

SUPREME COURT OF NIGERIA
FRIDAY 1ST FEBRUARY, 2013. SC. 305/2010
**CORAM:- W. S. N. ONNOGHEN, C. M. CHUKWUMA-
ENEH, S. GALADIMA, M. D. MUHAMMAD,
C. B. OGUNBIYI, JJSC**

OJO ADEYEYE APPELLANT
V.
THE STATE RESPONDENT

MURDER - Ingredients - Proof - Prosecution must prove that the deceased died - And that the death was caused by act of accused - Which was intentional (H1)

CRIMINAL PROCEDURE - Murder - Self defence - Sustainability - Accused must show an act of grave and sudden provocation - Loss of self control - And his retaliation must be proportionate (H2)

MURDER - Self defence - Failure of - Since there is no credible evidence of appellant's life being in danger - He is deemed to have intentionally killed the deceased (H3)

FACTS

Accused/appellant and the deceased who had a common boundary demarcating their farmlands had a disagreement in appellant's farmland and in the course of which according to appellant, who was the only eye witness, the deceased had pointed his dane gun at him threatening to kill him. Appellant then knocked off the dane gun from the deceased with his cutlass and a physical fight ensued between them. In the course of the scuffle the deceased, appellant alleged, appeared to have gained the upper hand and that appellant not knowing what else to do struck the deceased on the neck with his cutlass and he died instantly. Appellant was arrested in connection with the death of the deceased.

He made confessional statements to the Police admitting the crime. Appellant was thus arraigned before the High Court of Osun State Ilesha, for murder contrary to section 319 of the Criminal Code Cap 30 Vol. II, Laws of Oyo State 1978 (as applicable in Osun State

of Nigeria). At the trial, appellant admitted killing the deceased, but raised the issue of self defence. At the end of trial, the court rejected appellant's self defence and proceeded to convict and sentence him as charged. Appellant was dissatisfied and thus filed appeal at the Court of Appeal, Ibadan Division. The court dismissed the appeal and affirmed the judgment of trial court. Aggrieved, appellant appealed to Supreme Court.

ISSUE FOR DETERMINATION

"Whether the Court of Appeal was right in affirming the judgment of the trial court to the effect that the defence of self defence was not available to the appellant in all the circumstances of this case?"

HELD (Unanimously dismissing the appeal per OGUNBIYI JSC)

MURDER - Ingredients - Proof

1. It is well settled that in a charge of this nature, the prosecution must, as a matter of obligation, prove the following three essential ingredients beyond reasonable doubt:-

1. That the deceased died.

2. That it was the act of the accused that caused the death of the deceased.

3. That the act of the accused which caused the death of the deceased was intentional and it was with the knowledge that death or grievous bodily harm would be the probable consequence of that act. (p. 892 F)

Murder - Self defence - Sustainability

2. The defence of self defence by nature is determined essentially on facts and circumstances of each case.

The guiding principles of self defence are necessity and proportion. The two questions which ought to be posed and therefore answered before the trial court were: - (1) on the evidence, was the defence of self defence necessary? (2) was the injury inflicted proportionate to the threat offered, or was it excessive? If however the threat offered is disproportionate with the force used in repelling it, and the necessity of the

occasion did not demand such a self defence, then the defence cannot avail the accused.

It is also trite that the defence is weakest where the position of the victim is weaker than that of the accused and hence the issue of self defence does not arise; the defence will also not be available.

The reproduction of Section 286 of the Criminal Code Law (supra) is very explicit and specific and which is not ambiguous. In other words, for the defence of self defence to avail an accused person, the nature of the assault on him must be such as to cause reasonable apprehension of death or grievous harm. The extent of force which could be acceptable as a defence must be from the belief on reasonable grounds that death or grievous harm was the only last resort that must be used as a defence.

For the defence to avail the appellant he must satisfy the requirement that:-

- a) There was an act of grave and sudden provocation.**
- b) There was the loss of self control both actual and reasonable.**
- c) The retaliation must also be proportionate.**

In other words, all the three elements must co-exist and within a reasonable time. In determining what should constitute provocation, the court does not consider the susceptibilities of the accused. (pp. 893 F/895 F/899 C)

MURDER - Self defence - Failure of

3. The test is objective and not subjective. It therefore must be that of a reasonable man and the act which resulted in the killing ought to be the reaction of a reasonable person placed in similar situation.

In this case, there is no credible evidence that the life of the appellant was either in danger or that he wielded his machete in order to save himself, on a reasonable belief, from imminent death, or danger. From all indications, the appellant had conceived the intention to kill and therefore snared the deceased. The question of self defence, I again repeat, is from all indication an after thought. (p. 899 A)

REPRESENTATION

Ikenna Okoli Esq. with Jidefo Nwosu Esq. and N. Offodile (Miss),
for the Appellant

Abiola Adeweniro (Mrs.), (Solicitor-General Osun State) with Biodun

B Badiora (ACSC); and Mrs. Aarinade Idowu (PSC), for the Re-
spondent

CASES REFERRED TO

- C Laoye v. State (1985) 2 NWLR (pt. 10) 862
Ahmed v. State (1999) 12 NWLR (pt. 612) 641
Baridam v. State (1994) 1 NWLR (pt. 320) 262
Ozaki v. State (1990) 1 NWLR (pt. 124) 92
Uwagboe v. State (2007) 6 NWLR (pt. 103) 606
D Nwede v. The State (2007) 5 ACLR 17
Omoregie v. The State (2008) 12 SCM (pt. 2) 599
Udofia v. State (1984) NSCC 836
Uwaekweghinya v. State (2005) 9 NWLR (pt. 930) 227
Nwuguru v. State (1991) 1 NWLR (pt. 165) 41
E Ndukwe v. The State (2009) 2 SCM 147
Abogede v. The State (1996) 5 NWLR (pt. 448) 270
Nwosu v. The State (1986) 4 NWLR (pt. 35) 384
Ogba v. The State (1992) 2 NWLR (pt. 222) 164
F Daniel v. The State (1991) 8 NWLR (pt. 212) 715

STATUTE REFERRED TO

Criminal Code Cap 30 Vol. II Laws of Oyo State 1978, ss. 286, 319

LEAD JUDGMENT BY OGUNBIYI JSC

- G This is an appeal against the judgment of T. O. Awoloye J. of
the High Court of Justice Ilesha Osun State in charge No. HIL/12C/
99. The State V. Ojo Adeyeye delivered on the 26th July, 2001 wherein
the accused was tried, convicted and sentenced to death on a one
H count charge of murder contrary to Section 319 of the Criminal Code
Cap 30 Vol. II, Laws of Oyo State 1978 as applicable in Osun State
of Nigeria. The offence for which the accused was charged reads as
follows:

“STATEMENT OF OFFENCE

MURDER: Contrary to Section 319 of the Criminal Code Cap 30 Vol. II Laws of Oyo State of Nigeria now applicable to Osun State.

