

SUPREME COURT OF NIGERIA
30TH APRIL, 2010, SC. 372/2007
CORAM:- M. MOHAMMED, I. F. OGBUAGU, F. F. TABAI, M. S.
MUNTAKA-COOMASSIE, O. O. ADEKEYE, JJSC

OKON NSIBEHE EDOHO APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL LAW - Defences - Insanity - Conflict - Pleas of insanity and provocation presuppose the doing of the alleged act - Any argument suggesting the contrary - Is irreconcilable and untenable (H1)

CRIMINAL LAW - Defences - Accident - Propriety of being raised now - As it was neither raised at trial court - Nor at Court of Appeal - It is a fresh issue before Supreme Court - And may only be properly raised with leave (H2)

CRIMINAL PROCEDURE - Murder - Proof of cause of death - Testimony of medical officer - Whether it must be viva voce - It is not mandatory - Production of a certificate signed by him may suffice (H3)

MURDER - Defences - Provocation - Ingredients - For provocation to constitute a defence to an act - There must have been actual and reasonable loss of self-control - During which the act was done - In proportion to the provocation (H4)

CRIMINAL LAW - Defences - Insanity - Onus of proof - An accused person who pleads insanity - Has the onus of proving same - As every man is presumed to be sane - Until the contrary is proved (H5)

MURDER - Defences - Insanity vide witchcraft - Whether proved - The account of the incident - Given by appellant - Is more of feigning mental illness - And his evidence of witchcraft has no credence (H6)

FACTS

Appellant was arraigned and tried for the offence of murder before the High Court of Akwa Ibom State, Eket Judicial Division. The case of the prosecution was that appellant, the deceased, PW1, PW2 and DW2 belonged to the same family. **Salzgitter Stahl GMBH v Tunji Dosunmu Ltd . (2010) 4 KLR** vly. On the day of the incident, appellant took the deceased's walking stick and in the deceased's effort to recover the walking stick a fight broke out between them. It was during the fight that appellant stabbed the deceased in the chest with a dagger. The impact broke the dagger into two pieces leaving the first half buried in the deceased's chest. The deceased eventually died at the hospital. Appellant absconded upon hearing the news and made an effort to hang himself to death but was arrested during the attempt. The medical officer at the hospital where the deceased died operated on the corpse to bring out the piece of the dagger therein. He issued a medical report on the condition of the deceased.

In his defence, appellant pleaded temporary insanity which was intermittently being afflicted on him through witchcraft. At close of hearing, appellant was found guilty as trial judge rejected his plea of insanity. Aggrieved, appellant appealed to Court of Appeal. In his first issue for determination before that court, appellant contended that the failure of prosecution to tender the weapon of murder, i.e. the dagger, in evidence was fatal to prosecution's case. Moreover that the failure of the medical director who wrote the medical report to testify made the report suspect as it was not a statement on oath. However that issue was struck out by Court of Appeal as it held same to be inconsistent with the plea of insanity canvassed by appellant. Eventually the appeal was dismissed and the judgment of trial court affirmed. Appellant has brought this further and final appeal to the Supreme Court.

ISSUES FOR DETERMINATION

(1) Whether the lower court was justified in striking out the issue and argument on hearsay.

(2) Whether the lower court was justified in finding that the defences of insanity and provocation did not avail the accused person in this matter.

HELD (Unanimously dismissing the appeal per ADEKEYE JSC)

Defences - "Inadmissible hearsay" - Insanity - Congruity

1. The respondent equally observed that it will be irregular for the appellant to rely on the plea of insanity and then turn round to look for an excuse of "inadmissible hearsay". Such is untenable and will amount to a mere academic exercise. The foregoing conclusions of the lower court and the respondent on this issue are impeccable. The appellant raised the defence of provocation and plea of insanity. Both defences when raised by an accused person presupposes and amounts to an admission by the accused that the death of the deceased was as a result of the act of the appellant, to introduce a new argument in the face of that stance is surely contradiction in terms.

This argument raised by the appellant is totally off the track of his defence of provocation and insanity making same practically irreconcilable. (p. 1462 C/ 1463 F)

Defences - Accident - Propriety of being raised now

2. The appellant in his extra judicial statement made after his arrest to the police and his evidence in court admitted that there was a fight between him and the deceased, following which he stabbed the deceased. His main defence was however insanity - as he was oblivious of his act at the material time. The contention now being made by the appellant that (sic is that) the weapon of murder might be plastic and this did not support the fact that he had an intention to kill the deceased and that death may on the whole be accidental. I must point out right away that accidental death is a defence to murder. Since the appellant did not raise this at his trial or before the lower court, it becomes a fresh issue before this court, which cannot be taken without the appellant clearing the usual legal hurdles. (p. 1463 D)

Testimony of medical officer - Whether it must be viva voce

3. At paragraph D7 page 4 of the appellant's brief - the appellant raised the view that hearsay is no evidence because what the doctor said (if at all) to PW1 at page 18, lines 11-15 was not put on oath and the accused person had no opportunity to cross-examine him. It is not competent for the prosecution to prove a fact against an accused person by producing a document in which the fact is recorded without calling the maker of the document to say that what he wrote

in the document represented a true statement of fact.

By the provisions of section 42 (1) of the Evidence Act, it is not mandatory for a medical officer who performed an autopsy on a deceased to be present in court in order to give evidence during the trial. Production by either party of a certificate signed by the medical officer may be taken as sufficient evidence of the facts.

By virtue of Section 249 (3) of the Criminal Procedure Code, a written report by any medical officer or registered medical practitioner may at the discretion of the court be admitted in evidence for the purpose of proving the nature of any injuries received by and the physical cause of the death of any person who has been examined by him. (p. 1463 G)

Defences - Provocation - Ingredients

4. The claim to provocation is not consistent as he withdrew it under cross-examination. Secondly the appellant did not react to the provocation in the heat of passion at that period when he had lost his self-control but he allowed the annoyance to calm down. In murder cases, for provocation to constitute a defence, it must consist of three elements which must co-exist, namely -

(a) The act of provocation was done in the heat of passion.

(b) The loss of self-control (sic is) both actual and reasonable, that is to say, the act was done before there was time for cooling down

(c) The retaliation is proportionate to the provocation.

