

SUPREME COURT OF NIGERIA
FRIDAY 1ST FEBRUARY, 2013. SC. 232/2010
**CORAM:- W. S. N. ONNOGHEN, C. M. CHUKWUMA-
ENEH, S. GALADIMA, M. D. MUHAMMAD,
C. B. OGUNBIYI, JJSC**

SUNDAY NJOKWU APPELLANT
V.
THE STATE RESPONDENT

MURDER - Defence - Provocation - Is not a complete defence to charge of murder - As its being upheld would not result in discharge & acquittal - But in reduction of the offence to manslaughter (H1)

MURDER - Composition - The offence is committed if inter alia - The offender intends to cause death of deceased - Or to do to deceased some grievous harm (H2)

MURDER - Ingredients - Proof - Prosecution must prove that deceased died - Which death was caused by accused - Who intended to either kill or cause grievous bodily harm (H3)

MURDER - Evidence - Identity of deceased - Since there is no doubt as to identity of body of deceased - Failure of prosecution to call witness in respect of same - Is irrelevant (H4)

MURDER - Date of death - Contradictions - Discrepancies as to the actual date is not fatal to prosecution's case - Since the death occurred due to injuries sustained from attack by appellant (H5)

MURDER - Provocation - Elements - Provocation consists of the provocative incident - Actual and reasonable loss of self control - And proportionate retaliation to the provocation (H6)

MURDER - Provocation - Witchcraft - Plea of provocation founded on witchcraft and mere words - Cannot stand in law (H7)

FACTS

The deceased (Bartholomew Ivo) went with his fellow townsmen to console accused/appellant over the death of his two year old son and also to assist in the burial. During the burial, there was an alleged misunderstanding between appellant, his wife and the deceased arising from a previous action of the deceased by allegedly throwing charms at appellant with a curse that appellant's two sons will die and that it was the night following the incident that the two year old boy died in a mysterious circumstance.

It was in the above circumstance that the deceased is alleged to have taunted appellant during the burial activities by saying "I think I told you that you will see". Appellant was thus infuriated and he attacked the deceased with a machete. The deceased died 9 days thereafter as a result of injuries sustained from the attack. Consequently, appellant was arrested and arraigned before the High Court of Delta State, for murder contrary to section 319(1) of the Criminal Code, Cap. 48 vol. II, Laws of the defunct Bendel State. At the trial, he admitted committing the offence, but raised the defence of provocation. The court nevertheless found him guilty of murder. Appellant was accordingly convicted and sentenced. Being dissatisfied, appellant appealed to the Court of Appeal Benin City Division. The appeal was dismissed and appellant filed further appeal to Supreme Court.

ISSUES FOR DETERMINATION

"1) whether on the totality of evidence adduced, the learned Justices were right in holding that prosecution proved the case beyond reasonable doubt?

2) Whether the defence of provocation availed the Appellant on the facts and circumstances of this case?"

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

MURDER - Defence - Provocation

1. I have to make haste to comment that a defence of provocation is not a complete defence to a charge of murder as it being upheld would not result in the discharge and acquittal of the accused but in a reduction of the offence charged from

murder to manslaughter.

When a defence of provocation is raised by an accused person, he must, of necessity admit the commission of the offence charged in the first place before going on to explain the circumstances in which it was committed and contending that due to the circumstances surrounding the commission of the offence of murder, the offence be reduced from murder to manslaughter. (pp. 1102 B/1108 D)

MURDER - Composition

2. It is settled law that an offence of murder is committed when a person unlawfully kills another under any of the following circumstances, to wit:-

- (i) If the offender intends to cause the death of the person killed or that of some other persons;**
- (ii) If the offender intends to do to the person killed or to some other person some grievous harm;**
- (iii) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is such as to be likely to endanger human life.**
- (iv) If the offender intends to do grievous harm to some persons for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant or for the purpose of facilitating the flight of an offender who has committed or attempted to commit such an offence;**
- (v) If death is caused by administering any stupefying or overpowering thing for either of the purposes last aforesaid;**
- (vi) If death is caused by willfully stopping the breath of any person for either of such purposes.**

It is also settled law that it is immaterial that the offender charged under (ii) supra did not intend to hurt the particular person who is killed while it is also immaterial in case of (iii) also supra, that the offender did not intend to hurt any person neither is it material in case of iv - vi supra that the offender did not know that death was likely to result from his action.

(p. 1103 G)

MURDER - Ingredients - Proof

3. As rightly pointed out by both Counsel, the ingredients of the offence of murder, which the prosecution has the burden to prove beyond reasonable doubt are as follows:

- (a) that the deceased died;
- B (b) that the death was caused by the accused; and
- (c) that the accused person intended to either kill the victim or cause him grievous bodily harm. (p. 1104 D)

Evidence - Identity of deceased

- C **4. I have to emphasise that there is no scintilla of evidence on record to show the existence of any doubt as to the identity of the person who died and whose body was examined by PW4 and exhibit "A" issued. That being the case, the argument that**
- D **the failure of the Prosecution to call Paul Ivo, the brother of Bartholomew Ivo who identified the body of the said Bartholomew Ivo to PW4 for the autopsy is of no legal consequence, as same is grossly irrelevant. If the Appellant had**
- E **raised any doubt as to the identity of the body on which exhibit "A" was issued or made same an issue, then the Respondent could have had the duty to produce further evidence to support their charge. In the contrary, the Appellant admitted inflicting the cutlass/machete cuts on the stomach of Bartholomew Ivo which by exhibit "A" is found to have caused**
- F **his death. (p. 1105 H)**

MURDER - Date of death - Contradictions

- G **5. In the sub issue of contradictions in the evidence of Prosecution Witnesses, particularly PW3 and PW4 with regards to the date of death of the deceased, I agree with the lower Courts that the contradictions are not material so as to be fatal to the case of the Prosecution. Whether Bartholomew Ivo died nine days from the date of attack by the Appellant as stated by**
- H **PW3 or on 9/3/98, which was much less than 9 days from 4/3/98 as stated by PW4 - the Medical Doctor who performed the autopsy, the fact of the matter which remains relevant to the case is that Bartholomew Ivo who was savagely attacked by the Appellant on 4/3/98 died as a result of the injuries sus-**

tained from the attack by the Appellant as found by the Medical Doctor, and the trial Court and affirmed by the lower Court.

