

SUPREME COURT OF NIGERIA
FRIDAY 7TH JUNE, 2013. SC. 328/2011
**CORAM:- M. MOHAMMED, J. A. FABIYI, B. RHODES-
VIVOUR, M. U. PETER-ODILI, K. B. AKA'AH, JJSC**

LT. F. O. ODUNLAMI (NN/2121) APPELLANT
V.
THE NIGERIAN NAVY RESPONDENT

CRIMINAL LAW - Provocation - Defence of - The defence can be considered if there was unlawful assault - That was not provoked by accused - And accused reaction must be proportionate with the provocation (H1)

CRIMINAL PROCEDURE - Military law - Service property - Loss of - To establish the offence under Armed Forces Act s. 68(1)(a) - Prosecution must inter alia prove that accused is subject to service law - And was in charge of the property (H2)

COURT MARTIAL - Fair hearing - Sentence - Review of - By Armed Forces Act s. 149 - A convict has 3 months to appeal for a review - And is also allowed by s. 154(6) to appeal to CA - And thereafter to SC (H3)

EVIDENCE - Contradictions - Effect - Contradictions must be fundamental and substantial - Before they may affect prosecution's case - As discrepancies are minor differences in details - Which are allowed in proceedings (H4)

EVIDENCE - Documentary evidence - Weight - Where the evidence supports oral testimony - The latter becomes more credible - As the former serves as hanger from which to assess the latter (H5)

CRIMINAL PROCEDURE - Military law - Manslaughter - Sentence - Under Armed Forces Act s. 105 - Once accused is convicted of the offence - Trial Judge has no discretion - But to impose sentence of life imprisonment (H6)

CHARGES - Murder - Provocation - Defence of - Once the defence is sustained in the charge - Accused would be found guilty of manslaughter - And the Judge has discretion to impose sentence (H7)

FACTS

Accused/appellant was arraigned before the General Court Martial sitting in Lagos on a three count charge of murder under section 106, loss of service property under section 68 and conduct to the prejudice of good service and discipline under section 103 of the Armed Forces Act Cap. A20 LFN 2004. Prosecution/respondent alleged that appellant while driving to Apapa from the Lagos State Secretariat Alausa, was hit at the rear of his car by a commercial motorcycle ridden by the deceased one Peter Ede. The deceased upon noticing that appellant was a military officer, knelt down and pleaded for forgiveness for his act. However, appellant gave a deaf ear to the deceased plea. He rather brought out his service pistol and shot the deceased in the mouth. This led to the death of the deceased on the spot. Appellant's reaction angered passers-by at the material time, who instantly descended on appellant. Appellant was severely beaten with his car set ablaze. Appellant was nevertheless rescued by police constable - Richard Ugbekile.

Appellant was thus taken to nearby police station and the case subsequently transferred to the Nigerian Navy for investigation as appellant was subject to service law by virtue of section 270(1)(a) of aforementioned Act. At the trial before the General Court Martial, respondent called witnesses prominent among whom was PW4 (an eyewitness), who testified against appellant. Appellant raised the defence of provocation and self defence. At the end of trial, the court relied on the testimony of PW4 and found appellant guilty of count 2 but found that the charge of murder under count 1 was not proved. Appellant was therefore convicted of a lesser offence of manslaughter. Appellant was unsatisfied and therefore appealed to the Court of Appeal Lagos Division, contending inter alia that that there are contradictions in the testimony of PW4. The court dismissed the appeal in its entirety. The decision led to the filing of the present appeal in Supreme Court by appellant.

ISSUES FOR DETERMINATION

ISSUE ONE

Whether the learned justices of the Court of Appeal rightly dismissed the appellant's pleas of self-defence, instead of death by provocation relied upon by the trial court Martial.

ISSUE TWO

Whether Court of Appeal rightly upheld the General Court Martial decision on loss of service property in spite of the evidence on record, by speculating on what might have happened which prosecution failed to prove.