For the act of provocation to avail an accused person the act complained of must occur on the spur of the moment and before there is time for passion to cool off. The retaliation was obviously out of proportion to the provocation in the circumstance of this case. The appellant reacted to the slap of the deceased by attacking him with a lethal weapon. (p. 1469 B)

Defences - Insanity - Onus of proof

5. The appellant raised the plea of insanity. The law is that in all criminal cases, every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved by virtue of section 27 of the Criminal Code of Cross River State - as applicable to Akwa Ibom State. Accordingly, there is no duty on the prosecution in criminal cases to establish what

the law presumes in its favour - that is to say the sanity of an accused person. Where an accused person pleads insanity or insane delusion as a defence to a criminal prosecution, there is a duty which the onus is on him to rebut the primary presumption of law as to his sanity and to establish his insanity as the case may be within the context of section 28 of the Criminal Code. (p. 1470 A) B

Defences - Insanity - Whether proved

6. The account of the incident given by the appellant is more of feigning mental illness. The events prior to the fight and after attacking the deceased did not show any sign of mental infirmity. He made an effort to run away and also to terminate his own life when he heard that the deceased had died. The witnesses DW2 and DW3 gave evidence of his treatment through native herbalist and his strange behaviour in prison custody after his arrest. The court has to warn itself of relying on this kind of testimony given by the appellant and his witnesses. The PW1 gave evidence that he was not aware of any evidence of insanity in the appellant, his ancestors or other blood relations in their entire family. C

The evidence of witchcraft as a source of his mental incapacity will not avail the appellant; as such defence is not given any legal credence in the Nigeria Legal System. (p. 1472 D/ G) D

NOTABLE POINT OF INTEREST **OGBUAGU JSC**

1. Evidence of PW1 and PW2 is unreliable F

I will pause here to state that the evidence of the PW1 and PW. 2 as to the Appellant coming back to the scene after (30) thirty minutes to stab the deceased, is unreliable. This evidence as correctly submitted in the Brief of the Appellant at pages 7 and 8 paragraphs E, 9, to E. 13, was given over five (5) years after the date of the incident when the matter or hearing was started de novo. It is an after-thought. I so hold. G

I therefore, apply the “inconsistency rule” which rule is that where a witness makes an extra-judicial statement which is inconsistent with his later testimony at the trial, such testimony, is to be treated as unreliable while the statement is not regarded as evidence on which the court can act. H

Both lower courts, should and ought not to have relied and acted on the said evidence of the said two witnesses.(p. 1481 A)

REPRESENTATION

Chief O. I. Ironbar for the Appellant

- B Chief Victor Mae Iyanam, Attorney-General/Commissioner for Justice, Akwa Ibom for the Respondent.

CASES REFERRED TO

- C Isiekwe v. State (1999) 6 NWLR pt. 617 pg. 43
Ubani v. State (2003) 18 NWLR pt. 851 pg. 224
Asanya v. State (1991) 3 NWLR pt. 180 pg. 442
Ihuebeka v. The State (2000) 4 SC pt. 1 pg. 203
Ugwu v. The State (2002) 9 NWLR pt. 771 pg. 90
Ajunwa v. The State (1988) 4 NWLR pt. 89 pg. 380
D Sanusi v. The State (1984) NSCC . 659 @ 663, 671
Nwuzoke v. The State (1988) 1 NWLR pt. 72 pg. 529
Nwachukwu v. State (2007) 17 NMLR pt 1062 pg. 31
Yusufu v. The State (1988) 7 SCNJ. (Pt. I) 173 @ 179
Arisa v. The State (1986) 7 S.C. (PART 1) 52 AT 59/60
E Stephen Emoga v. The State (1997) 7 SCNJ. 518 @ 529
Egbohonome v. The State (1993) 7 NWLR (Pt. 206) 382
Onyekwe v. The State (1988) 1 NWLR (Pt. 72) 565@ 579
Mallam Z. Ahmed v. The State (1999) 5 SCNJ. 233 @ 267
F Godwin v. The Christ Apostolic Church & ors. (1998) 4 NWLR (Pt. 584) 162

STATUTES REFERRED TO

Criminal Code of Cross River State, as applicable to Akwa Ibom, ss. 27, 28 & 319(1)

- G Criminal Procedure Code, s. 249 (3)
Evidence Act, ss. 42 (1) & 140 (3)

LEAD JUDGMENT BY ADEKEYE JSC

- H The appellant Okon Nsibehe Edoho was produced before the High Court of Akwa Ibom State, Eket Judicial Division on the 10th of September 1984, but could not be arraigned as he refused to respond to the charge. He was properly arraigned before

the court on the 5th of October 1988 when his plea was taken. The charge preferred against him read as follows -

Statement of Offence

Murder contrary to Section 319 (1) of the Criminal Code

Particulars of Offence

Okon Nsibehe Edoho on the 31st day of October, 1983

at No. 8. Esin Ufot Street, Afoha Eket in Eket Judicial Division murdered Akanimo Jacob Edoho.

Trial commenced de novo in the matter on the 21st of March 1989. The prosecution called three witnesses: the father of the deceased Okon Jacob Edoho as PW¹, Akpachia Jacob Edoho as PW² both were eyewitnesses of the incident leading to the death of the deceased on the 31st of October 1983 and a police officer who deposed on oath that he could recognize the handwriting of the IPO. The Investigating Police Officer could not be produced in court as a witness in the case, as he had retired from Police Service. The appellant after giving evidence, called two other witnesses, his brother Edoho Nsibehe Edoho as DW² and Benjamin Edung a Prison Warder from the Prison in Eket where the appellant was remanded in prison custody. The background facts of this case were that the appellant, the deceased, PW¹, PW² and DW² belong to the same family as clearly confirmed by their names and they were all at the scene of the incident. According to their testimony, the appellant took the walking stick of the deceased and in an effort to recover the walking stick; a fight broke out between them. After exchanging the initial slaps, the appellant went further to plunge a dagger into the chest of the deceased. The impact broke the dagger into two; the head was buried in the chest of the deceased leaving only the stump as remnant. The deceased was immediately rushed to a hospital where all efforts made to save his life failed. The appellant absconded on hearing about the news of the death of Akanimo. He thereafter made an effort to take his life by hanging with a rope. He was there and then arrested and handed over to the police. The medical officer in charge of the hospital where the deceased was admitted operated on his corpse to remove the head of the dagger. He issued a Medical Report about the condition of the deceased. The appellant blamed his reaction on being afflicted with insanity through witchcraft. The incident of attacking the deceased was beyond his control as he was

then under the spell of the witchcraft and ultimately insanity. At the conclusion of trial, the learned trial judge believed the case of the prosecution as the PW1 and PW2 who are members of the same family with the appellant and eyewitnesses of the incident testified that they did not observe any abnormality in the appellant and (sic as) B at the time he stabbed the deceased on 30/10/83 and that there was no history of insanity in their family. The learned trial judge rejected the appellant's plea of insanity and found him guilty of murder. He was convicted and sentenced to death by hanging. Being dissatisfied C with the verdict of the trial court, the appellant found his way to the Court of Appeal for the review of his case on appeal. The Court of Appeal Calabar Division in its considered judgment delivered on the 4th of April 2006 affirmed the decision of the trial court.

The present appeal to this Court is against the dismissal of his appeal by the Court of Appeal. Both parties filed their respective D brief of argument. Two issues for determination were distilled from the grounds of appeal filed and they read as follows -

(1) Whether the lower court was justified in striking out the issue and argument on hearsay.

E (2) Whether the lower court was justified in finding that the defences of insanity and provocation did not avail the accused person in this matter.

The respondent in the brief filed on 25/3/2008 raised similar and identical issues as the appellant. I intend to be guided by these F two issues for the purpose of this appeal.

Issue One

Whether the lower court was justified in striking out the issue and argument on hearsay.