In any event, exhibit “A”, the medical report clearly stated the date Bartholomew Ivo died as 9/3/98, thereby putting paid (sic, rest) to the controversy. I agree with the concurrent findings of the lower Courts that the contradiction as to date of death of the deceased is no more than a mere slip which never misled the Appellant. (p. 1107 A)

MURDER - Provocation - Elements

6. In deciding the issue as to whether or not there is provocation in any particular case, regard must be had to the nature of the act by which the offender caused death; to the time which elapsed between the provocation and the act which caused death; to the offender’s conduct during that interval; and to all other circumstances tending to show the state of his mind.

Provocation therefore consists of three elements, to wit:

(a) The provocative incident,

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

and,

(c) The retaliation, which must be proportionate to the provocation. (p. 1108 H)

MURDER - Provocation - Witchcraft

7. From the stand point of the law, the incidence of dropping a charm or juju at the residence of the Appellant which is allegedly linked with the death of the two year old son of the Appellant does not qualify as an incident of provocation. It does not matter that the Appellant may honestly believe that there was a connection between the two events, which belief is obviously founded on witchcraft simpliciter as learned Counsel for the Appellant has offered no other explanation. It is however, settled law that a plea of provocation founded upon witchcraft cannot stand.

Another thing said to constitute an incident of provocation is the alleged statement by the deceased on the date, of the incident to wit. “I think I told you that you will see.”

The above are mere words which do not constitute provocation on our law. (p. 1109 F)

NOTABLE POINT OF INTEREST

OGUNBIYI JSC

B 1. Prosecution must prove guilty of accused

The general principle of law is well settled in plethora of authorities that the burden of proof in all criminal cases is upon the Prosecution to prove the accused guilty of the offence charged beyond reasonable doubt. It is not for the accused to prove his innocence as this will negate the Constitutional provision that the accused is presumed innocent until proved otherwise. Our judicial system of adjudication is adversarial and not inquisitorial. However and for purpose of availing an accused person the benefit of the defences which will serve a mitigating factor against his conviction, the onus is upon him to raise such a defence which can only be within his knowledge. The Prosecution cannot be saddled with that which is not known to it. (p. 1116 H)

E REPRESENTATION

Chike Onyemenam, Esq. with Philips Adu-Odogwu, for appellant
A. A. Adedeji, Esq. with C. Aliego Esq., for the respondent

F CASES REFERRED TO

- Sule vs State (2009) All FWLR (pt. 481) 809
- Okoro vs State (1988) 12 SC (pt. 2) 83
- Ahmed vs State (2002) FWLR (pt. 90) 1350
- Princewill vs State (1994) 7-8 SCNJ (pt. 2) 226
- G Uguru vs State (2002) FWLR (pt. 103) 330
- Onyenankeya v. State (1964) NMLR 34
- Agbo vs State (2006) All FWLR (pt. 309) 380
- Archibong vs State (2006) All FWLR (pt. 323) 1747
- Igbele vs State (2000) 6 NWLR (pt. 975) 100
- H Opayemi vs State (1985) 2 NWLR (pt. 5) 101
- Olayinka vs State (2007) 9 NWLR (pt. 1040) 561
- R. vs Skyes (1913) 8 CAR 233
- Ntaha vs The State (1972) 4 SC 1

Yesufu vs The State (1976) 6 SC 167

Ikemson vs The State (1989) 3 NWLR (pt. 110) 455

STATUTE REFERRED TO

Criminal Code, s. 319(1)

B

LEAD JUDGMENT BY ONNOGHEN JSC

This is an Appeal against the Judgment of the Court of Appeal, Benin Division in Appeal No. CA/B/83c/2007 delivered on the 4th day of March, 2010 in which the Court dismissed the Appeal of the Appellant against his conviction and sentence to death by the Delta State High Court, Issele-Uku Judicial Division in charge No. HCI/3c/2000. C

The Appellant was charged with the offence of murder punishable under Section 319(1) of the Criminal Code, Cap. 48 vol. II, Laws of the defunct Bendel State in that on or about the 4th day of March, 1998 at Idumunel Quarters, Issele-Uku within Issele-Uku Judicial Division, he murdered one Bartholomew Ivo. The facts of the case, as can be gleaned from the record, include the following:- D

On 4/3/98, one Bartholomew Ivo went with his fellow townsmen from Ohazara town, Ebonyi State who settled in Issele-Uku town, Delta State to console the Appellant over the death of his two year old son and assist in the burial. The Appellant and his townsmen belong to the same town association with the deceased. During the burial, there was an alleged misunderstanding between the Appellant, his wife and the deceased arising from a previous action of the deceased by allegedly throwing charms at the Appellant with a curse that the Appellant's two sons will die; that it was the night following the incident that the two year old boy died in a mysterious circumstance. E F G

It is in the above circumstance that the deceased is alleged to have taunted the Appellant during the burial activities by saying "I think I told you that you will see," and making jest of the Appellant by placing his fingers on his eyes as a result of which the Appellant went into his room, brought out a cutlass/machete and struck the deceased on the head and stomach and the deceased collapsed and was rushed to hospital at Issele-Uku but later transferred to the General Hospital, Asaba, where he later died on 9th March, 1998. The H

Appellant was arrested and charged with the offence of murder and he volunteered a statement in which he admitted inflicting the machete cuts on the deceased. Following his trial, Appellant was found guilty and convicted of the offence of murder and sentenced accordingly.

