the chest of the deceased, Umaru Alhaji Idrisa. Probable cause of death was due to loss of blood, as a result of the stab injury.

The appellant's case was that he was provoked and that he acted in self-defence as well. He maintained that it was the deceased who first attacked him with a knife. It was in retaliation that he seized the knife and stabbed the deceased with it.

For the offence of culpable homicide punishable with death, the applicable law is section 221 (a) of the Penal Code. For ease of reference, it is reproduced as follows:-

"221 Except in circumstances mentioned in section 222 of this Penal Code, culpable homicide shall be punished with death- (a) If the act by which the death is caused is done with the intention of causing death."

It is now well settled that the ingredients for the offence of culpable homicide punishable with death which must be proved beyond reasonable doubt by the prosecution as variously pronounced by this court are:

1. That the death of a human being has actually taken place.

2. That such death was caused by the accused.

3. That the act was done with the intention of causing death.

4. That the accused knew or had reason to know that death would be the probable and not only the likely consequence of his act.

For the above stated requisite ingredients, see in particular Usman Kaza v. The State (2008) 7 NWLR (Pt 1085) 125 at page 163 and also George v. The State (1993) 6 NWLR (Pt 297) 41; (1993) 6 SCNJ 249. The bottom line is that if it is found that 'the man died' the death of the deceased must be directly traceable to the act of the accused person.

The 2nd issue couched by the appellant is similar in tune and purport to the 1st issue distilled by the respondent. It is whether there

were material contradictions in the evidence of PW1 and PW2 capable of rendering their evidence unreliable and incapable of supporting the conviction of the appellant. It is apt to treat this salient issue at this point in time.

On behalf of the appellant, it was submitted that the evidence of PW2 is self-contradictory and ought not to have been relied upon to convict the appellant. It was contended that the evidence of PW2 cannot be held to be the evidence of a credible witness but a fabrication and distortion of what actually happened on 25th July, 1988. Learned counsel felt that the evidence of such a witness should be rejected. He cited the cases of *Dogo v. The State* (2001) 3 NWLR (Pt. 699) 192 and *Ezemba v. Ibeneme* (2000) 10 NWLR (Pt. 674) 61. B
C

Further, the appellant's counsel observed that contradictions in the evidence of PW1 and PW2 are manifest. He cited *Iseikwe v. The State* (1991) 9 NWLR (Pt. 617) 46, *Onah v. The State* (1985) 3 NWLR (126) 236; *Onafowokan v. The State* (1987) 3 NWLR (Pt. 61) 538, *Opayemi v. The State* (1985) 2 NWLR (Pt. 5) 101, *Onubogu & Anr. V. The State* (1974) NSCC 358. D

Learned counsel asserted that based the contradictory evidence of PW1 and PW2, this issue should be resolved in favour of the appellant. E

The learned counsel for the respondent submitted that there are no material contradictions in the evidence of PW 1 and PW2. He observed that there is no dispute that the deceased died as a result of the act of the appellant as found by the trial court and affirmed by the court below. F

Learned counsel observed that there is ample evidence on the record that it was the appellant who stabbed the deceased and that the appellant admitted same. He felt that the contradictions pinpointed are not material and that for contradictions to be material, they must go to the root of the charge before the court. Contradiction must touch an important element of what the prosecution needs to prove. He cited *Dibie v. The State* (2007) All FWLR (Pt. 363) 83 at 102; 110; *Ahmed v. The State* (2002) All FWLR (Pt. 90) 1358 at 1385. G
H

Learned counsel felt that what the appellant's counsel pointed out as contradictions are not contradictions but discrepancies which are not unexpected in trials of this nature. He observed that once the

finding of fact is supported by evidence, an appellate court will not interfere with such finding unless it is shown to be perverse by the appellant. He referred to Saidu v. The State (1984) 4 S.C. 41; The State v. Aibangbee (1988) 3 NWLR (Pt. 84) 548; Nwosu v. The State (1986) 4 NWLR (Pt. 35) 348.

B Learned counsel for the respondent felt that both the trial court and the court below made concurrent finding of fact that PW1 and PW2 were credible eye witnesses and that unless special circumstances are shown, this court will not disturb such findings of fact. He referred to the cases of Gbadamosi v. Governor of Oyo State (2006) All FWLR (Pt. 326) 224 at 233 -234; Baker Marine (Nig.) Ltd v. Chevron (Nig.) Ltd (2006) All FWLR (Pt. 326) 235 at 248; Dibie v. The State (supra).
C Learned counsel urged that the issue be resolved against the appellant.