G The appellant in the argument and submission canvassed that the knife, the supposed weapon of the murder was not wholly an exhibit before the court. Only the handle was exhibited without the part that did the damage. The knife or dagger was not identified in court by neither the prosecution nor the defence to determine if it was plastic as stated by the accused person or not. Even the handle tendered in court was not shown by credible evidence to come from H the knife that killed the deceased. Without establishing that the type of knife was intended to kill at all circumstances and not by accident, the conviction of murder should with respect not stand particularly

in this case where such finding was based on hearsay testimony. Hearsay is no evidence because what the doctor said if at all to PW1 at page 18 lines 11-13 was not put on oath and the accused person had no opportunity to cross-examine him. It is not competent for the prosecution to prove a fact against an accused person by producing a document in which the fact is recorded without calling the maker of the document to say that what he wrote in the document represented a true statement of fact. The appellant was subsequently emphatic that evidence to do with murder, the weapon either to prove or disprove same must be positive and direct and not based on hearsay as herein. The appellant cited cases as follows -

Nwachukwu v. State (2007) 17 NMLR pt .1062 pg. 31.

Okoro v. State (1988) 5 NWLR pt. 94 pg. 255.

This court is urged to hold that the lower court was wrong to strike out issue one for determination.

The respondent however replied that the lower court was justified in striking out the issue and argument on hearsay same being incongruous to the plea of insanity canvassed by the appellant and therefore does not arise in the circumstance. The appellant having committed the act complained of, it is very clear even by his admission that the death of the deceased was as a result of the act of the appellant, the question of admitting inadmissible hearsay evidence does not arise. It will be irregular for the appellant to rely on the plea of insanity and then turn round to look for an excuse in "inadmissible hearsay". Such is untenable and consideration of same by court will amount to a mere academic exercise. The respondent referred to cases in support of the foregoing.

Salino v. The State (1995) 10 SC pg. 4.

Global Transport v. Free Enterprises Nig. Ltd. (2001) 2 SCNJ pg. 224 at pg. 242

The respondent thereby urged this court to dispose of this issue as being academic or hypothetical and therefore untenable.

For the purpose of clarity, I shall quote from the portion of the judgment of the lower court on which this issue is premised. On page 108 of the Record of Appeal, the lower court had this to say-

"I agree with the submission of the learned counsel for the respondent with regard to issue (1 above) that the plea of insanity raised in defence by the appellant showed that he (the respondent)

(sic) actually caused the death of the deceased. It is irregular after relying on the plea of insanity for the appellant to look for an excuse tagged “inadmissible hearsay”. Such excuse, in the prevailing circumstance is incongruous to the plea of insanity and thereby untenable. Arguments proffered in support of inadmissible hearsay
 B in the prevailing circumstances of this case are at best academic. An academic question is a question which does not require adjudication by any court because it is not necessary to the live question. It is hypothetical in nature. It is now well settled that courts of law do
 C not deal with academic or hypothetical matters as they are best left to debating fora.”

The respondent equally observed that it will be irregular for the appellant to rely on the plea of insanity and then turn round to look for an excuse of “inadmissible hearsay”. Such is untenable and will amount to a mere academic exercise. The foregoing conclusions
 D of the lower court and the respondent on this issue are impeccable. The appellant raised the defence of provocation and plea of insanity. Both defences when raised by an accused person presupposes and amounts to an admission by the accused that the death of the
 E deceased was as a result of the act of the appellant, to introduce a new argument in the face of that stance is surely contradiction in terms. It is however worthy of note that the issue raised is that of the identity of the weapon of murder. The bones of contention of the appellant are that-

F (1) Only the handle of the knife or dagger and not the whole weapon and particularly the part that did the damage was not exhibited in court.

(2) The knife or dagger was not identified in court by neither the prosecution nor the defence to determine if it was plastic as stated by accused or not.

G (3) There was no credible evidence to establish that the handle tendered in court was part of the knife that killed the deceased.

(4) It was not established whether the knife was intended to kill the deceased or the deceased died by accident.

H (5) The conviction could not stand in the circumstance particularly when the finding was based on hearsay testimony.

The undisputed evidence before the court was that on the 31st day of October 1983, the accused stabbed the deceased on the

chest with a dagger and the impact was so strong that part of the dagger broke into the body of the deceased. The PW1 and PW2 gave this testimony and further that they rushed the deceased to a hospital where he later died. The medical doctor - Dr. De Bree who attended to the deceased operated on his corpse to remove the broken dagger. The PW¹ identified the corpse to the doctor. The medical report Exhibit G put the cause of death as "Excessive lung bleeding and pneumothorax due to stabbing with a dagger." The cause of death of the deceased backed up by the evidence of PW¹ and PW² was as a result of the injuries sustained from the stab wound inflicted by the appellant.

The appellant in his extra judicial statement made after his arrest to the police and his evidence in court admitted that there was a fight between him and the deceased, following which he stabbed the deceased. His main defence was however insanity - as he was oblivious of his act at the material time. The contention now being made by the appellant that (sic is that) the weapon of murder might be plastic and this did not support the fact that he had an intention to kill the deceased and that death may on the whole be accidental. I must point out right away that accidental death is a defence to murder. Since the appellant did not raise this at his trial or before the lower court, it becomes a fresh issue before this court, which cannot be taken without the appellant clearing the usual legal hurdles. As I said earlier, this argument raised by the appellant is totally off the track of his defence of provocation and insanity making same practically irreconcilable.

At paragraph D7 page 4 of the appellant's brief - the appellant raised the view that hearsay is no evidence because what the doctor said (if at all) to PW¹ at page 18, lines 11-15 was not put on oath and the accused person had no opportunity to cross-examine him. It is not competent for the prosecution to prove a fact against an accused person by producing a document in which the fact is recorded without calling the maker of the document to say that what he wrote in the document represented a true statement of fact.

By the provisions of section 42 (1) of the Evidence Act, it is not mandatory for a medical officer who performed an autopsy on a deceased to be present in court in order to give evidence during the trial. Production by either party of a certificate signed by the medical

officer may be taken as sufficient evidence of the facts.

Isiekwe v. State (1999) 6 NWLR pt. 617 pg. 43.

By virtue of Section 249 (3) of the Criminal Procedure Code, a written report by any medical officer or registered medical practitioner may at the discretion of the court be admitted in evidence for the purpose of proving the nature of any injuries received by and the physical cause of the death of any person who has been examined by him. On admission of such report, same shall be read over to the accused and he shall be asked whether he disagrees with any statement therein and any such disagreement shall be recorded by the court. If by reason of any such disagreement or otherwise it appears desirable for the ends of justice that such medical officer or registered medical practitioner shall attend or give evidence in person, the court shall summon such medical officer or registered medical practitioner to appear as a witness. The trial court did not have occasion to summon Dr. De Bree who conducted the postmortem examination on the corpse of the deceased. There was a letter tendered by the prosecution as Exhibit F that he had left Nigeria at the time of the trial of this case. Section 34 (3) of the Evidence Act can be invoked to tender any evidence of a witness which is relevant to a subsequent judicial proceedings to ascertain the truth of the facts which it states, when the witness is dead and cannot be found, or is incapable of giving evidence, or is kept out by the adverse party or when the absence cannot be obtained without an amount of delay or expense which in the circumstance of the case the court considers unreasonable. The 3rd PW worked with the investigating police officer for four years and had known his writing and signature. The statement of the Investigating Officer was tendered as Exhibit A through him.

I will like to examine the ingredients of the offence of murder so as to analyse the importance of the weapon of murder, in a murder case, the prosecution must prove beyond reasonable doubt the following ingredients; which are-

(a) That the deceased died.