ISSUE THREE

Whether the appellant was afforded fair hearing by the learned justices of the Court of Appeal who based their judgment on personal sentiments and extraneous conclusions (including allusions to findings of the General Court Martial which were not appealed against) and thereby refused to quash the conviction nor reduce the sentence.

HELD (Unanimously dismissing the appeal per

RHODES-VIVOUR JSC)

CRIMINAL LAW - Provocation - Defence of

1. The burden of proof of provocation and self-defence lies on the accused person. See *Gabriel v. State* (1989) vol. 22 NSCC pt. 111 p. 349. By section 286 of the Criminal Code when a person is unlawfully assaulted and he did not provoke the assault the law expects him to defend himself. He is expected to use such force on his assailant as would be reasonable to make an effective defence. For example if A slaps B and B defends himself by shooting A with a gun, that would be a disproportionate response to an unprovoked assault. The defence must not be intended to cause death or grievous harm. Self defence can only be considered if there was an unlawful assault that was not provoked by the accused person.

In his testimony in court (pages 586 to 589 of the Record of Appeal) the appellant did not say anything to establish the fact that he was provoked before he shot Peter Edeh (deceased) or that he shot the deceased in self defence. The prosecution thus had no obligation to disprove a defence that was

never raised. The evidence led by the prosecution is one way. The appellant did not kill Peter Edeh in self defence, neither was his death as a result of the appellant being provoked. The findings of the Court Martial affirmed by the Court of Appeal were correct.

- B Before I conclude this judgment I must comment on the defence of provocation and not calling a vital witness. Section 264 of the Criminal Code is relevant in considering section 518 of the Criminal Code and so they should be read together.**
- C When an accused person relies on provocation as his defence the court must consider the force or weapon used in relation to the provocation received to see if it was disproportionate, or reasonable. If the reaction of the accused to the provocation was disproportionate the defence of provocation fails. If**
- D on the other hand his response was reasonable the defence of provocation is sustained. Reasonableness or disproportionate response by the accused is a decision for the judge to make. (pp. 2734 D/2735 A/2742 E)**

- E CRIMINAL PROCEDURE - Military law - Service property - Loss of 2. Section 68(1)(a) of the Armed Forces Act states that:**

“A person subject to service law under this Act who loses a public or service property of which he has the charge or which forms part of the property of which he has the charge or which has been entrusted to his care is guilty of an offence under this section and liable, on conviction by a court martial to imprisonment for a term not exceeding two years or any less punishment provided by this Act.”

- G To succeed in a charge under section 68 (1) (a) supra the onus is on the prosecution to prove beyond reasonable doubt that:**

- (a) the accused is subject to service law**
- (b) the accused had charge of or was in care of the service property.**
- (c) the said service property is lost.**
- (d) the accused intentionally lost the items.**
- (e) the accused has no defence in law or facts.**

Section 68(1)(a) of the Armed Forces Act creates a strict li-

ability offence. That is to say a crime that does not require proof of mens rea, e.g. traffic offence. Once a serving officer of the Nigerian armed forces is given arms he is expected to guard them jealously and return them when due or demanded, or explain to the satisfaction of the appropriate authorities where the arms are. Failure to give proper account of the arms entrusted to a serving officer makes such an officer liable under section 68(1)(a) of the Armed Force Act.

On the 25th day of July, 2005, the appellant was given a service pistol and eight rounds of ammunition by PW2, the officer in-charge of the Armoury. After the unbelievable behaviour of the appellant, killing a defenceless civilian, he was unable to account for four rounds of ammunition. The offence created in section 68(1)(a) of the Armed Forces Act is in the circumstances proved beyond reasonable doubt.

Fair hearing - Sentence - Review of

3. By the provisions of section 149 of the Armed Forces Act after sentence by a court martial the accused person has three months to appeal to the confirming authority for a review of the sentence. According to learned counsel for the respondent if the accused/appellant fails to appeal for a review of his conviction and sentence, he still has a second opportunity as provided by section 154(6) of the Armed Forces Act.