The learned trial judge on page 36 of the transcript record of D appeal at lines 25 - 31 observed the credibility of PW1 and PW2 and stated as follows:-

"In my view and from all indications and having regards to the manner of demeanour of the prosecution witnesses 1 and 2 who were eye witnesses to that which happened, I have no doubt whatsoever in my mind that they were credible witnesses of truth and who knew exactly what they were saying as that which happened and which they saw on the day of incident. For example the said witnesses were not shaken even under cross-examination but stood firm in their evidence."

F It has been the stance of this court that an appellate court should not ordinarily substitute its own views of fact for those of the trial court. See Ebba v. Ogodo (1984) 1 SCNLR 372; Balogun v. Agboola (1974) 1 All NLR (Pt. 2) 66. An appellate court will not ordinarily
G interfere with findings of fact by a trial court except where wrongly applied to the circumstance of the case or conclusion reached was wrong or perverse: Nwosu v. Broad of Customs & Excise (1988) 5 NWLR (Pt 93) 225; Nneji v. Chukwu (1996) 10 NWLR (Pt.378) 265.
Certainly, ascription of probative value to the evidence of witnesses is pre-eminently the business of the trial court which saw and heard the witnesses. An appeal court will not lightly interfere with same unless for compelling reason See Ogbechi
H v. Onochie (1998) 1 NWLR (Pt. 470) 370.

The learned trial judge watched PW1 and PW2 when they

testified. They were found to be truthful witnesses on the material fact that it was the appellant who stabbed the deceased with a knife on the chest on the fateful day. The appellant admitted that much. I do not for one moment see how one can fault the learned trial judge when it was found that it was the act of stabbing done by the appellant that caused the deceased's death as confirmed by DW5 the medical officer who gave his expert opinion.

It is necessary at this juncture to point out that contradiction in the evidence of the prosecution that will be fatal must be substantial. It is not every miniature contradiction that can vitiate the case of the prosecution. Minor contradiction which did not affect the credibility of witnesses will be of no avail to the appellant. Contradiction, to be worthy of note, must relate to the substance and indeed the vital ingredients of the offence charged. Trivial contradiction should not vitiate a trial. See Ankwa v. The State (1969) All NLR 133, Queen v. Iyande (1960) SCNLR 595; Omisade v. Queen v. Queen (1964) I All NLR 233 and Sele v. The State (1993) 1 NWLR (Pt 269) 276; (1993) 1 SCNJ 15 at 22-23.

With regard to contradictions harped upon by the learned counsel for the appellant, the court below per R.D Muhammad, JCA had this to say at page 91 of the record of appeal:-

"In the instant case it is my considered opinion that there are no material contradictions in the testimonies of PW1 and PW2 when their evidence is taken as a whole without any legal technicalities. The question as to whether the appellant has left the scene of crime after or before PW1 left to report to the deceased's mother is not material to the issue at stake. What is at stake is who stabbed the deceased to death."

PW1 and PW2 testified as eye witnesses that the appellant was the one who stabbed the deceased with a knife on the chest on the fateful day. I have earlier pointed it out that the learned trial judge who watched their demeanour believed them. The appellant himself confirmed same and put up the defences of provocation, self-defence and act done in a sudden fight which shall all be considered later on in this judgment.

The court below affirmed the finding of fact made by the

learned trial judge. The finding of fact is supported by credible evidence on record and same is not perverse or wrongly applied. I shall not interfere with same. See the State v. Aibangbee (1998) 3 NWLR (Pt. 84) 548, Saidu v. The State (1982) 4 SC 41.

The above is still not the end of the matter on this point. The finding of fact in respect of the eye witness account of PW1 and PW2 as to who stabbed the deceased to death made by the trial court and the court below is a concurrent finding of fact. Again, this court will not interfere unless compelling reasons are shown which justify interference by the appellant. I dare say that no tenable reason has been shown to warrant interference by this court. I decline to interfere. See *Seven-up Bottling Co. Ltd v. Adewale* (2004) 4 NWLR (Pt. 862) 183 and *Fajemirokun v. C.B. Nig. Ltd* (2009) 5 NWLR (Pt. 135) 588 at page 599, *Dibie v. The State* (supra).

The contention of the appellant on this issue, to say the least, is of no moment. In short, I resolve the issue against the appellant without any hesitation.

The next issue for consideration is appellant's issue 3. It is whether the defence of provocation was not made out by the appellant. The learned counsel for the appellant maintained that the appellant raised the defence of provocation in his evidence at the trial and in his statements to the police. He felt that the deceased's conduct of abusing and stabbing the appellant was provocative in that it caused the appellant to temporarily lose control of his temper and action. He cited the cases of *Uwaekwechinya v. The State* (2005) 9 NWLR (pt. 930) 227; *Shande v. The State* (2005) 12 NWLR (Pt. 939) 301. He submitted that the sentence of death passed on the appellant ought to be set aside.