(b) That the death of the deceased resulted from the act of the appellant and

(c) That the act of the appellant was intentional with the knowledge that death or bodily harm was its probable consequence.

In effect in order to secure a conviction for murder the pros-

ecution must prove beyond reasonable doubt that the death of the deceased was caused directly or indirectly by the act of the accused. It is incumbent on the prosecution to establish not only that the act of the accused person caused the death of the deceased but that in actual fact the deceased died as a result of the act of the accused person to the exclusion of all other possibilities. Thus, where a person is attacked with a lethal weapon and he died on the spot or shortly afterwards, it is reasonable to infer that the injury inflicted on him caused the death. B

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

R. V. Nwokocha (1949) 12 WACA pg. 453.

R. v. Owe (1961) 2 SCNLR pg. 354.

State v. Omoni (1969) 2 ALL NLR pg. 337.

Bakuri v. State (1965) NMLR pg. 163.

Ugwu v. The State (2002) 9 NWLR pt. 771 pg. 90. D

Ubani v. State (2003) 18 NWLR pt. 851 pg. 224.

Stande v. State (2005) 1 NWLR pt. 907 pg. 218.

Iyabele v. The State (2006) 6 NWLR pt. 975 pg. 100.

Adawa v. State (2006) 9 NWLR pt. 984 pg. 155. E

In this case in hand, whatever the type of the knife or dagger, there is overwhelming evidence that the impact of attack by the appellant on the lungs of the deceased with the knife caused his death. The appellant admitted this. He would therefore be speaking from both sides of his mouth to raise the issue of hearsay. I agree that the lower court was justified in striking out the issue and the argument on hearsay. Issue one is resolved in favour of the respondent. F

Issue Two

Whether the lower court was justified in finding that the defences of insanity and provocation did not avail the accused person in this matter. G

On the defence of provocation, the appellant argued and submitted that the prosecution witness did not mention at the earliest possible opportunity that he went away for 30 minutes, in fact they stated clearly and positively that he did not, as his action was immediate. For them to introduce such evidence five years plus later will make its admission unreliable and unsafe. The trial court should have been wary and the lower court should not have confirmed such misdirection leading to injustice in this case. Having agreed H

that the words were capable of provoking the accused person, the lower court had no credible evidence upon which to hold that the accused person had time to cool off. It was therefore wrong to find that the defence of provocation was available to the accused. This is enough to reduce the offence to manslaughter under section 318 of the Criminal Code of Akwa Ibom.

On the issue of insanity, the appellant submitted that the lower court was wrong to disregard the evidence of insanity immediately before and after the incident particularly when the accused person was in prison custody. The lower court was equally wrong to require the accused person instead of the prosecution to produce these witnesses and prison records in the complete absence of investigation by the prosecution. The lower court presumed that because the accused person ran away after the incident and attempted to commit suicide, he was sane whereas many suicides and attempts are by persons of unsound mind. It was also a matter for proof by evidence before the court concluded that the accused person carefully and comprehensively narrated the incident the next day because the police officer who took the statement was unavailable for cross-examination. The defence of insanity has also been established which is a complete defence to the charge of murder under which circumstances the accused person is entitled to an acquittal. The appellant is urging this court to quash his conviction and sentence affirmed by the lower court on grounds of insanity.

The respondent picked upon the submission by the appellant that he was provoked into acting in the manner that resulted in the death of the deceased and concluded that same was misconceived. The respondent re-stated the provocative words and submitted that words capable of constituting provocation must be of such a provocative nature as to incite a reasonable man of the accused standing in life to loose his self-control. The appellant denied under cross-examination that the deceased called him a mad-man. The respondent went further to say that even if the words uttered by the deceased were enough to provoke the appellant his reaction to the provocative words did not take place in the heat of passion. After the exchange of words with the deceased, from the evidence of PW², the appellant went away for about 30 minutes before he returned to stab the deceased to death. In effect, the appellant allowed his

passion to cool off before stabbing the deceased. This reaction of the appellant was confirmed by his extra-judicial statement to the police. The respondent cited the case *Ihuebeka v. The State* (2001) 2 ACLR 183 at page 186. On the issue of insanity, the respondent explained that the burden of insanity rests on the accused person/appellant and this will be based on balance of probabilities or preponderance of evidence. The attempt made by the appellant to establish insanity was through evidence of his brother - DW² about his medical treatment by a native doctor which was not properly substantiated. DW² was the warder with the Nigeria Prison Eket who gave evidence of his violent behaviours while in prison. The evidence fell short of the standard of proof required by law to sustain the defence of insanity. The functional pleas of the defence of insanity must be such that existed at the time the accused person committed the offence. The acts and traces relied upon by the appellant occurred at distant times, before and after the accused committed the offence. The nature of the evidence of the appellant does not show any trace of defect in his mental health nor does it show that the appellant did not know the nature of his act. He carefully narrated his evidence in his statement to the police. The respondent referred to cases

Udofia v. The State (1988) 7 SC part III pg. 59.

Uwaeke Ghinia v. State (2005) 3-4 SC pg. 29.

Willie v. The State (1968) 1 ALL NLR pg. 152.

Mbanenghen Shande v. The State (2005) 6 SC part II pg. 1

This court is urged to hold that defence of insanity pleaded by the appellant is not available to the appellant. The crux of the complaint of the appellant in this issue is that his defences of provocation and insanity were not properly considered before the two lower courts refused them. It is trite that in all cases attracting capital punishment, it is incumbent upon the trial court to consider all the defences put up by the accused person express or implied in the evidence before the court. No matter the level of the defences whether they are full of figments of imagination, fanciful, bereft with porous lies or even doubtful, the court must not be wary to give them due consideration.

Ani v. The State (2003) 11 NWLR pt. 830 pg. 142.

Green v. Queen (1955) 15 WACA pg. 73.

R. V. Bramah (1945) 11 WACA pg. 49.

Nwuzoke v. The State (1988) 1 NWLR pt. 72 pg. 529.

R. v. Bio (1945) 11 WACA 46 at pg. 48.

Asanya v. State (1991) 3 NWLR pt. 180 pg. 442.

The trial court is only under an obligation or duty to consider such defences open to an accused person only as disclosed or supported by the evidence on printed record. A court of law will not
B presume or speculate on the existence of facts not placed before it and that the accused person is usually required or recommended to give his evidence viva voce rather than adopting his previous extra-judicial statement for his defence or resting his case on the evidence of the
C prosecution.

Ekpenyong v. The State (1993) 5 NWLR pt. 295 pg. 513.
In order to establish the defence of provocation it is the duty of the accused person to adduce credible and positive evidence to support the allegation of provocation. Where an accused fails to adduce such evidence in support of his defence, the trial court has to rely
D on the evidence before it as adduced by the prosecution. A defence of provocation cannot be at large without supporting evidence. The statement of the investigating officer was tendered by another police officer as Exhibit A. Other exhibits tendered in the course of trial were the handle of a knife, a hat, walking stick and a medical report
E issued by one Dr. De Bree, as Exhibits B, C, D and G respectively. In his defence before the court, the appellant testified as DW1. There is nowhere in his defence where he narrated the words spoken by the deceased which were capable of provoking him to the point of
F stabbing the deceased with a knife. As a matter of fact he denied that the deceased at any point before the attack or during the fight preceding same called him a mad man and he did not at anytime warn the deceased not to call him mad man again as they were not age mates (Vide page 23 of the Record). In his extra-judicial statement of the police, Exhibit B before this court, the appellant had this to
G say -

“Akanimo told me that if I am crazing (sic) I should take the crazing to the person who did it. I was annoyed. I went back to him. When I wake up I was annoyed. I warned him that he is not my maid (sic) he kick me and I feel down. Akanimo pulled out his shirt and wanted to fight me. I told him to come outside and he came outside.
H I slapped him, He replied the slap, unfortunately when I used my left hand which the dagger was inside I chuk him, when I know that

I chuk him I was exhausted I started running".