Section 154(6) and Part XVI of the Armed Forces Act does not afford the accused/appellant a second opportunity to petition for a review of his conviction and sentence, but it affords the convict an opportunity to appeal to the Court of Appeal and thereafter to the Supreme Court. Since the appellant was not denied an opportunity to appeal and he appealed he was not denied fair hearing.

EVIDENCE - Contradictions - Effect

4. Evidence contradicts another evidence when it says the opposite of what the other evidence say on a material point. The contradictions must be fundamental and substantial before it can affect the prosecution's case. Discrepancies on

the other hand are minor differences in details and these are allowed in proceedings.

If a witness gives evidence on oath which contradicts his previous statement in writing his evidence should be treated as unreliable.

B On the other hand minor discrepancies between previous written statement and subsequent testimony on oath do not in any way affect the credibility of the witness. If in my view there are no discrepancies there would be strong inference or suspicion that the witness has been tutored.

C PW4 gave evidence on oath that the appellant shot Peter Edeh (deceased). This fact was never denied by the appellant. In fact the appellant agreed that he shot the deceased and the deceased was not armed. The post-mortem report also confirms that Peter Edeh died of gunshot wounds. Whether he was shot once or twice fades into insignificance as to the cause of death in the light of the appellant's admission that he shot the deceased. PW4's evidence contained some minor inconsistencies that do not amount to contradictions. The evidence of E PW4 was corroborated by the post-mortem report, in that the deceased died from gunshot wounds. (p. 2740 B/G)

EVIDENCE - Documentary evidence - Weight

F 5. Where documentary evidence (post-mortem report) supports oral testimony (PW4's testimony) oral testimony becomes more credible. This is premised on the position of the law that documentary evidence serves as a hanger from which to assess oral testimony. (p. 2741 A)

G Manslaughter - Sentence

H 6. Under the Penal Code (Sections 222, and 224), and the Criminal Code (Sections 317 and 325) a person convicted for manslaughter shall be punished with imprisonment for life or any less term or with fine or with both. It is clear that a trial judge has the discretion when sentence is considered. But under section 105 of the Armed Forces Act the trial judge has no discretion but to sentence the appellant to life imprisonment. That is the correct sentence under section 105 of the

Armed Force Act.

The confirming authority confirmed the sentence of life imprisonment and dismissal from the service of the Nigerian Navy. It further stripped the appellant of his rank and directed that he was not entitled to his financial entitlements. Was this sentence excessive? Dismissal means rejection, discarding. Once an officer is sentenced to life imprisonment and dismissed from the services of the Armed Forces it would be naive of him to expect to be entitled to his entitlements. Dismissal and forfeiture of entitlement go together. (pp. 2742 D/2743 B) B
C

Murder - Provocation - Defence of

7. Once the defence of provocation is sustained in a charge for murder, the accused would be found guilty of manslaughter and the judge has discretion to impose sentence bearing in mind that the maximum sentence is life. On the facts, a defence of provocation could be considered but it does not avail the appellant. (p. 2742 H) D

NOTABLE POINT OF INTEREST E

RHODES-VIVOUR JSC

1. Party who fails to utilize opportunity of being heard cannot complain of denial of fair hearing

Audi alteram partem means hear the other side. It is a maxim denoting basic fairness and a canon of natural justice. Once it can be shown that a party was given an opportunity of being heard but he refused to avail himself of the opportunity he cannot be heard to complain that he was not given a fair hearing. (p. 2739 A) F
G