PARTICULARS OF OFFENCE

OJO ADEYEYE 'M' on about 5th day of February, 1997 at about 7.30 hours at Iwori Aba Odole village in the Ilesha Judicial Division murdered one Babalola Ezekiel 'M'. B

Upon the charge being read to the accused, he pleaded not guilty. The case proceeded to be heard with the prosecution calling seven witnesses while the accused gave evidence in his own defence. In the course of the trial the accused's statements, a medical report, a dane gun and cutlass were all tendered and admitted as exhibits. Both counsel for the prosecution and accused respectively later addressed the court and in a considered judgment delivered on the 26th July, 2001 the learned trial judge found against the accused, who was accordingly convicted of murder and sentenced to death by hanging. C D

The facts of the case briefly are that the appellant and deceased who had a common boundary demarcating their farmlands had had a disagreement in the appellant's farm land and in the course of which according to the appellant, who was the only eye witness, the deceased had pointed his dane gun at him threatening to kill him. The appellant knocked off the dane gun from the deceased with his cutlass and a physical fight ensued between them. In the course of the scuffle the deceased, the appellant alleged, appeared to have gained the upper hand and that the appellant not knowing what else to do struck the deceased on the neck with his cutlass and he died instantly. The appellant admitted digging the ground and burying the deceased. An autopsy report tendered revealed that the deceased had died as a result of injury sustained from the cutlass blow. E F G

In his two extra judicial statements to the police (Exhibits 'B' and 'E') and also his statement in court, the appellant admitted killing the deceased but however, stated unequivocally that he did so in self defence when the deceased attempted killing him with a dane gun. None of the respondent's witnesses or any other at all was an eye witness to the alleged crime except the appellant himself. The trial court rejected the appellant's defence of self defence and proceeded to convict and sentence him as charged. The appellant was H

dissatisfied with the judgment of the trial court and consequently appealed to the Court of Appeal, which on the 25th March, 2012 delivered its judgment and dismissed the appellant's appeal and affirmed his conviction and sentence by the trial court.

The appellant again was dissatisfied with the outcome at the Court of Appeal and has now appealed against the judgment to this court vide a notice of appeal dated and filed 21st April, 2010. Two grounds of appeal were raised.

In accordance with the rules of this court, briefs were settled and filed on behalf of both parties by Ikenna Okoli Esq. and Biodun Badiora Esq. PSC (MOJ) Osun State for the appellant and respondent respectively. On the 8th November, 2012 at the hearing of the appeal, the respective briefs were adopted and relied upon. The learned appellant's counsel on the one hand urged that the appeal be allowed, the judgment of the lower court set aside and the appellant should be discharged and acquitted. On the other hand however, the respondent's counsel urged that the appeal be dismissed as it lacks merit.

From the two grounds of appeal the appellant formulated a lone issue which was also adopted by the respondent as follows:-

"Whether the Court of Appeal was right in affirming the judgment of the trial court to the effect that the defence of self defence was not available to the appellant in all the circumstances of this case?"

The learned appellant's counsel in his submission on the foregoing issue remarked that the Justices of the lower court were wrong in affirming the judgment of the trial court wherein they held that the appellant could not rely on the defence of self defence; that the justices must have, in the circumstance, misconstrued the law governing the defence of self defence and took some extraneous factors into consideration. The counsel cited and relied on the authorities of *Laoye V. State* (1985) 2 NWLR (pt. 10) 862, *Ahmed v. State* (1999) 12 NWLR (Pt. 612) 641 and also the provision of Section 286 of the Criminal Code which counsel argued would reveal the error committed by the lower court; that the defence put forward by the appellant was neither rebutted nor was his testimony discredited by the prosecution; that the appellant had established the ingredients of the defence of self defence as provided by the law.

Counsel further submitted that in a heat of the moment, the

appellant could not be expected to weigh to a nicety the exact measure of necessary defensive action or to pick and choose which part of the deceased's body he would strike a blow; that the appellant wanted to save his life which he believed was in danger and hence his striking the deceased only once. He argued further that if the killing was premeditated, the appellant would have dealt the deceased several machete cuts for purpose of making sure that the deceased died. The fact that the accused buried the body of the deceased and told nobody of the incident counsel argued, cannot be conclusive that the killing was premeditated and therefore not in self defence. With the appellant having raised the defence of self defence he continued, the onus did not lie on him to prove such defence but on the prosecution to disprove. The learned counsel called in aid the cases of *Baridam v. State* (1994) 1 NWLR (pt. 320) at 262; *Ozaki v. State* (1990) 1 NWLR (Pt. 124) 92 at 108 and *Uwagboe v. State* (2007) 6 NWLR (Pt 103) 606 for purpose of establishing that the appellant in the case at hand had no intention to kill the deceased.

On the question of discrepancies in the extra judicial statements by the appellant and his testimony in court, which is not conceded, the counsel argued that such discrepancies, if any, were not of a nature as to render his plea of self defence unacceptable. The learned counsel further submitted also that even if there were noticeable discrepancies between the appellant's extra judicial statement to the police and his testimony in court, there is one thread or theme that runs through the appellant's testimony in court and Exhibits 'B' and 'E'. In other words, that the appellant had successfully raised a defence of self defence; that Exhibits 'B' and 'E' are not in conflict with his testimony in court.

In summary, the learned counsel therefore urged the court to hold that the defence of self defence was available to the appellant in the circumstances. Furthermore that the respondent herein did not disprove the defence put forward by the appellant; that the court should therefore set aside the judgment of the lower court and discharge and acquit the appellant in the circumstance.