B Being dissatisfied with the Judgment, the Appellant appealed to the Court of Appeal, Benin Division in Appeal No. CA/B/183c/2007 which Appeal was dismissed by the Court in a Judgment delivered on the 4th day of March, 2010 resulting in the instant further
C Appeal to this Court. The issues for determination which have been identified by learned Counsel for the Appellant in the Appellant's brief deemed filed on 26/5/11 and adopted in argument of the Appeal on the 8th day of November, 2012 are as follows:

D *"(i) Whether the learned Justices of the Court of Appeal were right in affirming the trial Court's conviction and sentence of the Appellant to death for murder on the grounds that the prosecution established its case against the Appellant beyond reasonable doubt?"*

E *"(ii) Whether from the oral and documentary evidence adduced by both parties, the Appellant is not entitled to the defence of provocation; so as to enable him canvass the defence before the Supreme Court for the first time?"*

A.A. ADEDEJI ESQ, Counsel for the Respondent also identified two issues for determination in the Respondent's brief deemed
F filed on 14/3/12 which issues are crafted as follows:-

"1) whether on the totality of evidence adduced, the learned Justices were right in holding that prosecution proved the case beyond reasonable doubt?"

G *2) Whether the defence of provocation availed the Appellant on the facts and circumstances of this case?"*

Looking closely at the issues formulated by both Counsel, it is clear that they are the same though the ones formulated by learned Counsel for the Respondent are more to the point and very apt. Another point to be noted from the onset is the fact that from the
H two issues formulated for determination by both Counsel and reproduced above, the Appeal is on the facts of the case and consequently on concurrent findings of facts.

However, in arguing issue 1, learned Counsel for the Appellant, CHIKE ONYEMENAM ESQ, referred to the charge and sub-

mitted that in a charge of murder, the Prosecution must prove the following:

- (a) the death of the deceased;
 - (b) that the act of the accused caused the death of the deceased, and
 - (c) the act of the accused was intentional or pre-meditated
- relying on the decision in the case of *Sule vs State* (2009) All FWLR (pt. 481) 809 at 825 - 826.

It is the contention of learned Counsel that the prosecution failed to establish beyond reasonable doubt, the death of Bartholomew Ivo and the cause of his death and that the lower Courts erred in finding and affirming that the Respondent proved the death and cause of death of the Bartholomew Ivo. The reasons for the above submission are stated by learned Counsel to be:

- (a) the Prosecution did not prove that the deceased in the charge actually died, neither was it proved that the body on which the Pathologist performed the autopsy is that of the person mentioned in the charge as being the person killed or murdered; relying on *Okoro vs State* (1988) 12 S.C (pt.2) 83 at 89; *Ahmed vs State* (2002) FWLR (pt.90) 1350 at 1372; *Princewill vs State* (1994) 7-8 S.C.N.J (pt. 2) 226 at 235; that the Prosecution did not lead evidence that a Medical Doctor certified Bartholomew Ivo dead neither was such a Doctor called to testify at the trial, neither was a certificate of death tendered; that since the deceased did not die on the spot of attack but days after receiving treatment from two hospitals it was mandatory for the Prosecution to call medical evidence to prove the cause of death, relying on *Uguru vs State* (2002) FWLR (pt 103) 330 at 347; *Onyenankeya v. State* (1964) NMLR 34 at 36; that the evidence of PW1 - 3 who witnessed the attack on the deceased is not sufficient proof of the cause of death; that Appellant never confessed to the crime of murder in his exhibit B; that exhibit B contains evidence of provocation by the deceased, which led to the attack.

It is the further contention of learned Counsel that there are contradictions in the evidence of Prosecution Witnesses as PW3 stated that the deceased died 9 days after the attack, while PW4 the Pathologist put the date of death to be on 9/3/98, which contradictions are not minor or immaterial as held by the lower Courts; that the contradictions being material and there being no reasonable expla-

nation by the Prosecution, the conviction of Appellant based on such evidence should be quashed, relying on *Agbo vs State* (2006) All FWLR (pt 309) 380 at 1399; *Archibong vs State* (2006) All FWLR (pt. 323) 1747 at 1783-1784; that the Prosecution failed to call one Paul Ivo who allegedly identified the body of the deceased to the Pathologist, PW4 who performed the autopsy which renders the evidence of PW4 as to the identity of the body he examined doubtful.

On the third ingredient of the offence of murder, learned Counsel sought to treat same under issue 2 dealing with provocation.

I have to make haste to comment that a defence of provocation is not a complete defence to a charge of murder as it being upheld would not result in the discharge and acquittal of the accused but in a reduction of the offence charged from murder to manslaughter.

Secondly, a defence of provocation, in the circumstances of this case and having regard to the trend of argument of learned Counsel for appellant in issue 1 can only validly be raised by way of an alternative argument because the said defence is an admission to the commission of the offence charged but that the circumstances in which the said offence was committed should reduce the gravity of the offence from murder to manslaughter.

In the issue under consideration, it is the submission of Counsel for the Appellant, as summarised supra in this Judgment that the death of Bartholomew Ivo has not been proved by the Prosecution neither has the Prosecution proved that it was the act of the Appellant that caused the death of the said Bartholomew Ivo, period.

However, turning to the submission of learned Counsel for the Respondent, it is contended that the lower Court was right in affirming the decision of the trial Court that the Appellant is guilty of the offence charged and convicting and sentencing him accordingly; that the offence was proved beyond reasonable doubt as proof can be by confession, direct evidence of eye witnesses and circumstantial evidence, relying on *Igabele vs State* (2000) 6 NWLR (Pt 975) 100; *Mohammed vs State* (2007) 11 NWLR (pt. 1045) 3030; that the deceased died and that the direct evidence of the Appellant confirms that he died through the acts of the Appellant; that exhibit B is a confessional statement of the Appellant in relation to the offence; that exhibit A also clearly contains the evidence of the cause of death

of the deceased being the medical report on the deceased by the Pathologist; that an accused can be convicted solely on his confessional statement, relying on *R. vs Skyes* (1913) 8 CAR 233; *Ntaha vs The State* (1972) 4 S.C 1; *Yesufu vs The State* (1976) 6 S.C 167; *Ikemson vs The State* (1989) 3 NWLR (pt. 110) 455; that there is evidence that the death of Bartholomew Ivo was caused by the unlawful and intentional act of the Appellant; that the facts in *Uguru vs state* (supra) relied upon by Appellant are distinguishable from this case as there was no evidence on which part of the body of the deceased in *Uguru's* case was struck or the type of injury inflicted on the deceased while in the instant case, the Prosecution led evidence as to the condition that led the deceased to the hospitals and also showed what part of the body of the deceased was struck by the Appellant as well as the type of injury sustained thereby linking Appellant with the cause of death of the deceased; that deceased was rushed to a private hospital which immediately referred him to the General Hospital due to the severe nature of the wound sustained.