From the foregoing, he obviously tried to paint a picture of provocation. The claim to provocation is not consistent as he withdrew it under cross-examination. Secondly the appellant did not react to the provocation in the heat of passion at that period when he had lost his self-control but he allowed the annoyance to calm down. In murder cases, for provocation to constitute a defence, it must consist of three elements which must co-exist, namely -

(a) The act of provocation was done in the heat of passion.

(b) The loss of self-control (sic is) both actual and reasonable, that is to say, the act was done before there was time for cooling down

(c) The retaliation is proportionate to the provocation.

For the act of provocation to avail an accused person the act complained of must occur on the spur of the moment and before there is time for passion to cool off. The retaliation was obviously out of proportion to the provocation in the circumstance of this case. The appellant reacted to the slap of the deceased by attacking him with a lethal weapon. Where provocation is established, it has the effect of whittling down the punishment stipulated for the offence of murder under the provisions of section 318 of the Criminal Code to manslaughter.

Onyia v. The State (2006) 11 NWLR pt. 991 pg. 267.

Ihuebeka v. The State (2000) 4 SC pt. 1 pg. 203.

Ajunwa v. The State (1988) 4 NWLR pt. 89 pg. 380.

It has to be emphasized that mere anger is not provocation in law as the appellant confessed that he was annoyed by the words spoken to him by the deceased.

Onyia v. The State (2006) 11 NWLR pt. 991 pg. 267.

It is obvious from Exhibit B the extra-judicial statement of the appellant to the police that what he felt at the time they quarreled was annoyance and not provocation in the legal sense of the word. The appellant raised the plea of insanity. The law is that in all criminal cases, every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved by virtue of section 27 of the Criminal Code of Cross River State - as applicable to Akwa Ibom State. Accordingly, there is no duty on the prosecution in criminal cases to establish what the law presumes in its favour - that is to say the sanity of an accused per-

son. Where an accused person pleads insanity or insane delusion as a defence to a criminal prosecution, there is a duty which the onus is on him to rebut the primary presumption of law as to his sanity and to establish his insanity as the case may be within the context of section 28 of the Criminal Code. The standard of proof required of the accused is proof on the balance of probability or preponderance of evidence and not beyond reasonable doubt.

Guobadia v. State (2004) 6 NWLR pt. 869 pg. 340 SC.

Onakpoya v. The Queen (1959) NSCC pg. 130.

Onyekwe v. State (1988) 1 NWLR pt. 72 pg. 565.

Arisa v. State (1988) 3 NWLR pt. 83 pg. 388.

In order to establish the defence of insanity, the defence must first show that the accused was at the relevant time suffering from either mental disease or from natural mental infirmity. Then it must be established that the mental infirmity as the case may be was such that at the relevant time the accused was as a result deprived of capacity to

(a) understand what he was doing or

(b) control his actions

(c) know that he ought not to do the act or make the omission.

If there is incapacity or defect of understanding, there can be no consent of will, the act is therefore not punishable as a crime.

R. v. Omoni (1949) 12 WACA pg. 511.

Sanusi v. State (1984) 10 SC pg. 166.

Anim v. State (1979) 11 SC 91.

Oladele v. State (1993) 1 NWLR pt. 269 pg. 294.

The issue of insanity and determination of same in the legal sense at the time when the act was committed is a question of fact to be decided by the learned trial judge. The duty behoves on the trial judge to take into consideration each and every admissible piece of evidence tendered before it including medical evidence where available, together with the whole of the facts and surrounding circumstances in the case particularly -

(a) The nature of the killing

(b) The conduct of the accused person before, at and after the killing

(c) Any past history of mental abnormality of the accused,

(d) Evidence of insanity in the accused ancestors or blood relation.

Ani v. State (2002) 10 NWLR pt. 776 pg. 644.

Dim v. R (1952) 14 WACA pg. 154.

R. v. Ayande (1963) 1 ALL NLR pg. 393.

Kanmu v. The State (1989) 1 NWLR pg. 96 pg. 140. B

R. v. Inyang (1946) 12 WACA pg. 5.

Anyim v. State (1983) 1 SCNLR pg. 370

Kure v. State (1988) 1 NWLR pt. 71 pg. 404.

Majemu v. State (2001) 9 NWLR pt. 718 pg. 394. C

In the case of Guobadia v. State (2004) 6 NWLR pt. 869 pg. 360 this court is of the view that any evidence of insanity tendered by an accused person himself is suspect and is not usually taken seriously.

In the case in hand, the appellant gave evidence before the trial court, which the court of appeal affirmed that - D

(1) That the sickness of insanity was inflicted on him through witchcraft.

(2) That on the day of the incident he took the walking stick of the deceased, when he was going for a prayer meeting. These people including the deceased demanded for the walking stick which he returned. E

(3) The issue of the walking stick resulted in a fight between him and the deceased. F

According to his account of the event he mentioned that -

“As the fight continued, it seemed that a black cloth was thrown into my face. I did not know myself again. I used to have this type of sickness before. It was madness which I interpreted it to be. It was madness which used to disturb me. The madness used to come in different forms. Sometimes I would stay as a reasonable person, Then after sometimes I would not know myself again. It would make me to do things which I could not otherwise have done. When I was going I was holding a hat to which was attached a pointed rubber made in the form of a knife. As the fight was going on I used the hat to beat the deceased. I did not know when the pointed rubber made in the form of a knife wounded the deceased. I made a statement to the police.” G H

In the statement made to the police Exhibit B before the

court, the appellant described the fight by saying as follows -

“Akanimo pulled out his shirt and wanted to fight me. I told him to come outside. I slapped him, he replied the slap, unfortunately when I used by left hand which the dagger was inside I chuk him when I chuk I was exhausted and I started running.”

B The account of the incident given by the appellant is more of feigning mental illness. The events prior to the fight and after attacking the deceased did not show any sign of mental infirmity. He made an effort to run away and also to terminate his own life when
C he heard that the deceased had died. The witnesses DW2 and DW3 gave evidence of his treatment through native herbalist and his strange behaviour in prison custody after his arrest. The court has to warn itself of relying on this kind of testimony given by the appellant and his witnesses. Other witnesses of the event PW¹ and PW² who are members of the family of the appellant gave evidence of the fight over
D the issue of the walking stick of the deceased and how the appellant plunged a knife into the chest of the deceased - an aftermath of the exchange of slaps. The appellant confirmed in his statement that he already had the knife in his left hand during the fight. The PW1
E gave evidence that he was not aware of any evidence of insanity in the appellant, his ancestors or other blood relations in their entire family.