On behalf of the respondent, his counsel, for purpose of recapitulation outlined a graphic summary of those facts which were not in dispute and related them closely to Section 286 of the Criminal Code Law on defence of self defence as well as authorities establish-

ing the principle. The counsel in his further submission also implored us to seriously take into account the fact of concurrent findings by the court below and the trial court which in legal parlance speak volume; that the court below was therefore right in upholding the decision of the trial court, in view of the position and direct confession by the appellant that he killed the deceased; that the appellant did confess that he killed the deceased because of a land dispute. The counsel for purpose of buttressing his submission cited the cases of *Nwede v. The State* (2007) 5 ACLR 17 at 26, *Omoriegie V. The State* (2008) 12 SCM (Pt. 2) 599 at 611 and *Udofia V. State* (1984) NSCC 836 at 850 a decision of this court; that the autopsy result should also be taken into specific account where the blood vessels supplying the head and neck of the deceased were all severed and as a consequence the appellant cannot therefore be exonerated from criminal responsibility. The learned counsel re-echoed the cases of *Uwaekweghinya v. State* (2005) 9 NWLR (Pt 930) 227 and *Nwuguru v. State* (1991) 1 NWLR (pt 165) 41 which were relied upon by the appellant and remarked that they are not helpful to his case. The counsel in the result urged therefore that the court should hold that the defence of self - defence put up by the appellant has been disproved by the prosecution and to uphold the judgment of the lower court.

These are therefore the arguments and submissions advanced by both counsel in the appeal. The appellant, as earlier stated, was charged, tried convicted and sentenced to death for murder contrary to Section 319 of the Criminal Code. ***It is well settled that in a charge of this nature, the prosecution must, as a matter of obligation, prove the following three essential ingredients beyond reasonable doubt:-***

1. ***That the deceased died.***
2. ***That it was the act of the accused that caused the death of the deceased.***
3. ***That the act of the accused which caused the death of the deceased was intentional and it was with the knowledge that death or grievous bodily harm would be the probable consequence of that act.***

Plethora of case law establishing the basic requirements will serve to illustrate the point. The cases are: *Ndukwe v. The State* (2009)

2 SCM 147 at 167; Abogede v. The State (1996) 5 NWLR (pt 448) 270; Nwosu v. The State (1986) 4 NWLR (Pt. 35) 384; Ogba v. The State (1992) 2 NWLR (Pt 222) 164; and Daniel v. The State (1991) 8 NWLR (Pt 212) 715.

As a matter of fact, the first two ingredients are not in question. In other words, it is not in any doubt that the deceased is dead. This is established with his body having been found. The fact also that the appellant's act caused the deceased's death is not in issue especially with the appellant having so confessed to the killing by means of one blow by machete cut strike. It is the third ingredient therefore that is the subject of contention wherein the appellant pleads the defence of self defence and hence the reason for the deceased's death. The relevant legislation dealing with such defence is Section 286 of the Criminal Code which reproduction state as follows:-

"When a person is unlawfully assaulted and has not provoked the assault it is lawful for him to use such force to the assailant as it is reasonably necessary to make effectual defence against the assault: Provided that the force used is not intended and is not such as is likely to cause death or grievous harm.

If the nature of the assault is such as to cause reasonable apprehension of death or grievous harm, and the person using force by way of defence believes on reasonable ground that he cannot otherwise preserve the person defended from death or grievous harm, it is lawful for him to use any such force on the assailant as is necessary for defence even though such force may cause death or grievous harm."

The defence of self defence by nature is determined essentially on facts and circumstances of each case. See Omoregie V. The State supra at 615. ***The guiding principles of self defence are necessity and proportion.*** The two questions which ought to be posed and therefore answered before the trial court were: - (1) on the evidence, was the defence of self defence necessary? (2) was the injury inflicted proportionate to the threat offered, or was it excessive? If however the threat offered is disproportionate with the force used in repelling it, and the necessity of the occasion did not demand such a self defence, then the defence cannot avail the accused. See R. V. Onyemaizu (1958) N.R.L.R 93. ***It is also trite that the defence***

is weakest where the position of the victim is weaker than that of the accused and hence the issue of self defence does not arise; the defence will also not be available. See Udofia V. The State (1984) NSCC 836, at 856 - 857.

The learned trial court judge on the record I hold meticulously reviewed the defence of self defence put forward by the appellant and thereafter held thus on the defence and said:-

"I have carefully watched the demeanor of the accused in the witness box when he gave evidence before me. I am convinced that he did not say the truth when he said that the deceased after knocking him down retrieved the dane gun and tried to shoot him again hence he killed the deceased. This aspect of his evidence was not narrated in his memory at the Police station. Rather in his statement at the police station he said he killed the deceased because of the dispute on land. I strongly believe that the accused was the aggressor and assailant in this case and so defence of self-defence is not available to him. It is clear that at the stage the accused killed the deceased he was not under any danger or threat of death since the gun was already knocked off the hand of the deceased..."

The accused must believe on reasonable ground that he cannot otherwise preserve his own life other than killing of the deceased before the defence of self defence can avail him.

In my view the defence of self defence is not available to the accused. He maliciously killed the deceased."

The court below in affirming the decision of the trial court on the same point also held and said:-

"In the present case on appeal, allegations of theft on the deceased's farm which shares the same boundary had been made against the appellant which he denied but his statement to the police is explicit; that he killed the deceased in order to put to rest the quarrels and confrontation that both had been having over land ownership. This confession to my mind being voluntary is quite direct and positive to rule out the defence of self defence and to ground a conviction for the murder of the deceased.

...The severity of the machete cut coupled with where the machete cut was directed i.e. the neck of the deceased are not consistent with the defence of self defence but a pre-meditated intention to either kill the deceased or cause him grievous bodily harm. That

he dug a pit in the ground where he buried the deceased's body which he covered with cocoa leaves and told nobody of the killing was an attempt to hide his crime. I do not find the findings of the lower court perverse, unreasonable or unsupportable by evidence or circumstances of this case and as such I have no reasons whatsoever to disturb the findings." B

Suffice it to say that from the totality and perusal of the record of appeal, the following facts are expressive and not in dispute since there is no appeal against the findings.

1. The appellant killed the deceased by macheting him. C

2. The fatal blow inflicted by the appellant caused a 10 cm by 6 cm laceration on the side and back of the head extending from left ear to the right side of the back of the neck and the blood vessels supplying the head and neck region were all severed.