There is no evidence of any treatment being given to the deceased at the first hospital. With regard to the none calling of Paul Ivo as a witness by the Prosecution, Counsel submitted that the Prosecution is under no obligation to call every witness to prove a case when one witness would suffice, relying on *Opayemi vs State* (1985) 2 NWLR (pt. 5) 101; *Olayinka vs State* (2007) 9 NWLR (pt. 1040) 561 at 584; that the identity of the deceased was never in doubt in anyway; relying on *Idemudia vs State* (1999) 69 LRCN 1043.

Finally, Counsel submitted that the contradictions relied upon by the Appellant are not material and should be discountenanced, relying on *Kalu vs State* (1988) 4 NWLR (pt. 90) 503; *Akpan vs State* (1991) 3 NWLR (Pt. 187) 646. Learned Counsel then urged the Court to resolve the issue against the Appellant.

It is settled law that an offence of murder is committed when a person unlawfully kills another under any of the following circumstances, to wit:-

- (i) If the offender intends to cause the death of the person killed or that of some other persons;***
- (ii) If the offender intends to do to the person killed or to some other person some grievous harm;***
- (iii) If death is caused by means of an act done in the***

prosecution of an unlawful purpose, which act is such as to be likely to endanger human life.

(iv) If the offender intends to do grievous harm to some persons for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant or for the purpose of facilitating the flight of an offender who has committed or attempted to commit such an offence;

(v) If death is caused by administering any stupefying or overpowering thing for either of the purposes last aforesaid;

(vi) If death is caused by willfully stopping the breath of any person for either of such purposes.

It is also settled law that it is immaterial that the offender charged under (ii) supra did not intend to hurt the particular person who is killed while it is also immaterial in case of (iii) also supra, that the offender did not intend to hurt any person neither is it material in case of iv - vi supra that the offender did not know that death was likely to result from his action.

As rightly pointed out by both Counsel, the ingredients of the offence of murder, which the prosecution has the burden to prove beyond reasonable doubt are as follows:

(a) that the deceased died;

(b) that the death was caused by the accused; and

(c) that the accused person intended to either kill the victim or cause him grievous bodily harm. See *Durwode vs State* (2000) 15 NWLR (pt. 691) 467; *Idemudia vs State* (1999) 7 NWLR (Pt. 610) 202; *Akpan vs State* (2000) 12 NWLR (Pt.682) 607; *Ubani vs State* 2003 18 NWLR (pt. 851) 2224; *Igabele vs State* (2006) (1992) 2 NWLR (pt.222) 164 etc.

It is the submission of Counsel for the Appellant that the Respondent failed to establish beyond reasonable doubt the death of Bartholomew Ivo and the cause of his death contrary to the findings by the trial Court and its affirmation by the lower Court. Learned Counsel has also given reasons for his so submitting which had earlier been reproduced in this Judgment. The question is whether learned Counsel is right.

It is very important to note that the Appellant does not deny matcheting Bartholomew Ivo on the day in question neither is he

contending that the said Bartholomew Ivo he so matcheted is still alive while he is being charged with his murder. His argument, which is nothing but the acts of a drowning man clinging to anything, including a straw, is that the dead body on which a post mortem examination was performed by the doctor who testified as PW4, has not been proved beyond reasonable doubt to be that of Bartholomew Ivo. B

The above submission has been made despite the fact that the body was identified by a brother of late Bartholomew Ivo to the Medical Doctor who performed the autopsy and subsequently issued a medical report as to the cause of death to be that of Bartholomew Ivo! It is also the contention of the Appellant that no death certificate was tendered by the Respondent to establish the death and cause of death of Bartholomew Ivo. The submission is very much misconceived in view of the autopsy report by PW4 which was tendered and admitted as exhibit "A" which also contains the cause of death of the deceased. C D

At pages 43 - 44 of the record, PW4, the Medical Doctor who performed the autopsy and issued exhibit "A" testified as follows:-

"I performed an autopsy on the fresh body of one Bartholomew Ivo, upon examination, I found that the abdomen was distended with fluid, there were severe injuries on the body of the stomach; the right lobe of the liver and the small intestines. The abdominal cavity contained blood clots. The primary cause of death was by abdominal stab wounds with severe injuries to the liver, stomach and the intestines. Secondary causes are massive internal hemorrhage and eventually the deceased died of shock." E F

The above finding by the Doctor as to where the deceased sustained the injuries that led to his death is consistent with the statement of the Appellant, exhibit "B" where he stated, at page 84 of the record inter alia thus: G

"... I was annoyed and with that annoyance I rushed into my room and took cutlass and cut him in his stomach."

At page 59 of the record, the Appellant had identified the instrument of death, as follows: H

"This is the cutlass I used on Bartholomew."

I have to emphasise that there is no scintilla of evidence on record to show the existence of any doubt as to the iden-

tity of the person who died and whose body was examined by PW4 and exhibit “A” issued. That being the case, the argument that the failure of the Prosecution to call Paul Ivo, the brother of Bartholomew Ivo who identified the body of the said Bartholomew Ivo to PW4 for the autopsy is of no legal consequence, as same is grossly irrelevant. If the Appellant had raised any doubt as to the identity of the body on which exhibit “A” was issued or made same an issue, then the Respondent could have had the duty to produce further evidence to support their charge. In the contrary, the Appellant admitted inflicting the cutlass/machete cuts on the stomach of Bartholomew Ivo which by exhibit “A” is found to have caused his death.