The evidence of witchcraft as a source of his mental incapacity will not avail the appellant; as such defence is not given any legal
F credence in the Nigeria Legal System.

The trial court and the lower court were right based on the overwhelming evidence before the courts both viva voce and on printed record that the appellant was not at the time of the commission of the offence in such a state of either mental disease or natural mental infirmity as to deprive the appellant of the capacity to control
G his actions. Usually medical evidence may be of great assistance in the establishment of insanity but in this particular instance, the trial court had abundant vital facts to roach the conclusion that the appellant was not insane when he struck the deceased in the chest with a knife.

H In short the defence of insanity was rightly rejected by the two lower courts. In sum I dismiss this appeal as it lacks merit. The conviction and sentence of me appellant are hereby affirmed.

MOHAMMED JSC

I have been privileged before today of reading in draft the judgment just delivered by my learned brother Adekeye JSC. I entirely agree that having regard to the evidence on record against the Appellant, I see no merit at all in this appeal. Accordingly, I also dismiss the appeal. The conviction and sentence of the Appellant as found and passed by the trial High Court and affirmed by the Court of Appeal, are hereby further affirmed.

OGBUAGU JSC

This is an appeal against the Judgment of the Court of Appeal, Calabar Division (hereinafter called the “court below”), delivered on 4th April, 2006 dismissing the appeal to it by the Appellant and affirming the decision of the trial court - per Udofia, J. delivered on 9th December, 1991 convicting and sentencing the Appellant to death by hanging.

Dissatisfied with the said Judgment, the Appellant has now appealed to this Court on five (5) grounds of appeal. The Appellant has formulated two (2) issues for determination, namely,

“C. 1. WHETHER THE LOWER COURT WAS JUSTIFIED IN STRIKING OUT THE ISSUE AND ARGUMENT ON HEARSAY.

C. 2 WHETHER THE LOWER COURT WAS JUSTIFIED IN FINDING THAT THE DEFENCES OF INSANITY AND PROVOCATION DID NOT AVAIL THE ACCUSED PERSON IN THIS MATTER”.

The Respondent has adopted the above issue in its Brief. I note however, that the Appellant, did not indicate under which of his grounds of appeal, the two issues were distilled from. The consequence is now firmly settled. The purpose of formulating issues for determination, is to isolate in the grounds of appeal filed, the critical issues relevant for determination of the appeal. Hence, an issue may be limited to one ground or traverse more than one ground of appeal. See the case of Igago v. The State (1999) 12 SCNJ. 140 @ 156 citing

the case of *Godwin v. The Christ Apostolic Church & ors.* (1998) 4 NWLR (Pt. 584) 162; (1998) 12 SCNJ. 213. However, since this is a criminal case and the fault is that of the learned counsel, I will, in the interest of justice, deal with the merits of the appeal. I will deal with Issue 2 of the parties.

B This case, speaking for myself from the Records or facts, is a pathetic and an unfortunate one. It seems to me that both the victim or deceased. P. W. 1 - the father of the deceased and the Appellant, are relations and come from the same family. From the statement of
C the Appellant at pages 8 and 9 of the Records, he appears to have had an unstable mental position that came off and on. The weapon he used on the deceased, was a plastic knife or "dagger" and this was why it broke and part of it was inside the body of the deceased and in fact, needed an operation by a medical doctor in order to remove it. But unfortunately, it had pierced the lungs of the deceased who it
D is clear to me, died from excessive bleeding therefrom. It is admitted or conceded in paragraph D. 2 of the Appellant's Brief, that there was the stabbing of the deceased by the Appellant. The Appellant has raised the plea of insanity and provocation at the same time which undoubtedly, are contradictory. In other words, an insane person,
E cannot at the same time, plead provocation.

I pause here to observe that on 11th February, 2010 when this appeal came up for hearing, the learned counsel for the Respondent Chief Iyanem, was not in Court. Chief Ironbar - the learned counsel
F for the Appellant, informed the Court that the Respondent's learned counsel, sent him that morning, a text message saying that he was stranded at the Airport. Chief Ironbar thereafter, adopted their Brief of Argument and he urged the Court to allow the appeal. Since the Respondent had filed their Brief of Argument, pursuant to Order 6 Rule 8(6) of the Rules of this Court as Amended, the appeal, was
G deemed treated and as having been argued. Judgment was therefore, reserved till to-day.

I will first of all, deal with the defence of insanity. It is now firmly settled that in order to establish the defence under the Nigerian Law, the defence must prove;

H "(i) that the accused was, at the relevant time, suffering either from mental disease or from "natural mental infirmity".

(ii) that the mental disease or the natural mental infirmity was

such that at the relevant time, the accused was as a result, deprived of capacity —

- (a) to understand what he was doing; or
- (b) to control his actions; or
- (c) to know that he ought not to do the act or make the omission.

See the cases of Rex v. Omoni (1949) 12 WACA 511; Rex v. Ashrigifuwo (1948) 12 WACA 389 and Sanusi v. The State (1984) NSCC . 659 @ 663, 671.

It need be stressed and this is also settled, that mere absence of any evidence of motive for a crime, is not a sufficient ground upon which to infer mania. See the cases of Salako v. Attorney -General, Western Nigeria (1965) NMLR 107 and Nkanu v. The State (1980) 3 S.C. 1 @ 13. If the facts proved by the defence are such as to make it most probable that the accused person by reason of mental infirmity, was deprived of his capacity to understand what he was doing or control his actions, then, the defence has discharged the burden of proof required to establish the defence of insanity. See the cases of R. V Inyang (1946) 12 WACA 5 and R. v. Nasamu 6 WACA 74. However, a defence founded on belief of witchcraft or juju, is a defence that is untenable because, it is a defence founded on the subjective belief of the accused person, rather than on the objective requirements of the law relating to the particular relevant defence. But if the belief in witchcraft or juju produces a state of insanity, or delusion, then, the criminal responsibility of the accused person, will be measured not by the tenets of his belief, but by the objective standard of the law relating to such defence viz insanity, delusion or provocation as the case may be. See the case of Ihonre v. The State (1987) 4 NWLR (Pt. 67) 778; (1987) 11-12 SCNJ. 143.

For purposes of emphasis, the law in Nigeria, is that if an accused person decides to contend that he is insane, as in the instant case, then he has the duty to rebut the presumption of law which regards all persons to be sane until the contrary is proved. Section 27 of the Criminal Code, Laws of the Federation of Nigeria Cap. 42 provides that;

“Every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question until the contrary is proved”.

See the cases of *Upitire v. Attorney-General, Western Nigeria* (1964) 1 All NLR 204 and *R. v. Oliver Smith* 6 CAR 19.

In other words, the onus of proof of insanity, is on the accused person, but the standard of proof, is on the balance of probabilities. See the cases of *Sanusi v. The State* (supra); *Peter Johnny Loke v. The State* (1981) 1 NWLR (Pt. 1); *Nwabo v. The State* (1994) 9 SCNJ. 144 @ 160 citing the cases of *R v. Dim* 14 WACA 154; *R. v. Ediom* 14 WACA 158; *R. v. Onakpoya* 4 FSC. 150; *Emenyi v. The State* (1973) 6 S.C. 215 @ 226; *Ukachukwu v. The State* (1973) 3 ECSLR 277 and *Madjemu v. The* (2001) 5 SCNJ. 31 @ 47 citing some other cases therein.