3. The appellant made 2 statements to the police (Exhibits 'B' D and 'E') wherein he stated that he knocked off the dane gun from the hand of the deceased and that in the course of the struggle, the appellant picked his cutlass and cut the deceased's head.

4. There were allegations of theft of crops on the farm of the deceased made by him against the appellant before the incident. E

5. The appellant in his statement of 11/2/97 (Exhibit 'E') said he killed the deceased because of farmland that has been a source of problem between him and the deceased.

6. The appellant's testimony in court that the deceased regained his gun after it was knocked off and that he was killed in self defence when he tried to shoot him again was rejected by the trial court and the court below. F

The reproduction of Section 286 of the Criminal Code Law (supra) is very explicit and specific and which is not ambiguous. In other words, for the defence of self defence to avail an accused person, the nature of the assault on him must be such as to cause reasonable apprehension of death or grievous harm. The extent of force which could be acceptable as a defence must be from the belief on reasonable grounds that death or grievous harm was the only last resort that must be used as a defence. H

A recapitulation of the appellant's extra judicial statements from Exhibits 'B' and 'E' is very revealing when compared with his testi-

mony in court. For instance in his statement to the police made when the incident was still very fresh in his memory he said:-

“Ezekiel Awodiya put his dane gun in his heart and said that he will kill me and I used my cutlass in my hand to hit his dane gun in his hand, the dane gun then fell down from his hand. There Baba Ezekiel Awodiya greaped (sic) me and we started fighting in my farm as both of us were fighting in the farm for almost one hour and Baba Ezekiel Awodiya over-powered me and I cannot do any other (sic) along to defend myself. Then I took my cutlass in the ground and cut his head. That is where (sic) he died instantly.” (Emphasis is mine)

Also on the 1st February, 1997 the appellant made another statement to the Police and said:-

“Both myself and the deceased have common boundary in our farm. I did not entered (sic) deceased farm before and he did not cut (sic) me in his farm stealing his properties before. I only kill him because of the farm land that use to cause anything between me and himself.” (Emphasis is also mine).

The appellant in his evidence while testifying before the trial court, changed his story wherein he stated for the first time that the deceased succeeded in retrieving his gun which he tried to use again while he was lying down on the appellant, who consequently *“threw the cutlass to prevent the man from shooting”* him, and that it was in the process that the cutlass hit the deceased.

The foregoing testimony was rejected by the trial court and rightly too I hold because it was not stated in the appellant’s extrajudicial statement when the matter was fresh in his memory; the appellant had also earlier contested that he killed the deceased because of dispute on land. A similar related authority is again the case of *Omoregie V. The State* supra, wherein the court rejected as an after thought a piece of evidence by the appellant which came up only during his testimony in court and which was never stated in his first extra judicial statement. Being on all fours with the case under consideration, the piece of evidence was meant to make the defence of self defence available to the appellant. In the case under reference, both the Court of Appeal and this court upheld the rejection of the piece of evidence by the trial court.

Also in the case of *Udofia V. State* (supra) the appellant in his statement to the police said that:-

“Immediately I came home from under the bed Raymond seeing me jumped from the bed and gripped me and we started to struggle in the darkness ... I then lay my hand on my cutlass and started cutting towards the direction which inflicted several machete cuts all over his body.”

In his testimony in court however, the appellant in the same case said:-

“When the deceased gripped my neck the cutlass fell, I then fell on the cutlass at that time I did not know how my hands got hold of the cutlass. I then saw the deceased ran out.”

This court upheld the findings of the lower court and that of the trial judge that the plea of self defence put up by the appellant was an after thought. Further still and in the same case, this court reiterated also and held that such a defence will not be available where if on the accepted evidence it is not necessary or where the threat offered is disproportionate with the force used in repelling it. In other words, the defence of self defence will not avail an appellant who stabbed a deceased person who was unarmed and fighting with his bare hand. See the case of Ahmed v. The State (supra).

In the instant case, the prevailing evidence revealed that the gun was already knocked off the hand of the deceased when the machete cut was inflicted on him. The autopsy report also revealed *“a 10 cm by 6 cm deep laceration at the side and back of the head extending from the left ear to the right side of the back of the neck. The blood vessels supplying the head and neck were all severed.”* The facts of the location of the injury and its depth on the corpse of the deceased as established by PW1’s testimony are more consistent with an injury inflicted from the back with full force and not one inflicted by a person who was on the ground while the victim was on top of him and when he merely threw the cutlass as sought to allege by the appellant.

The appellant’s learned counsel in his submission was emphatic and resolute wherein he relied heavily on the cases of Laoye V. State and Ahmed V. State (supra) with the aim of rationalizing the use of the cutlass by the appellant in the instant case. For all intent and purpose, the two cases under reference are remarkably distinguishable from the case at hand. For instance in Laoye’s case, the deceased had used a knife on the appellant before he was killed by

him. Also in Ahmed's case, the trial court did not examine the defences available to the accused. The place where the incident happened was also in doubt and hence the conviction of the accused for manslaughter. It was also shown on the prosecution's case that the evidence of its witnesses were contradictory. The legal right to kill in self-defence cannot be made dependant upon the temperament or phlegmatic nature of the individual killer. For those who claim to have exercised this legal right to kill, the law insists upon one standard. It is the standard of a reasonable man. See again the case of *Udofia v. The State supra*. For the defence to be available and to exclude criminal responsibility the accused must face imminent apprehension of death or grievous harm from the victim. See *R. v. Onyemaizu (1953) NRNLR 93*.

Objectively, the facts of the case under consideration did not show that the accused/appellant was faced with such situational circumstance to have warranted the vicious attack. The learned appellant's counsel in his submission also relied heavily on the case of *Uwaekweghinya V. State* and *Nwuguru V. State* under reference *supra* to show that the defence of self defence was available to the accused. With due respect to the learned appellant's counsel, the circumstance of the case in issue is remarkably distinguishable from those cases cited under reference. In *Uwaekweghinya's* case for instance, the deceased who was armed with cutlass, iron rod and stick hit the appellant with stick twice while on the ground and was not stopping the attack when the appellant defended himself by matcheting him. Also in *Nguru's* case the appellant went to report himself to the police and made a statement. There was no other evidence from the prosecution apart from the statement. There was also no confession of motive for the killing. Unlike the two cases under reference the appellant in the case presently under consideration confessed that he killed the deceased in order to put an end to the land dispute between them. There is as a matter of fact the evidence of allegation of theft on the deceased's farm which was made against the appellant. A further evidence also revealed that the deceased and appellant were fighting with bare hands when the fatal blow was inflicted with the retrieved cutlass by the appellant. In the circumstance of the case, the appellant should not be allowed to take cover under this defence after having taken an undue double advantage of the deceased.