Secondly, the Appellant has not suggested that the real Bartholomew Ivo is alive and well somewhere while he stands trial for his alleged murder.

It is also the submission of learned Counsel for the Appellant that since the deceased was treated in two hospitals before his death, there is the duty on the Respondent to adduce evidence as to the nature of injuries he sustained and the treatment he received and finally the cause of his death, and that failure to do so is fatal to the case of the Prosecution.

From the evidence of PW1, PW2 and PW3, as can be gleaned from the record, it is not disputed that Bartholomew Ivo was initially taken to a private hospital at Issele-Uku where he was immediately referred to the General Hospital at Asaba due to the severity of the wounds he sustained. There is no evidence from either the Prosecution or Defence that Bartholomew Ivo was given any medical treatment at the private hospital in Issele-Uku before the reference to make it necessary to call evidence to establish the nature of the treatment he received or drugs administered which makes the case of *Uguru vs State (2005) ACLR 523* cited and relied upon by Counsel for the Appellant not relevant to the instant case and consequently inapplicable. In the instant case, it was only at the General Hospital, Asaba that the deceased was treated until his death and an autopsy report exhibit “A” was issued which showed the cause of death as being the result of the machete cut wounds inflicted on the deceased by the Appellant in the region of the body admitted by the Appellant

as being where he attacked the deceased.

In the sub issue of contradictions in the evidence of Prosecution Witnesses, particularly PW3 and PW4 with regards to the date of death of the deceased, I agree with the lower Courts that the contradictions are not material so as to be fatal to the case of the Prosecution. Whether Bartholomew Ivo died nine days from the date of attack by the Appellant as stated by PW3 or on 9/3/98, which was much less than 9 days from 4/3/98 as stated by PW4 - the Medical Doctor who performed the autopsy, the fact of the matter which remains relevant to the case is that Bartholomew Ivo who was savagely attacked by the Appellant on 4/3/98 died as a result of the injuries sustained from the attack by the Appellant as found by the Medical Doctor, and the trial Court and affirmed by the lower Court.

In any event, exhibit "A", the medical report clearly stated the date Bartholomew Ivo died as 9/3/98, thereby putting paid (sic, rest) to the controversy. I agree with the concurrent findings of the lower Courts that the contradiction as to date of death of the deceased is no more than a mere slip which never misled the Appellant.

On the second issue, it is the submission of learned Counsel for the Appellant that a clear case of provocation is made out in the record and that the said defence avails the Appellant, which defence was glossed over by the lower Courts; that there is evidence that the deceased dropped a substance said to be a charm a night before the death of the Appellant's son in the house of the Appellant and cursed the Appellant to the effect that the Appellant's two sons would die one after the other; that one of the Appellant's two sons died the following night of the incident; that while the child was being buried, the deceased (Bartholomew Ivo) taunted the Appellant by saying - "I think I told you that you will see" thereby making jest of the Appellant; that the appellant reacted immediately by getting hold of his cutlass and striking Bartholomew Ivo with it.

It is the contention of Counsel that the above facts constitute provocation, particularly as the Appellant acted instantly leaving no room for passion to cool and as such the Appellant lacked the mens rea needed to constitute the offence with which he was charged.

On his part, learned Counsel for the Respondent submitted

that the defence of provocation does not avail the Appellant as he did not commit the act/offence on the heat of passion caused by sudden provocation before there was time for his passion to cool, relying on *Chukwu Obaji vs State* (1965) NMLR 417 at 442; that the Appellant did not machete the deceased soon after the deceased
 B threw a charm on him saying that the Appellant's sons would die one after the other, that the death of one of the sons later which resulted in the matcheting of the deceased by the Appellant cannot be said to have been done under provocation but an act of revenge.

C I had earlier stated in this judgment that the submission of learned Counsel for the Appellant on the issue of provocation is not made in the alternative having regards to the submissions of the Appellant's Counsel in issue (1) which is a complete denial that it was the act of the Appellant that caused the death of the deceased or that
 D death of the deceased has not been established satisfactorily neither has the cause of that death been traceable to the acts of Appellant.

***When a defence of provocation is raised by an accused person, he must, of necessity admit the commission of the offence charged in the first place before going on to explain the circumstances in which it was committed and contending that
 E due to the circumstances surrounding the commission of the offence of murder, the offence be reduced from murder to manslaughter.***

F The above notwithstanding, is there evidence on record to support the defence of provocation as contended by Counsel for the Appellant? The answer is completely in the negative. In the case of *Akang vs State* (1971) 1 ALL NLR 46 at 49, COKER, JSC restated the basis of the defence of provocation as follows:

G *"Provocation which reduces what would otherwise amount to murder to manslaughter is a legal concept made up of a number of elements which must co-exist. It is of paramount importance in the consideration of this concept that the act held out as a natural and justifiable action of the provoked person be done not in self revenge
 H but in ventilation of a natural, sudden and contemporaneous feeling of anger caused by circumstances of the occasion."*

In deciding the issue as to whether or not there is provocation in any particular case, regard must be had to the nature of the act by which the offender caused death; to the time

which elapsed between the provocation and the act which caused death; to the offender's conduct during that interval; and to all other circumstances tending to show the state of his mind.

Provocation therefore consists of three elements, to wit:

(a) The provocative incident,

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

and,

(c) The retaliation, which must be proportionate to the provocation. See State vs Ibe (1965) NMLR 463; Akang vs State

supra.