At pages 35 to 39 of the Records, the learned trial Judge, examined the defence of insanity after considering both the statement of the Appellant to the Police, his evidence in court and the law. At page 38, His Lordship stated inter alia, as follows:

D “..... It was stated in the case of *YEKINI WAHIBI OKUNNU V. THE STATE* 3 S.C. 151 that the establishment of insanity rests on the accused but that it is discharged by mere balance of probabilities as in civil proceedings. But from the evidence before me the accused has not established his insanity by any probability. Apart from his own evidence and statement to the Police, the mere evidence by his brother (DW. 2) that the accused was insane and was brought from Port Harcourt for a native treatment does not establish any insanity of the accused. Also the evidence by the Prison Warder (DW. 3) that the accused behaved violently while in the cell does not also establish insanity on the accused because there is no evidence that the accused was subjected to any Medical diagnosis or treatment while in prison custody nor has any record of the accused violent behaviour in prison been produced to this Court. I have considered the case of *R. v. Inyang* (1949) 12 WACA 5 and *SULEIMAN v. The State* (1981) 1 NLR 242 cited by Counsel for the Accused in this respect. But for the evidence in this case the defence of insanity does not avail the accused person nor does the defence of witchcraft which he said in his statement to the Police as being the cause of his insanity”.

I agree.

H I note that at page 37 thereof, His Lordship had stated inter alia; as follows:

“.....Hence it is no defence to the accused person that it

was witchcraft which caused him to stab the deceased to death. Again the law is that the insanity must have been at the time the accused committed the offence. See the case of WILLIE v. The State (1968) 1 All NLR 152. In the instant case the evidence by the accused himself does not show any mental power nor does it show that he did not know the nature of his action.....”.

I also agree.

His Lordship, concluded at page 39 *ibid* *inter alia*, as follows:

“..... I have earlier stated in this judgment that even without the Medical Report, the cause of death can be established from the circumstances of this case. OGMHEN V. THE STATE (1994) 4 S.C. 1. It can also be inferred from the nature of the weapon used by the accused. Having thus found that it was the act of the Accused person which caused the death of the deceased Akanimo Jacob Edoho and that neither the defence of provocation nor self defence is available to the Accused nor the defence of insanity as put up by him both in his statement to the Police and in evidence, I hold that from the evidence before me the prosecution has proved beyond all reasonable doubt the offence of murder.....”.

As regards findings of fact by a trial court, it is settled that evaluation of evidence is the exclusive preserve of a trial court. An Appellate Court, lacks the power to interfere or disturb such findings of fact particularly, when such findings, are supported by the evidence on record. See perhaps the case of Iwuoha & anor. v. Nigerian Postal Services Ltd & anor. (2003) 4 SCNJ. 258 @ 278.

But before concluding the issue as regards insanity, it need be stressed as it is also settled, that the evidence to establish insanity in criminal trials, can come from or be adduced by either the prosecution witness(s) or defence witness(s). It need not come from the defence witnesses so long as it is credible and of probative value. See the case of Karimu v. The State (1989) 1 SCNJ. 74 @ 92. Again to be borne in mind, is that the defence of insanity and delusion, are different since the elements of the two, are different. See the case of Yusufu v. The State (1988) 7 SCNJ. (Pt. I) 173 @ 179; (1988) 4 NWLR (Pt. 86) 96.

In the case of Ejini v. The State, (1991) 7 SCNJ. (Pt. II) 318@ 328, it was held that the surest way of establishing insanity, is by medical evidence. Proof of insanity, can however, be established

from compelling evidence of eye witnesses, particularly relatives of the accused person, relating to his general behaviour before, during and after the incident.

There are certain traits in human beings, to varying degrees, which are sometimes mistaken for insanity. Some of them are said to include irascibility, irritability and quarrelsomeness. Persons afflicted with any of these traits to a high degree, are easily spurred to violence and wrongly regarded as being insane by the uninformed.

As I stated earlier in this Judgment, the onus of proving insanity, is on the accused person who should make available, evidence to satisfy the court that he was insane at the time he committed the offence, because by Section 27 of the Criminal Code, as I stated in this Judgment, there is a presumption that every person, is of sound mind, was of sound mind at any time which covers the period in question, until the contrary is proved. In effect, it must be shown that the accused person, at the time of killing the deceased, was in such a state of mental deacease or natural mental infirmity, as to deprive him of the capacity to understand what he was doing, or the capacity to control his action or of the capacity to know that he ought not to do the act. See the observation of Aniagolu, JSC in the case of *Sanusi v. The State* (supra) @ 1 77 and per Oputa, JSC in the case of *Onyekwe v. The State* (1988) 1 NWLR (Pt. 72) 565@ 579; (1988) 2 SCNJ. 354. See also the cases of *R v. Thamu* (1953) 14 WACA 372; *Upetire v. Attorney-General, Western Nigeria* (supra); *Arisa v. The State* (1988) 7 S.C. (Pt. 1) 52 @ 59-60 and *Udofia v. The State* (1988) 7 S.C. (Pt. III) 59 @ 61 - 62. There is no doubt that an accused person, can satisfy this burden imposed on him by Section 140 (3) Evidence Act if he can show that he was insane within the meaning of Section 28 of the Act. See the case of *R. v. Nasamu* (1940) 6 WACA 74. It need be also borne in mind that evidence of insanity of his ancestors or blood relations is admissible. Medical evidence though probative, is not essential. See the cases of *R. v. Inyang* (1948) 12 WACA 5- *Kure v. The State* (1988) 1 NWLR (pt. 11) 404: (1988) 2 SCNJ 204 - per Karibi-Whyte, JSC, *R. v. Omoni* and *Yesufu v. The State* (supra). I am aware that the PW1 - the father of the deceased under cross-examination at pages 18 - 19, stated inter alia:

“I do not know of any hereditary madness in our family”.

The court below in dealing with this issue, at pages 111 - 112,

stated inter alia, that it is trite that the functional pleas of the defence of insanity, must be such that existed at the time the accused person, committed the offence. It cited and relied on the case of Willie v. The State (1968) 1 All NLR 153. It held that the several acts or traces of insanity relied upon by the Appellant, occurred before and at distant times after the death of the deceased. That the Appellant did not in any way, assist his defence because he failed to call as witnesses, the persons he approached for medical attention in respect of his insanity. It stated further inter alia, as follows:

“To worsen the matter and in order to show the clarity of mind of the accused person at the time of the incident that there is un-contradicted evidence that he ran away from the scene on realizing the nature of his action. This act of absconding from the scene of crime and his attempt to commit suicide by the use of a rope found in his possession when he was thereafter arrested on the road were acts which showed that the accused person was apparently conscious that what he did by stabbing the deceased was wrong. Furthermore when the accused person was taken to the Police Station the day following the incident he carefully and comprehensively set out how the incident of the previous day took place without reference to any abnormal state of his mind.....”.

It further stated thus,

“In these circumstances, there is no basis to sustain the defence of insanity because he failed to establish that (a) the time of committing the offence he was in a state of either mental disease or of natural mental infirmity.