The test is objective and not subjective. It therefore must be that of a reasonable man and the act which resulted in the killing ought to be the reaction of a reasonable person placed in similar situation. See Palmer V. R. (1971) 55 cr. App. C 223. ***In this case, there is no credible evidence that the life of the appellant was either in danger or that he wielded his machete in order to save himself, on a reasonable belief, from imminent death, or danger. From all indications, the appellant had conceived the intention to kill and therefore snared the deceased. The question of self defence, I again repeat, is from all indication an after thought.***

For the defence to avail the appellant he must satisfy the requirement that:-

a) There was an act of grave and sudden provocation.
b) There was the loss of self control both actual and reasonable.

c) The retaliation must also be proportionate.

In other words, all the three elements must co-exist and within a reasonable time. In determining what should constitute provocation, the court does not consider the susceptibilities of the accused. See Olubu V. The State (1930) 1 NCR 309 at 321. The guiding principles of self-defence, I further repeat, are necessity and proportion. If the accused can show necessity for his conduct on the facts as he reasonably believed them to be a valid defence sufficient, his acquittal can be made. See R. V. Nwibo (1950) 19 NLR 124. If however the threat offered is disproportionate with the force used in repelling it, then the defence cannot avail the accused. See also the case of R. V. Onyemaizu (1958) N.R.N.L.R 93. The defence is weakest where the position of the victim, as in this case, is weaker than that of the accused. In such a situation the issue of self-defence does not arise and the defence is not available as rightly held by the lower court in affirming the judgment of the trial court.

In this appeal, the evidence accepted by the learned trial judge excluded any question of self defence on the part of the appellant. The Court of Appeal agreed with the trial court's rejection of the defence. I also agree entirely with these concurrent findings of fact of the two lower courts. See the case of Elowa Enang & Ors. V. Fidelis

Ikor Adu & Ors. (1981) 11-12 SC. 25. In other words, the defence of self-defence was right rejected by the learned trial judge and also affirmed by the lower court. There could have been no other alternative verdict better than the one put in place.

The defence of self defence put up by the appellant has been disproved by the prosecution who had successfully proved the appellant guilty as charged. The issue is therefore resolved against the appellant.

The appeal is hereby dismissed as lacking in merit. The conviction and sentence of death passed on the appellant by the trial High Court Osun State on the 26th July, 2001 and which was on the 25th March, 2010, affirmed by the Court of Appeal Ibadan Division is hereby also endorsed by this court. The sentence of death by hanging passed on the appellant is also affirmed.

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother, OGUNBIYI, J.S.C. just delivered.

I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

The issue before this court is whether the defence of self defence avails appellant having regards to the facts and circumstances of this, case. The lower courts held that it does not. Are they right? There is no dispute as to who killed the deceased as appellant admitted doing so by giving the deceased a savage machete cut on the neck which cut off all the arteries and other blood vessels connecting the body with the head region thereby killing the deceased on the spot. Just one cut with a machete ended the life of the deceased in a farm which shares a common boundary with the appellant. After the killing, appellant dug a shallow grave and buried the deceased.

Also not disputed is the fact that there had been incidents of stealing of farm crops/produce belonging to the deceased from his farm which the deceased blamed on appellant and that there existed bad blood between the farm neighbours over time and up to the date of incident.

In Exhibits “B” and “E” being the statements made by appellant soon after his arrest and caution by the police, appellant stated

that he knocked off the dane gun from the hand of the deceased and that when the struggle between them continued, he picked up his cutlass and cut the deceased's head off and that he killed the deceased because of farmland that had been causing problem between him and the deceased.

As stated earlier, the statements in Exhibits "B" and "E" were made when the facts were still very fresh in the mind of the appellant. However, in his testimony in court, appellant stated that after he knocked off the dane gun from the deceased's hand, the deceased regained his gun and that appellant killed the deceased in self defence when the deceased tried to shoot him (appellant). The trial judge did not accept the above sequence of events and therefore rejected the defence of self defence which rejection was affirmed by the lower court.

From the contents of Exhibits "B" and "E" it is clear that the defence of self defence raised at the trial is an afterthought particularly as appellant stated clearly in the exhibits as follows:-

"As both of us were fighting in the farm for almost one hour and the Baba had over power me, then I cannot do any other thing to defend myself, then I picked my cutlass in the ground and cut his neck once where he died on the spot".

Can it be said that in law the above stated facts disclose the defence of self defence? For the defence of self defence to avail an accused person it must be clear from the facts surrounding the killing of the deceased that the accused appellant was under reasonable apprehension of death or grievous harm from the deceased. It is settled law that the guiding principles of self defence are necessity and proportion. The relevant question to be asked and answered in the positive for the defence to apply is whether, on the evidence before the court, self defence was necessary and whether the injury inflicted was proportionate to the threat offered by the deceased, or was it excessive.

The above notwithstanding, let us take the sequence of events given in court by appellant and on which the defence of self defence is said to have been based. Appellant told the court the following story:-

"He pointed his dane gun at me and cocked it. In self defence, I used the cutlass in my hand to knock off the dane gun from his

hand. My cutlass also dropped we then decided to struggle. The man knocked his head against my chest. I then fell down. The man fell on me with the dane gun which he had succeeded in retrieving. I struggle to push him off me but to no avail. He tried to shoot his gun again. I raised alarm but nobody came to my rescue. I then looked and saw
 B a cutlass I threw the cutlass to prevent the man from shooting me. The man was hit with the cutlass. I then pushed the man off me. I was not happy because I did not intend to kill him”.