In the instant case, what is the provocative incident which the Appellant puts forward as constituting the basis of his provocation? From the Appellant's brief, learned Counsel for the Appellant has listed them as: fact that the deceased had on a previous day gone to the Appellant's house and dropped a substance said to be a charm and told the Appellant that "since he refused to agree, he would now agree by force as his two sons would begin to die one after the other" that the same night, the Appellant's two year old son began to shout "No, No, No" and died the following day; that the deceased attended the burial of the dead son and allegedly taunted the Appellant thus "... I think I told you that you will see" as a result of which the Appellant reacted by rushing into his room and came out with cutlass with which he matcheted the deceased.

From the stand point of the law, the incidence of dropping a charm or juju at the residence of the Appellant which is allegedly linked with the death of the two year old son of the Appellant does not qualify as an incident of provocation. It does not matter that the Appellant may honestly believe that there was a connection between the two events, which belief is obviously founded on witchcraft simpliciter as learned Counsel for the Appellant has offered no other explanation. It is however, settled law that a plea of provocation founded upon witchcraft cannot stand. See Konkomba vs R (1952) 14 WACA 236; Gadam vs R (1954) 14 WACA 442.

Another thing said to constitute an incident of provocation is the alleged statement by the deceased on the date, of the incident to wit. "I think I told you that you will see."

The above are mere words which do not constitute provocation on our law. See Akpakpan vs Queen (1956) 1 NSCC 1 at 2 (1956) 1 FSC 1 at 2. The fate of the plea of provocation in the circumstance of the facts of this case is sealed by the reaction of the Appellant in terms of the proportionality of the provocation with the force or action deployed by Appellant which were the use of mere words by the deceased and cutlass/machete by the Appellant in reaction to the alleged verbal provocation. The matcheting of the deceased in the circumstances of this case is clearly an act of revenge, not provocation.

In conclusion, I find no merit in the issue under consideration and consequently resolve same against the Appellant. In the circumstance, I find no merit whatsoever in the Appeal which is accordingly dismissed by me. Appeal dismissed.

CHUKWUMA-ENEH JSC

I have read the lead Judgment in this Appeal prepared and delivered by my learned brother Onnoghen, JSC with which I agree entirely and that this Appeal has no merit whatever and should be dismissed.

He has comprehensively covered all the issues raised for determination in this Appeal that all the make-believe defences raised by the defence have no leg on which to stand and rightly rejected by the Court. I also dismiss the Appeal and abide by the orders contained in the lead Judgment.

GALADIMA JSC

This Appeal is against the Judgment of Court of Appeal, Benin delivered on the 4th day of March, 2010, in which the Appellant's Appeal against his conviction and sentence by the High Court of Delta State, was dismissed.

The facts of this case have been fully set out in the lead Judgment. However, evidence before the trial High Court indicates that there was a misunderstanding between the Appellant, his wife and the deceased arising from a previous action of the deceased by allegedly throwing charms at the Appellant with a "curse" that his two

sons will die; that it was the night following the incident that the two year old boy died in a mysterious circumstance. It is in this circumstance, that the deceased taunted the Appellant during the burial of his son thus: *"I think I told you that you will see."*

The Appellant said that he was provoked and went to his room, took out a cutlass and struck the deceased on his head and stomach resulting in his death. Appellant admitted, in his voluntary statement that he inflicted the machete cuts on the deceased.

The two issues identified by both Counsel in their briefs for determination of this Appeal are:

"(1) Whether on the totality of evidence adduced, the learned Justices were right in holding that prosecution proved the case beyond reasonable doubt?"

"(2) Whether the defence of provocation availed the Appellant on the facts and circumstances of this case."

On the first issue, after a very careful consideration of the totality of evidence adduced at the trial, the Court below was right when it held that the Prosecution proved the offence for which the Appellant was charged beyond reasonable doubt. The cause of death of the deceased has been satisfactorily established and is traceable to the acts of the Appellant herein.

The next question is whether despite the proof by the Prosecution that the Appellant caused the death of the deceased, there could be any mitigating factor (possibly defence of provocation) open to the Appellant. For the defence of provocation to avail the Appellant it must come within the ambit of the provision of Section 318 of the Criminal Code. It provides thus:

"When a person who unlawfully kills another in the circumstances which, but for the provisions of this section, would constitute murder, does the acts which causes death in the heat of passion caused by grave and sudden provocation and before there is time for his passion to cool he is guilty of manslaughter only."

In this case, is there evidence on record to support the defence of provocation as contended by Counsel for the Appellant? I do not think so. In the case of *EWO AKANG V. THE STATE* (1970) 1 NMLR 38; (1971) 1 All NLR 46 at 49. Coker JSC, restated the basis of defence of provocation in the following manner:

"Provocation which reduces what would otherwise amount to

murder to manslaughter, is a legal concept made up of a number of elements which must co-exist. It is of paramount importance in the consideration of this concept that the act held as a natural and justifiable action of the provoked person be done not in self revenge but in ventilation of a natural sudden and contemporaneous feeling of anger caused by circumstances of the occasion.”

In consideration of the defence of provocation therefore the following three elements are essential, namely:

- “(i) *The provocative incident;*
- “(ii) *The loss of self-control;*
- “(iii) *The retaliation, which must be proportionate to the provocation.*

The appellant in this case at hand puts forward some incidents as constituting the basis of his provocation. These are:

- (i) The dropping of a substance said to be a “charm” on the Appellant and cursing him that his two sons would die after the other, and that one of the sons died the following night of the incident;
- (ii) That while the child was being buried, the deceased taunted the Appellant by saying “I think I told you that you will see”, thereby making jest of the Appellant.”

In the circumstance, the Appellant reacted by rushing into his room got hold of his cutlass with which he matcheted the deceased. It is difficult from the standpoint of our Criminal Law how the incident of dropping a charm or juju at the residence of the Appellant which is allegedly linked with the death of the two year old son of the Appellant can qualify as an incident of provocation. The belief of the Appellant, may be honest, but as it is founded on witchcraft it cannot ground him a defence of provocation See: KOKOMBA V. V. R. (1952) 14 WACA 236, GAIDAM V. R. (1154) 14 WACA, 442.