On his own part, learned counsel for the respondent submitted that the defence of provocation is not available to the appellant. He observed that the evidence on record shows that the appellant was never provoked by the deceased. He asserted that vide section 222 (1) of the Penal Code, there must be grave and sudden provocation offered which deprived the appellant the power of self control and that the appellant must not have sought the provocation. He referred to section 38 of the Penal Code. He observed that the nature of the insult alleged by the appellant was not stated by him. He asserted that the trial court considered the evidence of PW1 and PW2 and believed

them when they said there was no provocative word uttered by the deceased. He urged the court to hold that the defence of provocation was not available to the appellant.

In Black's Law Dictionary, Sixth Edition at page 1225, provocation is defined as the act of inciting another to do a particular deed, that which arouses, moves, call forth, causes or occasions. Such conduct or actions on the part of one person towards another as to tend to arouse rage, resentment, or fury in the later against the former and thereby cause him to do some illegal act against or in relation to the person offering the provocation. It further goes on to say that 'provocation which will reduce killing to manslaughter must be of such character as will, in the mind of an average reasonable man, stir resentment likely to cause violence, obscure reason, and lead to action from passion rather than judgment. There must be a state of passion without time to cool placing defendant beyond control of his reason. Provocation carries with it the idea of some physical aggression or some assault which suddenly arouses heat and passion in the person assaulted.'

The defence of provocation is traceable to section 222 (1) of the Panel Code which provides as follows:-

"Culpable homicide is not punishable with death if the offender whilst deprived of power of self control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident."

The utterance or action of the deceased to the accused must be such that would cause a reasonable person and actually caused the accused a sudden and temporary loss of self-control, so much so that for the moment he is not a master of his mind. See R. V. Duffy (1949) 1 All E.R. 8932; Mancini v. D.P.P. (1942) A.C. 19. ***The act of killing must have been done in the heat of passion and before there was time for temper to cool and it must be proportionate to the provocation.*** See R. V. Blake (1942) WACA 118.

The learned trial judge considered the evidence of PW1 and PW2 and found that none of them said the deceased uttered any word to provoke the appellant to a state of rage before he stabbed the deceased with a knife on the chest as a result of which he died. She did not believe the appellant's story that the

deceased insulted him. In any event, the learned trial judge found that there was no mention by the appellant of the actual insulting words uttered by the deceased.

The court below agreed with the learned trial judge's findings above and stated as follows:-

B *"As borne out by the records, the appellant, clearly, was not a victim of provocation which was grave and sudden as to deprive him of the power of self-control. The learned trial judge has carefully reviewed the evidence of PW1 and PW2 vis-a-vis the defence put forward by the appellant. There is nothing perverse in the finding*
 C *amply supported by the totality of the evidence adduced before the trial court. This court cannot interfere with the finding. I therefore hold that the defence of provocation is not available to the appellant."*

I am at one with the concurrent findings by the two courts below
 D as depicted above. It is flawless. I cannot see how I can interfere with same under any guise. I should add that it was the appellant who sought for provocation if in fact there was any thing that got him irritated. The appellant did not say that any one made him an armed sentry of the school. Vide section 38 of the Penal Code, provocation
 E as defence was not available to the appellant in the prevailing circumstances of the matter. This is the home truth and the appellant must be so told.

In short, the defence of provocation, looked at from all angles,
 F does not avail the appellant. The issue is hereby resolved against him.

The next issue relates to the appellant's stance touching on self-defence. The learned counsel for the appellant felt that this defence is available to the appellant who raised it in his statements to the police and in his *viva voce* evidence at the trial court. He referred to section
 G 222 (2) of the Penal Code and cited the cases of Ifejiroka v. The State (1999) 3 NWLR (Pt. 593) 59, Mohamed v. The State (1997) 9 NWLR (Pt. 520) 169; Ahmed v. The State (1999) 7 NWLR (Pt. 612) 641; Apogo v. The State (2006) 16 NWLR (Pt. 1002) 227.

On behalf of the respondent, learned counsel observed that the
 H appellant did not act in good faith in the purported exercise of self-defence as the force used was out of proportion. He felt that the stabbing of the appellant was uncalled for and there was no evidence that at the time the appellant stabbed the deceased, he was under a reasonable apprehension of danger of his life as found by the trial

court and confirmed by the court below. He urged that the issue be resolved against the appellant.