What was the reaction of the lower courts to the above evidence? At pages 21 - 22 of the record, the trial court had this to say:-
 C “I have carefully watched the demeanor of the accused in the witness box when he gave evidence before me. I am convinced that he did not say the truth when he said that the deceased after knocking him down retrieved the dane gun, and tried to shoot him again
 D hence he killed the deceased. This aspect of his evidence was not narrated in his memory at the police station. Rather in his statement at the police station he said he killed the deceased because of the dispute on land. I strongly believe that the accused was the aggressor and assailant in this case and so defence of self defence is not avail-
 E able to him. It is clear that at the stage the accused killed the deceased he was not under any danger or threat of death since the gun was already knocked off the hand of the deceased...”

The accused must believe on reasonable ground that he cannot, otherwise preserve his own life other than killing of the deceased
 F before the defence of self defence can avail him. In my view the defence of self defence is not available to the accused. He maliciously killed the deceased”

The reaction of the lower court to the above findings is at pages
 G 101 - 102 of the record where the court stated inter alia, as follows:-

“In the present case on appeal, allegation of theft on the deceased’s farm which shares the same boundary had been made against the appellant which he denied but his statement to the police is explicit, that he killed the deceased in order to put to rest the quar-
 Hrels and confrontation that both had been having over land ownership. This confession to my mind being voluntary is quite direct and positive to rule out the defence of self defence and to ground a conviction for the murder of the deceased...”

The severity of the machete cut coupled with where the ma-

chete cut was directed i.e. the neck of the deceased are not consistent with the defence of self defence but a premeditated intention to either kill the deceased or cause him grievous bodily harm. That he dug a pit in the ground where he buried the deceased's body which he covered with cocoa leaves and told nobody of the killing was an attempt to hide his crime. I do not find the findings of the lower court perverse, unreasonable or insupportable by evidence or circumstances of this case and as such I have no reasons whatsoever to disturb the findings".

I am of the firm view that the findings by the trial court and their affirmation by the lower court are without reproach, as same are supported by the evidence on record. To strengthen that fact, is it not strange that a cut by a machete directed at the deceased who was said to be lying on top of appellant on the ground hit the deceased on the neck, not on the throat or the side of the neck? Looking at where the cut on the neck was inflicted, it is clear that the deceased could not have been on top of appellant but that the deceased was rather on the ground while appellant was bending over him (deceased) when the machete cut was inflicted.

It should also be borne in mind that this appeal is basically on the facts and the law is that this court does not make a practice of setting aside concurrent findings of facts by the lower courts except in circumstances which have not been demonstrated to have existed in this case. It is with the above reasons in mind and the more detailed ones given in the lead judgment of my learned brother OGUNBIYI, J.S.C. that I too dismiss the appeal for lack of merit. Appeal dismissed.

CHUKWUMA-ENEH JSC

This is an appeal against the charge of murder preferred against the accused/appellant and I have read in advance the lead judgment of my learned brother Ogunbiyi JSC in the matter and agree with the findings and the conclusions reached therein.

The facts of this matter however as they are told and the evidence led by the prosecution in expatiation of the same as graphically reviewed in the lead judgment do not admit of any doubt that the prosecution has discharged the burden of proving beyond rea-

sonable doubt the death of the deceased and that the accused with intention of causing the deceased grievously bodily harm has macheted the deceased to death and as if that act is not grave enough he has dug a shallow grave and has buried the deceased's remains therein to cover his wicked acts. The appellant's story of a scuffle with the deceased is self contrived to set the stage for his concocted stories in his defence.

The defences of provocation and self defence put up by the accused even from the accused's own showing are tantamount to afterthoughts and have not attained even the standard of balance of probabilities to warrant any serious comment of any of them. These defences have been rightly rejected after due consideration. I see no merit whatever in this appeal and it should be dismissed and I dismiss it and abide by the orders in the lead judgment.

D _____

GALADIMA JSC

I have read before now the draft of the lead Judgment of my Learned Brother OGUNBIYI, JSC just delivered. I agree with his reasoning and conclusion that the appeal be dismissed for lacking in merit.

The background fact of this case is straightforward. These are set out in detail in the lead Judgment. It is not disputed as to who killed the deceased because appellant himself admitted that he did, after which he callously dug a shallow grave and buried the deceased.

The narrow issue before this court is whether the defence of self-defence put up by the Appellant will avail him having regards to the facts and circumstances of this case. The two lower courts had held that this defence does not avail him. The Appellant apparently must have blamed the deceased for incessant incidents of stealing of his farm products. Surely that had created bad blood between himself and the deceased. However, in my view this, is not good defence. It is vapid to say the least. He had knocked off the dane gun from the deceased's hand. At that vantage position, he still picked up his sharp cutlass with which he cut of the deceased's head. These were the statements of the appellant in Exhibits "B" and "E" shortly after his arrest under caution by the police. He slightly coined his testimony in court so as to put up "self-defence". He stated that after

he had disarmed the deceased, the deceased regained his gun and therefore it was in self defence he killed the deceased

The two courts below did not accept these sequence of events as narrated by the Appellants. The self-defence claim was accordingly rejected. I am also of the view that from the contents of Exhibits “B” and “E” it is very clear that the claim of self-defence put up at the trial by the Appellant was an afterthought. Furthermore their Lordships of the court below held that self defence will not be available where if on the accepted evidence, it is not necessary or where the threat offered is “disproportionate” with the force used (applied) in repelling it. How, indeed can the defence of self defence avail an Appellant who stabbed a deceased person who had been disarmed and was fighting with his bare hand. See, AHMED V. THE STATE (1999) 12 NWLR (Pt.612) 2 NWLR (Pt.10) 862, where such defence could be held not to avail the appellant.

This is the Appellant’s story in court:

“He pointed his dane gun at me and cocked it. In self defence I used the cutlass in my hand to knock off the dane gun from his hand. My cutlass also dropped. We then decided to struggle. The man knocked his head against my chest. I then fell down. The man fell on me with the dane gun which he had succeeded in retrieving. I struggled to push-him off me but to no avail. He tried to shoot his gun again. I raised alarm but nobody came to my rescue. I then looked and saw a cutlass. I threw the cutlass to prevent the man from shooting me. The man was hit with the cutlass. I then pushed the man off me. I was not happy because I did not intend to kill him...”