The Appellant’s plea of provocation, in the circumstance of the facts of this case is faulted by the unreasonable reaction of the Appellant when he matcheted the deceased who verbally provoked him. Mere words used in the circumstance of the facts of this case would not constitute provocation. See: AKPAKPAN V. QUEEN (1956) 1 NSCC 1 at 2.

In the light of the foregoing and more detailed reasoning and conclusion reached in the lead Judgment of my learned brother ONNOGHEN JSC, I too find no merit in this appeal and it is accord-

ingly dismissed.

MUHAMMAD JSC

Having had a preview of the lead Judgment of my learned brother Onnoghen JSC just delivered, I completely agree with the reasonings and conclusion therein that the Appeal which is lacking in merit should be dismissed. B

In saying it in my own words, purely by way of emphasis, I rely on the background facts on which the Appeal predicates elaborately stated in the lead Judgment. C

The issue the Appeal raises is whether provocation or any other defence arising from the alleged witchcraft of the deceased avails and exculpates the Appellant from the offence of murder which the Appellant himself in his statement and evidence before the trial Court admitted. D

The Appeal is against the Judgment of the Benin division of the Court of Appeal dated 4th March, 2010 dismissing Appellant's Appeal No. CA/B/83c/2007. By the said Judgment, the Court has affirmed the conviction and sentence of the Appellant by the Delta State High Court, Isselu-uku Judicial division, for the offence of murder punishable under Section 319(1) of the Criminal Procedure Code Cap 48 Vol 11 laws of the defunct Bendel State applicable to Delta State. Both Counsel are right that in sustaining the conviction and sentence for the offence of murder under Section 319 (1) of the Criminal code, the Respondent must be seen to have established: E F

(a) The death of a human being.

(b) That the death of the human being was caused by the act or omission of the Appellant and

(c) That the act or omission of the Appellant which caused the death of the deceased, here Bartholomew Ivo, was intentional and done with the knowledge that death or grievous bodily harm was its probable consequence. G

The foregoing requirements, I further agree with Counsel, must coexist at the same time and the absence of any of the three will entitle the Appellant to an acquittal. See *Alewo Abogede Vs State* (1995) 5 NWLR (Pt 448) 270; *Edwin Ogba Vs State* (1992) 2 NWLR (Pt 222) 160 and *Obudo Vs the State* (1991) 5 NWLR (Pt 198) 435. H

In the case at hand, evidence on record abound that the Re-

spondent has met each of the three requirements. Exhibit B is Appellant's confessional statement admitting the fact of inflicting injuries with a cutlass on the deceased's head and stomach. Pw4 the Pathologist who issued Exhibit A stated therein that Bartholomew's death is consistent with and a probable consequence of the injuries he sustained from the machete blows the Appellant dealt on him. PW1, PW2 and PW3 all testified that Bartholomew died at the Asaba General Hospital subsequent to the injuries the Appellant inflicted on him. They identified the corpse Pw4 conducted his autopsy upon as that of Bartholomew Ivo, the deceased.

Learned Appellant's Counsel has argued that Appellant was provoked by the deceased who had, before the date of the incident cursed the Appellant by throwing charms on him and saying that the Appellant's two children will die. Appellant's two year old child died the next day. On 4-3-98 when the child was being buried, learned Counsel submits, the deceased further taunted the Appellant by telling him that the curse about the death of Appellant's children had started coming to pass. These, contends learned Counsel, justify the injury the Appellant inflicted on the deceased. The two Courts below, submits learned Counsel, are wrong to have ignored these glaring facts from the record of Appeal.

I am unable to agree with learned Appellant's Counsel that the two Courts did not consider this dimension of the case in coming to their respective decisions on the Appellant's culpability. It must outrightly be stated that the law does not accept the deceased's witchcraft the appellant asserts as the basis of his being provoked. Witchcraft being metaphysical is necessarily founded on the subjective belief of the accused person. The law, on the other hand, only takes cognizance of such defences that are founded on requirements capable of being objectively tested on the basis of facts relevant to the particular defence. It remains the principle that the Appellant's resort to witchcraft in relation to provocation or any other defence will not be measured on the basis of his belief. A defence will only avail him consequent upon the objective scrutiny the law empowers the Court to carry out on the particular defence. See *Edoho Vs State NCC Vol 5 (2010) 546 at 588*.

The law still remains that even if the two Courts are left in no doubt that the Appellant at the time he struck the fatal blows on

Bartholomew honestly believed that he was striking a man who had threatened to and already killed one of his two children by witchcraft and in the process of killing the other son, Appellant's belief in that regard constitutes no defence in Law. See *Maawole Konkonba Vs the Queen* (1952) 14 WACA 236 at 237. In *Goodluck Oviefus Vs The State* (1984) 10 SC 207 this Court per Oputa JSC (as he then was) observed in relation to the defence the Appellant asserted on the basis of witchcraft at pages 261, 262, and 264 of the report thus:-

"No man's belief is on trial in a murder case... What is on trial is the act or omission of the accused. Whether or not the accused believes in witchcraft seems quite irrelevant to the inquiry... Therefore a defence founded on belief in witchcraft or juju is a defence founded on the subjective belief of the accused rather than on the objective requirements of the law relating to the particular relevant defence. Such defences are untenable. But if the belief in witchcraft or juju produces a state of insanity or delusion then the criminal responsibility of the accused will be measured not by the tenets of his belief but by the objective standard of the law relating to such defences - Viz Insanity, Delusion or Provocation as the case may be, Belief in witchcraft or juju per se is no defence ... Whether or not such belief is superstitious, primitive or civilized is totally irrelevant. What is important is the effect of such belief on the person accused; his conduct resulting from such belief; and whether or not the law offers protection to or with regard to such conduct as an excuse thus offering him a defence."