The plea of self defence is as provided in Section 222 (2) of the Penal Code. It goes thus:-

“Culpable homicide is not punishable with death if the offender, in the exercise in good faith of the right of private defence of a person or property, exceeds the powers given to him by law and causes that death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for purpose of such defence.”

For the defence to avail an accused person, he must not be the aggressor in the first instance. He must have acted in good faith without premeditation and intention of doing more harm than necessary and the act of the deceased must be sufficient to excite in the accused a reasonable apprehension of imminent danger of death or grievous harm to justify using appropriate defence See Akpan v. The State (1994) 9 NWLR (Pt 368) 347.

From the evidence of PW1 and PW2 which the trial court believed, it was the appellant who caused the incident. He was the aggressor. The court below was of the same view. The appellant was the person on the offensive who used a sharp knife to stab the deceased on the chest. He did not act in good faith. He was the assailant; not the assailed.

The two courts below held that the defence of self-defence is not available to the appellant. From the cold facts in the evidence on record, I cannot see my way clear in finding otherwise. This issue is resolved against the appellant; as well.

I still desire to consider the provision of Section 222(4) of the Penal Code so as not to leave any stone unturned in the determination of issues raised in this appeal. It provides as follows:-

“Culpable homicide is not punishable with death if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender’s having taken undue advantage or acted in a cruel or unusual manner.”

For the provision to come into play, there must be a

sudden fight in the heat of passion. There must be absence of premeditation. And the accused must not take undue advantage or act in a cruel or unusual manner. The three requirements must co-exist in my opinion. PW1 and PW2 did not say

B there was a sudden fight. Appellant's action of stabbing the deceased was premeditated. The appellant took undue advantage and acted in a cruel and unusual manner. The learned trial judge held 'the view that the accused person, from all indications must have made up his story of a sudden quarrel.' The court below said it could not fault the stance
C taken by the trial court. I also say that I am at one with the position taken by the two courts below.

The defences of provocation and self-defence were not rooted on firm ground. On behalf of the appellant, learned counsel, as is always the case in criminal trials, asserted that the prosecution did not
D prove its case against the appellant beyond reasonable doubt. This is akin to flying of a kite. The origin of the principle of law is traceable to the pronouncement of Lord Sankey, L.C in Woolmington v. D.P.P (1935) A.C 462 at 481. He described it as the 'golden thread' in English Criminal Law that it is the duty of the prosecution in any
E criminal trial to prove its case beyond reasonable doubt. In Miller v. Minister of Pensions (1947) 2 All E.R 372, Denning, J. (as he then was) maintained that 'it is not proof to the hilt.' It does not mean proof beyond the shadow of doubt. He observed "*that the law would fail to*
F *protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt but nothing short of that will*
G *suffice.*"

I further add that **Uwais, CJN in Nasiru v. The State (1999) NWLR (Pt. 589) 87 at 98 pronounced with force that 'it is not proof beyond all iota of doubt.'** Let me observe that where all
H **essential ingredients of the offence charged have been satisfactorily proved by the prosecution, as in the matter culminating in this appeal, the charge is proved beyond reasonable doubt.** See Alabi v. The State (1993) 7 NWLR (Pt. 307) 511 at page 5234.

In conclusion, I find that this appeal is devoid of merit. It is

hereby dismissed. The conviction and sentence of the appellant by the learned trial judge affirmed by the court below is hereby further confirmed.

MOHAMMED JSC

B

At the High Court of Justice of Borno State sitting in Maiduguri the State Capital, the Appellant was tried for the offence of culpable homicide punishable with death on the following charge -

“That you Gambo Musa on or about 15th of July, 1988 at Gwange II Primary School in Gwange Ward in Maiduguri Metropolitan Area did commit culpable homicide punishable with death in that you caused the death of Umaru Alhaji Idrisa by doing an act to wit: you brought out a knife and stabbed Umaru Idrisa on the chest when you know or had reason to know that death was the probable and not only likely consequence of your act and thereby committed an offence punishable under Section 221(b) of the Penal Code.”

Section 221 of the Penal Code under which the Appellant was charged and tried states -

“221. Except in the circumstances mentioned in Section 222 culpable homicide shall be punished with death -

(a) if the act by which the death is caused is done with the intention of causing death; or

(b) if the doer of the act knew or had reason to know that death would be the probable and not only a likely consequence of the act or of any bodily injury which the act was intended to cause.