To the above evidence of the Appellant, the two lower courts reacted sharply. The trial court commented on the Appellant’s demeanour and his contradictory statements at pp 21 - 22 of the record thus:

“I have watched the demeanour of the accused in the witness box when he gave evidence before me. I am convinced he did not say the truth when he said that the deceased after knocking him down retrieved the dane gun and tried to shoot him again hence he killed the deceased. This aspect of his evidence was not narrated in his memory at the police station. Rather in his statement at the police station he said he killed the deceased because of dispute on land. I strongly believe that the accused was the aggressor and assailant in

this case and so defence of self-defence is not available to him. It is clear that as the accused killed the deceased he was not under any danger or threat of death since the gun was already knocked off the hand of the deceased...”

At pages 101 - 102 of the Record, the reaction of the lower court, was that:

“...*He killed the deceased in order to put to rest the quarrels and confrontation that both had been having over land ownership. This confession to my mind being voluntary is quite direct and positive to rule out the defence of self defence... The severity of the machete cut coupled with where the machete was directed i.e. the neck of the deceased are not consistent with defence of self defence but a premeditated intention to either kill the deceased or cause him grievous bodily harm... I do not find the findings of the lower court perverse, unreasonable or insupportable (sic) by evidence or circumstances of this case and as such I have no reason whatsoever to disturb the findings.*”

I have no reason either to disturb the findings by the trial court and affirmation of same by the lower court. These findings are supported by the evidence on record. This Court does not make a practice of setting aside concurrent findings of facts by the lower courts, except such findings are perverse and unreasonable and not being supported by evidence at the trial.

In the light of the foregoing reasons and fuller ones given in detail in the lead Judgment of my learned brother OGUNBIYI JSC I shall and hereby dismiss the appeal. It is lacking in merit.

G **MUHAMMAD JSC**

I read in draft the lead judgment of my learned brother Ogunbiyi JSC with whose reasonings and conclusion that the appeal lacks merit I entirely agree.

The lone issue distilled from the appellant’s two grounds of appeal reads:-

“Whether the Court of Appeal was right in affirming the judgment of the trial court to the effect that the self defence was not available to the appellant in all the circumstances of this case.”

Be it noted that there was no eye witness to the offence for

which appellant is convicted. In Exhibit B and E and in his testimony at the trial court, the appellant admitted that following a quarrel and a scuffle with the deceased, he dealt a blow with a cutlass on the deceased's neck from which injury the latter died immediately. The appellant further admitted burying the deceased. The autopsy conducted on the deceased shows the cutlass injury the appellant inflicted on the deceased to be the cause of death. B

Learned appellant counsel contends that the lower court refused to be guided by extant principles on self-defence and chose rather to apply extraneous matters in denying the appellant the defence he richly merits. The act of burying the deceased by the appellant, it is argued, does not necessarily indicate that appellant's act was premeditated. Were the killing to be premeditated, learned counsel further argues, appellant would have dealt several blows instead of the single blow he did on the deceased. The appellant has remained consistent both in his statements to the police and evidence in court on the facts which, submits learned counsel, on the authorities, inter alia of *Ozaki V. State* (1990) 1 NWLR (Pt. 124) 92 at 108; *Uwogboe V. State* (2007) 6 NWLR (Pt 103) 606, *Laoye v. State* (1985) 2 NWLR (Pt 10) 862 and *Ahmed V. State* (1999) 12 NWLR (Pt. 612) 641, entitle the appellant to the defence he raises. C D E

Responding learned counsel submits that the fact of appellant's admission of the murder of the deceased, the severity of the injury inflicted as well as the reason for appellant's illegal conduct if taken into account disentitle him from the defence he advances. Indeed, learned counsel further contends, all the cases the appellant seeks to rely on do not avail him. Rather, the cases necessitate appellant's being held culpable for the deliberate murder of the deceased. He urges on us not to lose sight of the fact that the two courts below have concurrently found the appellant culpable and the difficulty this court faces in setting such findings aside. F G

The issue raised by the appeal is a very narrow one. It is not in dispute that the appellant had inflicted on the deceased, Babalola Ezekiel, the fatal cutlass injury effect of which Ex A, the medical report, states thus:- H

"Death was from the machete injuries sustained in the neck. The autopsy revealed a 10 x 5 cm laceration of the side and back of the head extending from the left pinna to the right side of the back of

the neck.”

This is the nature of the wound that led to the death of the victim of what the appellant claims to be an act in self defence. The issue in the appeal is whether the two lower courts are wrong in their concurrent findings that the appellant, from the evidence before them, B is not entitled to the defence he asserts.

It must outrightly be stressed that the fact that appellant has admitted killing the deceased does not absolve the respondent from further proving that the appellant did not kill the deceased in self C defence. The onus of proof in criminal cases and the instant is such, remains on the respondent. The onus is static through out. It does not shift unto the appellant. See *Woolmington v. DPP (1935) AC 462*, *Ogbu Nwagu V. State (1966) ALL NLR 207* at 208.

It must be remembered that there was no eye witness to the D incidence that led to the death of the deceased. In appellant’s first statement to the police, Ex B, he stated partly thus:-

“Ezekiel Awodiya put his dane gun in his heart and said that he will kill me and I used my cutlass in my hand to hit his dane gun in his hand, the dane gun then fell down from his hand. There Baba Ezekiel E Awodiya greaped me and we started fighting in my farm as both of us were fighting in the farm for almost one hour and Baba Ezekiel Awodiya over-powered me and I cannot do any other along to defence myself. Then I took my cutlass in the ground and cut his head. F That is where he died instantly.”

In his second statement, EX E, the appellant stated partly as follows:-

“Both myself and the deceased have common boundary in our farm I did not entered deceased farm before and he did not cut G me in his farm stealing his properties before. I only kill am because of the farm land that use to cause anything between me and himself.”

In his evidence before the trial court the appellant inter alia said:-

“I live of No. 72 Igbogi Street. I am a driver. I know Babalola H Ezekiel. I did not kill Babalola Ezekiel. Earlier Babalola Ezekiel had approached me to release a farmland at Iwori to him. I have three farms in the area. I refused. The man then went away. Three days later, Babalola Ezekiel came to make the same request. He questioned me why I gave farm to a woman. I told him that was my own

decision. The man again went away. On the day of the incident I was in my farm around 8 am about 10 am. the man came again and challenged me. He pointed his dane gun at me and cocked it. In self defence, I used the cutlass in my hand to knock off the dane gun from his hand. My cutlass also dropped. We then decided to struggled. The man knocked his head against my chest. I felt down. The man felt on me with the gun which he had succeeded in retrieving. I struggled to push him off me but to no avail. He tried to shoot the gun again, I raised alarm but nobody came to my rescue. I then looked around and saw a cutlass. I threw the cutlass to prevent the man from shooting me. The man was hit with the cutlass, I then pushed the man off me. I was not happy because I did not intend to kill him."