In *Godwin Josiah Vs The State* (1985) 1 NWLR 125 at 141 this Court further reiterated *"that Courts should be very slow in accepting facile defences that are in the main as subjective of a man's belief which has no objective standard against which it may be judged."*

The two Court's application of the principle in point to the facts of the instant case and their conclusion consequent upon that exercise cannot be faulted. The appellant who has volunteered EX B admitting injuring, nay, killing the deceased, having not brought himself within the defence of provocation as known to law, has rightly been convicted and sentenced for the offence under Section 319(1) of the Criminal Code by the trial Court, a decision which the Court below, in my firm and considered view rightly affirmed.

For the foregoing and more so the fuller reasons contained in

the lead Judgment I also dismiss the Appeal and affirm the decision of the Court below. I abide by the consequential orders decreed in the lead Judgment.

B

OGUNBIYI JSC

I have been privileged before today of reading in draft the lead Judgment just delivered by my learned brother Walter S. N. Onnoghen, JSC. I entirely agree with the reasoning and the conclusion arrived thereat in resolving the issues arising for the determination of this Appeal. That the Appeal is devoid of any merit is quite obvious. Accordingly, I also dismiss same and affirm the concurrent findings of facts by both the lower and trial Courts.

The further Appeal herein is against the Judgment of the Court of Appeal, Benin Division delivered on the 4th day of March, 2010 wherein the Appellant's Appeal was dismissed and the court affirmed the Judgment of the Delta State High Court, which convicted and sentenced the Appellant to death on the 2nd day of August, 2005 for the murder of one Bartholomew Ivo.

The Appellant was obviously dissatisfied with the said Judgment and hence appealed against same by filing his Notice of Appeal on the 1st day of April, 2010 containing three Grounds of Appeal. The facts of the case have been clearly spelt out in the lead Judgment. In proving its case, the Respondent called five witnesses in total and tendered four exhibits while the Appellant on his own behalf testified in his defence and called no witness. The Appellant's counsel of the close of the case for the prosecution, made a no-case submission which was overruled by the learned trial Judge in his ruling delivered on the 19th day of December, 2003.

The two issues formulated by both Counsel for the determination of this Appeal are very much similar. Those by the Respondent's Counsel are however more explicit and concise as follows:-

(1) Whether on the totality of evidence adduced, the learned Justices were right in holding that the Prosecution proved the case beyond reasonable doubt?

(2) Whether the defence of provocation availed the Appellant on the facts and circumstances of this case?

The general principle of law is well settled in plethora of au-

thorities that the burden of proof in all criminal cases is upon the Prosecution to prove the accused guilty of the offence charged beyond reasonable doubt. It is not for the accused to prove his innocence as this will negate the Constitutional provision that the accused is presumed innocent until proved otherwise. Our judicial system of adjudication is adversarial and not inquisitorial. However and for purpose of availing an accused person the benefit of the defences which will serve a mitigating factor against his conviction, the onus is upon him to raise such a defence which can only be within his knowledge. The Prosecution cannot be saddled with that which is not known to it. B
C

The law is firmly upheld therefore that even where the Prosecution had succeeded in proving an accused person guilty of an offence charged, for instance as it is with the nature of the offence considered in this appeal, the proof of the defences available could earn a reprieve as a mitigating factor. On a corporate reading of the record of Appeal before us and taking into consideration the concurrent findings of facts by the two lower Courts on the totality of the case, it is not in any doubt that the Prosecution had successfully proved the three ingredients necessary in a charge of an offence of murder which are as follows:- D
E

- (a) That the deceased died;
- (b) That the death of the deceased resulted from the actions of the accused;
- (c) That the actions of the accused were intentional with knowledge that death or grievous bodily harm was its probable consequences. F

The over powering rider however is, whether despite the proof by the Prosecution, the mitigating factor of possible defence of provocation is open to the Appellant. For the defence to avail, the Appellant must come within the provision of Section 318 of the Criminal Code which reproduction states thus:- G

“When a person who unlawfully kills another in circumstances which, but for the provisions of this section, would constitute murder, does the acts which causes death in the heat of passion caused by grave and sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.” H

Deducing from the foregoing provision, it must be established

that the wrongful act or insult was of such a nature when done to an ordinary person is likely (a) to deprive him of the power of self-control and (b) to induce him to assault the person by whom the act or insult is done or offered. The following authorities are relevant in support:- The Queen v. Afonja 15 WACA 26 at 27; Ewo Akong v. The State (1970) 1 NMLR 36 at 38; Chukwu Obaji v. The State (1965) NMLR 417 at 442. At page 84 of the record of appeal, for instance, the Appellant in his confessional statement had this to say:-

“... when they took the child to the grave side for burial, I was crying, he, Bartholomew Ivo looked at me and I looked at him also. He put his finger into his eye lids draw it down and said, I no tell you? I was annoyed and with that annoyance I rushed into my room and took cutlass and cut him in the stomach.”

As rightly submitted by the Respondent’s Counsel, from the confessional statement, there was sufficient lapse of time to afford cooling of passion between the time of the provocative words and retaliation. The seizing of the cutlass was not spontaneous. The Appellant had to rush into the room to take a cutlass.

It was expected of him to have gained control of his mind within the period of time. For the Appellant to succeed on the defence therefore, the act must have been:-

- (a) Done in the heat of passion;
- (b) Caused by sudden provocation and
- (c) Committed before there was time for his passion to cool.

See the case of Chukwu Obaji v. The State supra.

Certain additional factors which are relevant for consideration in assessing the Appellant are:- the nature of the weapon used; the extent of force as well as the part of the body inflicted with the injury. In the case under consideration, the totality of the outcome reveals that the Appellant for all intent and purpose was acting for a reason other than complete loss of self control caused by sudden provocation. There cannot therefore be a mitigating factor as sought by the Appellant. The defence of provocation is not in the circumstances available to the appellant. He must face the consequences of his deeds squarely. The Appeal is hereby dismissed. The Judgment of the two lower Courts are affirmed. The Appellant is to die by hanging. Appeal dismissed.