In the course of this trial, the prosecution called a total of five witness two of whom PW1 and PW2 were eye witnesses to the act of stabbing the deceased with a knife by the Appellant resulting in the death of the deceased on the spot. In a considered judgment delivered on 24th February, 1994, the trial Court found the Appellant guilty of the offence as charged and convicted and sentenced him to death. In the judgment, the learned trial Judge accepted the evidence by the prosecution on the circumstances the deceased met his death in the hands of the Appellant and rejected the version of the Appellant's story in his evidence peddling the defences of a fight, provocation and self defence. Part of this judgment at page 41 of the record of appeal states

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"I have also stated earlier that the accused's evidence of a sudden quarrel is not believable but that only made up as an after thought for purpose of defence. I hold that the shirt ought to have been produced and tendered in evidence by the accused if at all his story was true. Moreso when explanation was not given as to his reason of failure to produce same which would have served as corroboration as rightly argued and submitted by D.P.P. It follows in my view that the accused was never as a matter of fact stabbed by anybody except probably by himself in inflicting especially the wound on his hand purposely with a view to make up a defence."

With regard to the contention of the Appellant that the evidence of the two eye witnesses who testified against him was full of contradictions which ought to have created doubt in the mind of the learned trial Judge to justify the resolving of the doubt in his favour, the trial Court also very carefully examined the alleged contradictions and came to the conclusion that they were not material to the extent of rendering the evidence of the two eye witnesses not reliable. These findings of the learned trial Judge on the absence of the defences of provocation sudden quarrel and self defence including the alleged contradictions in the evidence of the two eye witnesses, were also duly considered and rejected in the issues raised by the Appellant in his appeal at the Court of Appeal which dismissed his appeal and affirmed his conviction and sentence.

On the face of overwhelming evidence against the Appellant and the concurrent findings on the same by the two Courts below, I find myself agreeing completely with the judgment of my learned brother Fabiyi, JSC in dismissing this appeal. Accordingly the appeal is hereby dismissed. The conviction and sentence of the Appellant by the trial Court for the offence of culpable homicide punishable with death under Section 221(b) of the Penal Code affirmed by the Court below are further affirmed by me.

H TABAI JSC

I have had the benefit of reading, in advance, the lead judgment of my learned brother FABIYI, JSC and I agree entirely with his reasoning and conclusion that the appeal lacks merit. The result is that I also dismiss the appeal.

ADEREMI JSC

The appeal before us is against the judgment of the Court of Appeal, Jos Division delivered on the 6th of July, 2006 wherein the appellant's appeal against his conviction and death sentence, by hanging, by the trial High Court in Borno State at Maiduguri Division on the 24 of February, 1994 was affirmed. B

Briefly put, the facts of the case are as follows: the appellant left his house on the 25th of July 1988 for Gwange II Primary School with a view to playing football. On getting there, he met the deceased along with some boys playing in one of the classrooms in the School. The appellant ordered all of them to leave the classroom on the authority he claimed he had from the headmaster of the School. Some of the boys immediately left and some including the deceased, refused to leave. A fight ensued the appellant then stabbed the deceased (Umaru D Alhaji Idrisa) with the knife he (appellant) brought out of his pocket. The defence of the appellant was that he was provoked by the act of the deceased in first attacking him and hence he (appellant) in self-defence, stabbed the deceased. After carefully appraising the evidence led at the trial court, the trial judge held that no provocation emanated from the deceased such as to sustain the defences of provocation and of self-defence put up by the appellant. E

Two vital witnesses - PW1 and PW2 Mohammed Jinadu Saidu and Garba Yakubu - both of whose evidence formed, in the main, the foundation for the conviction and sentence of the appellant testified. Suffice it to say that both PW¹ and PW² were eye witnesses. The appellant had consistently argued that the evidence of PW and PW is contradictory of each other. The trial court and the court below held a contrary view to the contention of the appellant that the evidence of the two witnesses was contradictory of each other. The principle is now well settled in our criminal jurisprudence that where prosecution witnesses have given conflicting versions of material facts in issue, the trial judge before whom such evidence was led must make specific findings on the point, and in so doing, must give reasons for rejecting one version and accepting the other. F G H

The learned trial judge, on the evidence of PW¹ and PW² did find thus; -

"In my view and from all indications and having regard to the

manner of demeanour of the prosecution witnesses P1 and 2 who were eye-witnesses to that which happened, I have no doubt whatsoever in my mind that they are credible witnesses of truth and who knew exactly what they were saying as that which happened and which they saw on the day of the incident, ”

- B It is clear from the above finding, that no contradiction was deciphered between the evidence of PW¹ and PW². Rather than reject the evidence of one witness and prefer that of the other, the trial judge held that both of them were credible witnesses and consequently their testimonies had evidential value and thus believed them.
- C The court below as I have said, upheld the findings. The law has long been settled that an appellate court does not make a practice of upturning the concurrent findings of courts below unless they are seen to be manifestly perverse. Following the above is the fact that based on the totality of the evidence led, the defences of provocation and self-defence did not and will not avail the accused/appellant.
- D