REPRESENTATION

A. J. Owonikoko, SAN with T. Bashorun, O. Jolaawo, F. Eki, B. Olukosi, for the Appellant

A. Igboekwe, J. A. Adam A.D Federal Ministry of Justice, for the Respondent H

CASES REFERRED TO

Oseni v. State(2012) 37 WRN 1

- State v. Isah (2012) 16 NWLR (pt. 1327) 613
Omogodo v. State (1981) NSCC 119
State v. Ajie (2000) 11 NWLR (pt. 678) 434
Gabriel v. State (1989) 5 NWLR (pt. 122) 457
Ahmed v. State (2001) 8 NWLR (pt. 746) 622
B Apugo v. State (2006) 15 NWLR (pt. 1002) 227
Kalu v. Nig. Army (2010) 4 NWLR (pt. 1185) 433
Ukwunnenyi v. State (1989) 4 NWLR (pt. 114) 131
Adele v. State (1995) 2 NWLR (pt. 377) 269
C Kwaghshie v. State (1995) 3 NWLR (pt. 386) 651
Onubogu v. State (1974) SC 358
Kindley v. M. G. Gongola State (1988) 2 NWLR (pt. 77) 473
Omoregbe v. Lawani (1980) 3 - 4 SC 117
Thomas v. State (1994) 4 NWLR (pt. 337) 129

D

STATUTES REFERRED TO

Armed Forces Act Cap. A20 LFN 2004, ss. 68(1)(a), 103(i), 105, 106, 149, 154(6)
Criminal Code, ss. 222, 224, 264, 317, 325, 518

E

LEAD JUDGMENT BY RHODES-VIVOURE JSC

On the 27th day of January, 2006 the appellant, a lieutenant in the Nigerian Navy was arraigned on an amended three count charge before a General Court Martial. The three count amended charge read:

F

COUNT ONE

STATEMENT OF OFFENCE

Murder contrary to section 106 of the Armed Forces Act, Cap. A. 20 Laws of the Federation of Nigeria, 2004.

G

PARTICULARS OF OFFENCE

That you Lt. F.O. Odunlami NN/2121, on or about the 25th day of July, 2005 at Alausa, Ikeja, Lagos within the jurisdiction of this Court Martial, shot and killed one Peter Edeh (deceased) with a service pistol without any justification or excuse and in a manner intended to cause death or grievous bodily harm committed an offence.

H

COUNT TWO

STATEMENT OF OFFENCE

Loss of service property contrary to section 68(1)(a) of the Armed Forces Act Cap A20 Laws of the Federation of Nigeria, 2004.

PARTICULARS OF OFFENCE

That you Lt. F.O. Odunlami NN/2121, on or about the 25th day of July, 2005 at Alausa, Ikeja, Lagos within the jurisdiction of this Court Martial, loss (sic) 4 rounds of 9mm live ammunition being service property issued and entrusted to your care and thereby committed an offence. B

COUNT THREE

STATEMENT OF OFFENCE

Conduct to the prejudice of service discipline section 103(i) C
AFA 105 of the Armed Force Act Cap A20 Laws of the Federation of Nigeria, 2004.

PARTICULARS OF OFFENCE

That you Lt. F.O. Odunlami NN/2121, on or about the 25th D
day of July, 2005 at Alausa, Ikeja, Lagos within the jurisdiction of this Court Martial, were illegally in possession of 4 Rounds of ammunition which was known to you as not being the service property officially entrusted to your care and thereby committed an offence.

The accused/appellant entered not guilty pleas to the three E
count amended charge. Trial ran from the 27th day of January 2000 to the 27th day of July, 2006. Nine witnesses gave evidence for the prosecution (respondent), and twenty-two items were admitted as exhibits (exhibits A - X). The appellant gave evidence, called four F
witnesses in defence and tendered one exhibit. At the close of the case the Court Martial studied the final addresses of counsel and the judge Advocate, and then proceeded to find the appellant guilty on counts 1 and 2, and not guilty on count 3. The Court Martial sentence ran thus: G

“Count one, manslaughter - imprisonment for life. Count Two, loss of service property - dismissal from the service of the Nigerian Navy.”

The sentences were to run concurrently.