Having evaluated the evidence before him, Awotoye J (as he then was) inferred as follows:-

"I have carefully watched the demeanour of the accused in the witness box when he gave evidence before me. I am convinced that he did not say the truth when he said that the deceased after knocking him down retrieve the dane gun and tried to shoot him again hence he killed the deceased. This aspect of his evidence was not narrated in his memory at the Police Station. Rather, in his statement at the Police Station he said he killed the deceased because of the dispute on land. I strongly believe that the accused was the aggressor and assailant in this case and so the defence of self-defence is not available to him. It is clear that at the stage the accused killed the deceased he was not under any danger or threat of death since the gun was already knocked off the hand of the deceased."

In affirming the trial court's foregoing finding, the court below at pages 101 - 102 of the record concludes as follows:-

"In the present case on appeal, allegations of theft on the deceased's farm which shares the same boundary had been made against the Appellant which he denied but his statement to the police is explicit, that he killed the deceased in order to put to rest the constant quarrels and confrontation that both had been having over land ownership. This confession to my mind being voluntary is quite direct and positive to rule out the defence of self defence and to ground a conviction for the murder of the deceased. See ADIO & ANOR V. THE STATE (2005) 4 ACLR 296 Page 309. The severity of

the machete cut coupled with where the machete cut was directed i.e. the neck of the deceased are not consistent with the defence of self defence but a pre-meditated intention to either kill the deceased or cause him grievous bodily harm. That he dug a pit in the ground where he buried the deceased's body which he covered with cocoa leaves and told nobody of the killing was an attempt to hide his crime. I do not find the findings of the lower court perverse, unreasonable or unsupportable by evidence or circumstances of this case and as such I have no reasons whatsoever to disturb the findings..."

C I disagree with learned appellant counsel that in their foregoing findings the two lower courts are wrong. Firstly, as rightly submitted by learned respondent counsel, the two courts have made concurrent findings on appellant's guilt and accordingly convicted and sentenced him. It is often more difficult to have concurrent findings D set aside than it would a decision of an only court. All the same, such decisions if shown to be perverse can on further appeal be set aside. See Akpabio V. State (1994) 7 NWLR (pt 359) 635 and Ejikeme v. Okonkwo (1994) 8 NWLR (Pt 362) 266.

E Secondly, the determination of this appeal requires re-evaluation of the evidence on the basis of which the two courts made their findings. It is trite that the duty of evaluating evidence led remains primarily that of the trial court particularly where the exercise rests squarely on the credibility of the witnesses whose evidence is being F considered. An appellate court is, however, equally entitled to evaluate evidence where the trial court either failed to take advantage of the opportunity it had in the course of trial of seeing the witnesses and observing their demeanour or took extraneous matters in arriving at its conclusions from the exercise. See Mogaji v. Odojin (1978) G 4 SC 91; Okonji v. State (1987) 1 NWLR (52) 659 and Kalio v. Woluchem (1985) 1 NWLR (pt 4) 610. From the judgment of the trial court earlier reproduced herein, I am of the firm view that the lower court's decision that in evaluating the evidence led, the trial court has fully discharged its duty unassailable. In Ige v. Akoju (1994) H 4 NWLR (pt 340) 535 at 543, this court observed as follows:-

"While it is true that the demeanour of a witness may not be a guide to the truth, the conclusions of a trial court judge on how a witness behaved in the box should not easily be disregarded" See also Kasa V. State (Pt 344) 269.

The defence the appellant claims entitlement to, as rightly held by the court below, is provided by S. 286 of the Criminal code which reads:-

“When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make effectual defence against the assault: Provided that the force used is not intended, and is not such as is likely to cause death or grievous harm.

If the nature of the assault is such as to cause reasonable apprehension of death or grievous harm, and the person using force by way of defence believes, on reasonable grounds, that he cannot otherwise preserve the person defended from death or grievous harm, it is Lawful for him to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous harm.”

Learned appellant counsel must be reminded one important finding of the trial court which they failed to appeal against at the lower court. The trial court found that the appellant had not been assaulted by the deceased. Rather, the court further held, appellant was the aggressor and assailant. The law is that a finding of a competent court persists until it is set aside on appeal. Having not appealed against the trial court’s finding on the issue, the appellant could not have legitimately raised the same defence at the court below. See: *Aladegbemi v. Fasanmade* (1988) 3 NWLR (Pt 81) 129.

Finally, even if the appellant had appealed against the finding the defence he asserts under S. 286 of the criminal Code will still not have availed him. In *Bassey v. The Queen* (1963) NSCC 227 at 229, this court in stating the circumstances which will warrant a finding in favour of an accused who raises the defence under S. 286 of the Criminal Code, held:-

“The appellant was attacked by two women, one of them elderly, and a man. None of them was armed with any weapon. The appellant had a knife which he used on the man, who let go of him, opened the door and ran out. The appellant struck the elderly woman, the deceased, once with a knife and she let go to him and he then struck her again three times when she was at the door of the house.

The appellant received no injuries and was unable to show any on his person. In these circumstances we think that the assault on

the appellant was not such as to cause reasonable apprehension of death or grievous harm and that the force used by the appellant was excessive in all these circumstances. The defence of self defence was consequently rightly rejected.”

B In the instant case, the court below is right to have affirmed the
decision of the trial court which found on the basis of Ex A, the medi-
cal report, the two confessional statements of the appellant as well as
his evidence in court that not only was the appellant not under any
apprehension of death or grievous harm, he was also the aggressor
C and assailant and, the force he used on the deceased, given the cir-
cumstances, was totally excessive and unjustified. I agree entirely with
the lower courts decision that appellant is not entitled to the defence
he asserts under S. 286 of the Criminal Code.

D It is for the foregoing and the fuller reasons contained in the
lead judgment that I also dismiss the appeal and abide by the conse-
quential orders reflected therein.

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