The accused/appellant was charged with the offence of culpable homicide punishable with death under Section 221 (b) of the Penal Code which reads: -

- E *“(a) If the act by which the death is caused is done with the intention of causing death”.*

Suffice it to say that Section 221 of the said Penal Code which prescribes the punishment reads: -

- F *“Except in circumstances mentioned in Section 222 of this Penal Code, culpable homicide shall be punished with death.”*

The ingredients of the offence of culpable homicide punishable with death which ingredients must be proved beyond reasonable doubt by the prosecution are in the following terms: -

- G (1) That the death of the victim has actually taken place.
 (2) That the death was caused by the act of the accused and no one else.
 (3) That the act was done with the intention of causing death.
 (4) That the accused knew or reasonably knew that death would be the probable consequences of his act.”
- H

The printed evidence is replete with pieces of evidence which established beyond reasonable doubt all these ingredients.

It is for the foregoing but most especially for the detailed reasoning and conclusion contained in the lead judgment of my

learned brother, Fabiyi JSC, with which I am in full agreement, that I also say that this appeal is unmeritorious. It must be dismissed and I accordingly dismiss it. The conviction and sentence of the appellant by the learned trial judge and affirmed by the court below are hereby endorsed by me.

B

ADEKEYE JSC

I was privileged to read in draft the judgment just delivered by my learned brother J.A Fabiyi JSC. The unfortunate incident of murder the gravamen of this appeal occurred on a Sallah day the 25th of July 1988. After the usual exchange of the symbol of celebration the Ram meat, the deceased Umaru Alhaji Idrisu decided to recreate with his friends at the premises of Gwange primary school, in Gwange Ward, Maiduguri Metropolitan Area and play football for the rest of the day. They were together in a classroom at the school premises when the accused, now Appellant, Gambo Musa, entered the classroom. He directed those he met to vacate the classroom on the alleged order of the Headmaster of the school.

The deceased and a couple of his friends defied him and decided to stay behind. He then inquired about the identity of the two people with the deceased. The Appellant brought out a knife and plunged same into the chest of Umaru Idrisu as a result of which he died. After the initial investigation into the incident by the police, the Appellant was charged to court. The charge reads:-

“That you Gambo Musa on or about 25th of July 1988, at Gwange primary school in Gwange Ward in Maiduguri Metropolitan Area did commit culpable homicide punishable with death in that you caused the death of Umaru Alhaji Idrisu by doing an act to wit, you brought out a knife and stabbed Umaru Idrisu on the chest when you knew or had reason to know that death was the probable and not only likely consequence of your act and thereby committed an offence punishable under section 221 (b) of the Code”

The Appellant was charged before the High Court of Bornu State in the Maiduguri Judicial Division, In the process of trial the prosecution called five witnesses and tendered four exhibits. PW1 and PW2 were eyewitnesses of the incident, PW3 and PW4, the investigating police officers and PW5 the medical doctor who gave an insight

into the cause of death of the deceased after performing post mortem examination. In her considered judgment delivered on the 24th of February 1994, the learned trial judge found the Appellant guilty as charged and he was consequently convicted and sentenced to death on the gallows. He went on appeal against his conviction and sentence.

B On the 6th of July 2006, the learned justices of the Court of Appeal Jos in their unanimous decision dismissed the appeal, affirmed the conviction and the death sentence by the trial court. The Appellant filed a further appeal in this court on the 4th of October 2006. In the appeal before this court the substantial issues for determination identified by both parties are:-

C (1) Whether the defence of self defence was not made out by the Appellant.

(2) Whether contradictions in the evidence of PW1 and PW2 were not as material as to render the evidence unreliable to support conviction.

(3) Where the defence of provocation can avail the Appellant in the circumstance of this case.

E In consideration of the foregoing, this court must give an in depth analysis to the available evidence depicting the incident. The crime allegedly committed by the Appellant is the offence of culpable homicide punishable with death contrary to Section 221 (b) of the Penal Code. This applicable Section 221 of the Penal Code reads as follows:-

F Except in circumstances mentioned in Section 222 of this Penal Code, culpable homicide shall be punished with death

(a) If the act by which the death is caused is done with the intention of causing death.

G (b) If the doer of the act knew or had reason to know that death would be the probable and not only a likely consequence of the act or of any bodily injury which the act was intended to cause.

H The ingredients of the offence of murder which the prosecution must prove to secure a conviction on the offence of murder are as follows:-

(a) That the deceased died.

(b) That the death of the deceased was caused by the accused.

(c) That the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or

grievous bodily harm was its probable consequence.