Not satisfied with the judgment, the appellant lodged an appeal. H
The appeal was heard by the Lagos Division of the Court of Appeal. In a considered judgment delivered on the 31st of January, 2011 the appeal was dismissed. On count 1 the Court of Appeal found the appellant guilty reasoning as follows”

“...It’s not in doubt, that from the totality of the evidence adduced at the trial, most especially that of the PW4 and the post mortem examination report exhibit T, there is every cogent reason for me to uphold the finding of the trial court to the effect that the appellant killed the deceased in the heat of passion caused by sudden provocation and before there is time for his passion to cool. Most undoubtedly, the alleged inconsistencies inherent in the evidence of PW4 were in my view, not sufficiently material, thus incapable of rendering the said evidence unreliable. And I so hold...”

And on count 2 the Court of Appeal said:
 “...Out of the 8 rounds of the ammunition signed for and collected by the appellant, only three rounds of the ammunition had been returned along with the service pistol to the Navy... the fact that the service pistol and three of the eight rounds of ammunition were recovered is not a sufficient ground to absolve the appellant of culpability for losing the service property in question...”

On this reasoning the Court of Appeal confirmed the judgment of the General Court Martial. This appeal is against that judgment.

In accordance with Rules of this court briefs were filed and exchanged by counsel. The appellant’s brief was filed on the 22nd day of November 2011, while the respondents brief was deemed duly filed on the 14th day of March 2013.

Learned counsel for the appellant, Mr. A. J. Owonikoko SAN formulated three issues from his 10 grounds Notice of Appeal. They are:

ISSUE ONE

Whether the learned justices of the Court of Appeal rightly dismissed the appellant’s pleas of self-defence, instead of death by provocation relied upon by the trial court Martial.

ISSUE TWO

Whether Court of Appeal rightly upheld the General Court Martial decision on loss of service property in spite of the evidence on record, by speculating on what might have happened which prosecution failed to prove.

ISSUE THREE

Whether the appellant was afforded fair hearing by the learned justices of the Court of Appeal who based their judgment on

personal sentiments and extraneous conclusions (including allusions to findings of the General Court Martial which were not appealed against) and thereby refused to quash the conviction nor reduce the sentence.

Learned counsel for the respondent, Mr. A. C. Igboekwe, also formulated three issues for determination: B

ISSUE ONE

Whether from the facts and circumstances of this case, the Court of Appeal was right in holding, that the defence of self-defence did not avail the appellant. C

ISSUE TWO

Whether from the facts and circumstances of this case, the Court of Appeal was right in upholding the decision of the General Court Martial on the loss of service property.

ISSUE THREE D

Whether from the facts and circumstances of this case, the Court of Appeal was right in refusing, to quash the conviction and also refusing to reduce the sentence on the appellant by the General Court Martial.

Issues one and two formulated by both sides ask the same questions, and the questions cover counts one and two, the counts on which the appellant was found guilty and sentenced. E

Issues one and two formulated by learned counsel for the respondent is better couched and is preferred. Issue three formulated by the appellant would be taken along with the two issues formulated by the respondent. F

At the hearing of the appeal on the 14th day of March 2013 learned counsel for the appellant, Mr. A. J. Owonikoko SAN adopted the appellant's brief filed on the 22nd of November, 2011 and in amplification observed that the appellant's defence is self defence and not provocation, invented by the Tribunal. He further observed that vital witness was not called and PW4's evidence and Medical Report are contradictory. Reliance was placed on *Oseni v. State* 2012 37 WRN p.1, *State v. Isah* 2012 16 NWLR pt. 1327 p. 613. G

On issue 2 he observed that losing service pistol is not a strict liability offence. Relying on section 68 (2) of Arms Forces Act he submitted that the evidence reveals preserving and not loosing service pistol, contending that there was doubt between Police and Navy H

on the loss of the gun and it should be resolved in favour of the appellant.

Finally on issue 3 he observed that the confirming authority has no power to increase punishment contending that they can only reduce it. He urged this court to acquit the appellant. Reference was
B made to section 105 of Armed Forces Act.