(h) the disease or infirmity was such as to have deprived him either

(i) of his capacity to understand what he was doing; or
(ii) of his capacity to know that he ought not to do the act or make the omission; or of his capacity to control his actions. See Arisa v. The State (1986) 7 S.C. (PART 1) 52 AT 59/60 AND UDOFIA V. THE STATE (1988) 7 S C. (PART III) 59 AT 69/62”

I completely agree. These are the concurrent findings of facts by the two lower courts. Since they are not perverse, this Court, cannot disturb or interfere. This should have been the end of this appeal, but I am bound to consider the alternative defence of provocation.

As regards provocation, I have noted that such defence is

contradictory in terms or to a defence of insanity. An insane person can hardly claim that he was provoked. On this ground, I was minded to totally discountenance it, but since it is firmly settled that all defences whether stupid or irrelevant, trivial express or implied, must be considered by a court, I will deal with the said defence. See the cases of Gabriel v. The State (1989) 5 NWLR (Pt. 122) 457; (1989) 12 SCNJ. 33 @ 38; Njoku v. The State (1993) 7 SCNJ. (Pt. 1) 36 and Nwambe v. The State (1995) 3 SCNJ. 77. In other words, alternative defences in favour of an accused person, must be considered both by a trial and an Appellate Court.

Under our criminal jurisprudence, provocation which is not at large and which will reduce what would otherwise amount to murder to manslaughter, it is a legal concept which is made up of a number of elements which must co-exist within a reasonable time.

They are,

- (a) the act of provocation-done in the heat of passion;
- (b) the loss of self-control both actual and reasonable - the act done before there was time for cooling down; and
- (c) the proportionate retaliation.

See the cases of Obaji v. The State (1965) NMLR 417; Uraka v. The State (1976) 6 S.C. 195; and Nwede v. The State (1985) 12 S.C. 32; (1985) 3 NWLR (Pt. 13) 444. Thus, when a person who unlawfully kills another in circumstances which but for the provisions of Section 318 of the Criminal Code would constitute murder, does the act which causes death in the heat of passion caused by grave and sudden provocation and before there is time for the passion to cool down, he is guilty of manslaughter. See also the case of Mallam Z. Ahmed v. The State (1999) 5 SCNJ. 233 @ 267. Mere annoyance or anger, is not provocation.

I will pause here to state that the evidence of the PW1 and PW. 2 as to the Appellant coming back to the scene after (30) thirty minutes to stab the deceased, is unreliable. This evidence as correctly submitted in the Brief of the Appellant at pages 7 and 8 paragraphs E, 9, to E. 13, was given over five (5) years after the date of the incident when the matter or hearing was started de novo. It is an after-thought. I so hold. I have read the statement of PW1 on 31st October, 1983 at page 4 of the Records to belie his evidence. Said he inter alia;

“..... Okon Nsibahe Edoho (meaning the Appellant) said,

it could have been better for you to die than to take, your stick from me. As I was outside, I told my boy Akanimo Jacob Edoho (meaning the deceased) to follow me into the house. As I was on my veranda Akanimo Jacob Edoho was following me behind, suddenly Okon Nsehehe Edoho appeared from behind and held Akanimo Jacob Edoho and stabbed on the chest (sic) Akanimo Jacob Edoho said, B
he has stabbed me to death”.

[the underlining mine]

The PW2 who also made his statement to the Police at page 5 of the Records on the same 3 1st October, 1983, stated inter alia: C

“..... My senior brother Mr. O. J. Edoho ordered his son Akanimoh Okon Jacob to go right inside the house. The boy immediately made his way out to the house not knowing that Okon Nsehehe Edoho (the Appellant) is following him behind, immediately he appeared before Akanimoh Okon Jacob (the deceased) at the D
same time he used the knife he was holding on the boy’s chest.....

[the underlining mine]

I therefore, apply the “inconsistency rule” which rule is that where a witness makes an extra-judicial statement which is inconsistent with his later testimony at the trial, such testimony, is to be E
treated as unreliable while the statement is not regarded as evidence on which the court can act. See the cases of Egbohonome v. The State (1993) 7 NWLR (Pt. 206) 382; (1993) 9 SCNJ. (Pt. 1) 1 and Stephen Emoga v. The State (1997) 7 SCNJ. 518 @ 529 adopting F
earlier decisions in several other cases.

Both lower courts, should and ought not to have relied and acted on the said evidence of the said two witnesses. I so hold. But here again, the success of an Appellant in an issue, does not vitiate the entire appeal. In other words, mistake or error in a Judgment, is G
immaterial. See the case of Gwonto v. The State (1983) 1 SCNLR 142 (a). 152 - 157.

Now back to provocation, the court below, at pages 113 to 114, stated inter alia, as follows:

“It is settled law that the functional provocation must be grave H
and sudden and must be such as to take away from the accused person the power of self control making him for the moment not a master of his mind. It is also trite that the words alone can constitute provocation as to reduce the offence of murder to manslaughter. See

THUEBEKA V. THE STATE (supra) (i.e. (2000) 2 FWLR (Pt. II) 1827), The learned counsel argued that by calling the accused person a crazy man or mad man it was enough to provoke him to lose his self control, it is possible that the words alleged to have been uttered by the deceased were enough to provoke the accused person in view
B of station in life" (sic)

It continued For provocation to achieve the required result to reduce the offence of murder to the offence of manslaughter the reaction of the accused person to such provocation must take place
C contemporaneously in the heat of passion before it is cooled off".

It then relied and acted on the said inconsistent evidence of the said two witnesses. My answer therefore, to issue C. 2 of the Appellant is render in the Affirmative/Positive.

It is from the foregoing and the fuller lead Judgment of my learned brother, Adekeye, JSC, just delivered that I too, hold that
D the appeal lacks substance and fails and I too, dismiss it. Save for the said error by the two lower courts herein highlighted, I hereby affirm the said decision of the court below affirming the conviction and sentence of the Appellant by the trial court.

E _____

TABAI JSC

I read, in draft, the lead judgement of my learned brother
F ADEKEYE JSC. In my view all the issues raised were exhaustively examined and resolved against the Appellant. All the arguments about the medical evidence being only hearsay are not tenable.

The settled principle of law is that if, from the totality of evidence, a particular defence avails an accused person in a criminal matter, he should be given the benefit of that defence notwithstanding
G the fact that he did not specifically raise it. I examined the evidence in details and in my view none of the defences of accident, insanity and provocation are available to the Appellant. In conclusion therefore, I also hold that the appeal has no merit and is accordingly dismissed by me as well.

H _____

Being privileged to have read before now the lead judgment rendered by my learned lord Adekeye JSC, I agree entirely for the reasons adumbrated in the said judgment that this appeal is lacking in merit. I also dismiss the appeal. The issue of witchcraft as a cause of the Appellant's mental derangement and incapacity, without more, which in fact was not properly established, goes to no issue. It cannot be possibly a defence to a proper charge of heinous murder the Appellant intentionally committed. B

There was overwhelming evidence that at the time he committed the offence he was in firm control of his mental capacity to control his actions. He deliberately killed the deceased. His subsequent plea of insanity was but a mere flimsy afterthought. Both trial and court below unanimously rejected the defence of insanity. Both courts were right in so holding. I have no cause to deviate from the correct findings of the two lower courts. Appeal, I repeat Jacked merit D same is hereby dismissed.

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