Ogba v State (1992) 2 NWLR pt 222 pg 104 Nwanze v State (1996) 2 NWLR pt 428 pg 1 Gira v State (1996) 4 NWLR pt 443 pg 375 Haruna v State (1972) 8 - 9 SC pg 174 Archibong v State (2004) 1 NWLR pt 855 pg 488

The evidence relied upon to prove the foregoing ingredients may be direct or circumstantial but in the offence of murder the prosecution by virtue of Section 138 (1) of the Evidence Act must prove them all beyond reasonable doubt. Where any of the three ingredients is not proved beyond reasonable doubt the prosecution's case must fail. This onus of proof of murder is on the prosecution as a general rule and it does not shift. In effect the accused does not have a duty to prove or even suggest an alternative cause of death.

Aruna v State (1990) 6 NWLR pt 155 pg 125

Audu v State (2003) 7 NWLR pt 820 pg 516

R v Oledima (1940) 6 WACA pt 202

R v Abengewe (1936) 3 WACA

Owen v Isa (1961) 2 SCNLR pg 347

The prosecution from the evidence on printed record discharged the burden of establishing the guilt of the accused through five witnesses. The two vital witnesses PW1 Mohammed Jinadu Saidu and PW2 Garba Yakubu gave eye witnesses account of the incident. They were both in the company of the deceased inside the classroom where the Appellant joined them. The deceased and these two people did not respond to his call that all those in the classroom should vacate the place. The Accused/Appellant brought out a knife from his pocket and stabbed the deceased on the chest. The deceased died on the spot. The matter was brought to the attention of the police and in the course of investigation into the incident which led to the death of the deceased a medical doctor was contacted. He gave evidence of the cause of death during his testimony before the trial court. In Exhibit D which he tendered in support of his viva voce testimony, PW 5 a medical practitioner by profession gave an in depth evidence and explained the cause of death of the deceased. He found a stab wound about 5 inches deep puncturing the heart inflicted with a sharp object on the chest of the deceased Umaru Alhaji Idrisa. He finally gave the cause of death as loss of blood as a result of stab injury. There was no evidence to contradict the evidence of PW 1 and PW 2. The learned trial judge

who had the privilege of hearing these witnesses and watching their demeanour found the evidence of PW 1 and PW 2 credible. The Appellant contended that the testimony of the two eyewitnesses was full of contradictions and that they were capable of creating a doubt in the mind of the court as to the guilt of the Appellant. The Appellant maintained the stance that at the time of the incident he was provoked and that following an attack by the deceased he had to act in self defence. Both the trial court and the lower court believed the testimony of the prosecution, convicted and sentenced the Appellant. The question now being posed is whether the contradictions in the evidence of the PW1 and PW2 were not material enough to render the evidence unreliable. What amounts to material contradiction depends on the circumstance of each case. They are contradictions or inconsistencies in the evidence of the witnesses for the prosecution which are substantial and fundamental to the main issues before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to the benefit therefrom. Where there are contradictions in the testimonies of the prosecution witnesses on a material fact and the contradictions are not explained by the prosecution through any of the witnesses, the trial court must not be left to speculate or proffer explanation for such contradictions, so that it will only find itself in a position where it will pick and choose from the evidence of the prosecution which it will believe. Contradictions in the testimony of witness are inevitable but what the law frowns at is material contradictions as they are fatal to the case of the prosecution. In the instant case the main issue before the trial court was whether the deceased died, and the death was caused by the intentional act of the Appellant, PW1 and PW2 at the lower court gave straight forward and categorical evidence to establish these main issues. In the circumstance the alleged contradictions are minor ones or trifles which did not affect the fundamental or basic issues before the trial court and the decision of the trial court.

- Onubogu v State (1974) 9 SC 1
- H Nasamu v State (1976) 6 - SC pg 153
- Enahoro v Queen (1965) 1 All NLR 125
- Ibe v State (1992) 5 NWLR pt 244 pg 642
- Kalu v State (1988) 4 NWLR pt 90 pg 503
- Ejigbadero v State (1978) (-10 SC P. 81

Omangu v State (2006)14 NWLR pt 1000 pg 532

This leads to another question in this appeal which is whether the defence of self defence was not made out by the appellant. The defence of self defence if successful is a complete defence or answer to the charge of murder or manslaughter. An accused is required to raise the defence in his plea, leaving the prosecution with the burden of showing that the defence was not available to the Appellant having regard to the circumstance of the case. B

Gabriel v State (1989) 5 NWLR pt 122 pg 457

R v. Onyeamaizu (1958) NWLR 93

R v. Oshunbiyi (1961) pt 4 All NLR 453

Apugo v. State (2006) 16 NWLR pt 1002 pg 227

Ahmed v State (1999) 2 NWLR pt 612 pg 641

Certain conditions that must be available before the defence of self defence can avail an accused person which are:- D

(1) The accused must be free from fault in bringing about the encounter.

(2) There must be present an impending peril to life or of great bodily harm either real or so apparent as to create honest belief of an existing necessity. E

(3) There must be no safe or reasonable mode of escape by retreat.

(4) There must have been a necessity for taking life.

All the above ingredients must be established conjunctively. F

In the instant case there was abundant evidence that the appellant not only incited this incident by forcing people to leave the classroom he was the only one who brought out a knife to inflict the lethal injury on-the deceased.

The case of R. v. Walfer Innes 55 CAR pg 551 is illustrative on the issue of self defence. Where it was held that:- G

“where an issue of self defence arises, the failure of the defendant to retreat when it was possible and safe for him to do so is simply a fact to be taken into account in deciding whether it was necessary for the defendant to use force and whether the force used by him was reasonable”. H

In this case the Appellant remained inside the classroom where he brought out a knife from his pocket and launched an attack which killed the deceased. The degree of force used by him was out of

proportion to the attack on him if any. Self defence is a last resort in the face of a life threatening attack, a kind of life saving option.

Baridam v. State (1994 1 NWLR pt 320 pg 250

Kim v. State (1992) 4 NWLR pt 233 pg 17

Duru v. State (1993)3 NWLR pt 281 pg 283

B R. v. Onyemaizu (1958) NWLR 93

R. v. Oshunbiyi (1961) pt 4 All NLR pg. 4533

Kwaghsir v. State (1995)3 NWLR pt 386 pg 651

Nwambie v. State (1995) 3 NWLR pt 384

C The plea of self defence cannot avail him and both the trial court and the lower court's decision to reject the plea cannot be faulted.

Another poser to unravel by this court is whether the defence of provocation can avail the appellant in the circumstance of this case.

The defence of provocation if properly established and well-taken has

D the effect of reducing the crime of murder to manslaughter. Provocation has been defined as some acts or series of acts which would cause

in a reasonable person and actually does cause in the accused, a sudden and temporary loss of self control rendering him so subject to

E passion as to make him for the moment not master of his mind. The person seeking to invoke the defence of provocation must satisfy the

court on the following:-

(a) That he killed the deceased in the heat-of-the passion caused by sudden provocation and

F (b) That at the time of killing the heat of passion had not cooled. The elements being read conjunctively demand that the appel-

lant would have acted on the spur of the moment of the act of sudden provocation which left him no time for cooling off his passion.

Uluebeka v State (2000) 7 NWLR pt 665 pg 401

G Nwide v State (1985) 3 NWLR pt 12 pg 444

Yusuf v State (1988) 4 NWLR pt 86 pg 96

R. v Afonja (1955) 15 WACA 26

In light of this case the behaviour of the appellant in the circumstance was that he was not going to take no for an answer from

H the boys who defied his instruction to leave the classroom. What he did was to bring out a knife to stab one of them. The test to be applied is

that of the effect the provocation would have on a reasonable man.

In that circumstance it is of particular importance to take into account the instrument with which the homicide was effected. In this case to

resort in the heat of passion induced by provocation by mere words of mouth is very different from retaliating by a deadly instrument like a knife. In short the mode of resentment does not bear a reasonable relationship to the provocation. Words can constitute provocation but such words must themselves be provocative in nature as to incite a reasonable man of the accused standing in life and education to lose his self control. In the instant case the exact insulting words were not heard by PW1 and PW2, and the Appellant himself did not disclose them, moreover he did not write them in his statement to the police. It was not possible to decide whether the words were provocative enough so as to deprive him of the power of self control. C

Ahmed v The State (1999) 7 NWLR pt 612 pg 641

Wonaka v Sokoto Native Authority (1956) SC NLR pg 79

Kumo v State (1967) 5 NSCC pg 286

R v Adekanmi (1944) 17 NLR pg 99 D

Akalezi v. State (1993) 2 NWLR pt 273 pg 1

Queen v. Akpakpan (1956) SCN LR pg 3

By virtue of section 141 of the Evidence Act the burden of proving his entitlement to the defence of provocation rests on the Appellant which he had failed to discharge here. This court agrees with the trial court and the lower court that the appellant cannot hide under the canopy of the defence of provocation to sniff life out of the deceased prematurely. With fuller reasons given in the leading judgment, I share the view that this appeal lacks merit and it is accordingly dismissed. The conviction and sentence of the appellant by the trial court and lower court is affirmed by me. F

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