Learned counsel for the respondent, Mr. A. Igboekwe adopted his brief deemed filed on 14th March 2013. On issue one he submitted that self defence does not avail the appellant.

C On issue three he observed that the sentence for manslaughter is life imprisonment, contending, that any officer that is convicted loses his rank etc. Relying on *Josiah v. State* 1985 1 NWLR pt. 1 p. 125 he urged this court to dismiss the appeal.

THE FACTS

D On the 25th day of July, 2005 at about 6p.m., the appellant while returning from the Lagos State Secretariat on his way to Apapa was hit at the rear of his Mercedes Benz Car Reg No AR 374 SMK by a commercial Motor cyclist (in local parlance called OKADA) ridden by Mr. Peter Ede (deceased).

E The appellant alighted from his car, noticing that he was a military officer Mr. Peter Ede knelt down and started pleading for forgiveness. Rather than accede to Mr. Peter Ede's begging and pleading the appellant brought out his service pistol and shot him in the
F mouth. He died on the spot. All hell was let loose as passers-by descended on the appellant and gave him the beating of his life. In the process his car was set ablaze. He was rescued from the angry mob by Policemen from the Alausa Police Station. The investigation Police officers aptly summed up the events of the 25th day of July, 2005
G that led to the death of Mr. Peter Ede thus:

It is unfortunate that this young officer allowed his temperament to push him into this messy situation. Investigation so far conducted has shown that it was a simple traffic matter, which the officer mismanaged.

H It cannot be better put. That is precisely what happened. I shall now address the issues which both courts below found do not avail the appellant.

ISSUE ONE

Whether from the facts and circumstances of this case, the

Court of Appeal was right in holding that the defence of self defence did not avail the appellant.

The Court of Appeal observed that the case of the appellant is/was predicated upon the claim of self defence.

The appellant said.

"I shot my assailant to save (sic, save) my life and the service B pistol. I consciously took the decision to save (sic, save) my life."

The Court said:

"I am unable to appreciate let alone uphold the appellant's purported defence that he shot the deceased to purposely save his own life. I am of the view that the evidence of PW4 the pillion rider to the deceased, to the effect that the appellant shot the deceased in the mouth was cogent and rather credible. In the circumstance I would want to believe that the trial Court Martial was absolutely right when it rejected the appellant's defence of self defence as an afterthought D and the figment of his own imagination."

And with that the Court of Appeal found count 1 which covers issue 1 proved, learned counsel for the appellant observed that the evidence of PW4 relied on by the court to convict the appellant was unreliable as it was inconsistent, and contradicted evidence of the other prosecution witnesses. He further observed that the other undisputed eye witness, Sgt. Richard Ugbekile who ought to have given evidence was not called" Relying on *Omogodo v. State* (1981) NSCC p.119, *State v. Ajie* (2000) 11 NWLR pt. 678 p. 434. E

He urged this court to sustain the plea of self defence, and return a verdict of discharge on the merit instead of conviction of manslaughter. F

Learned counsel for the respondent observed that having not satisfied all the four conditions that must co-exist, the defence of self defence is inapplicable. Reliance was placed on *Gabriel v. State* (1989) 5 NWLR pt. 122 p. 457, *Ahmed v. State* (2001) 8 NWLR pt. 746 p. 622, *Apugo v. State* (2006) 15 NWLR pt. 1002 p. 227. G

Further, observing that the Court of Appeal was right in holding that the defence of self defence did not avail the appellant, he urged this court to resolve this issue in favour of the respondent. H

On the issue of self defence the Court Martial said:

"The court considered very seriously the defence of self-defence put forward by the accused. The court also voted what amounts

to self-defence as espoused by both parties and confirmed by the judge advocate in his advice, the court however, did not agree with the story of the accused that the deceased and the other imaginary person whom he claimed ran away. We do not believe that he was being dragged out of the car by any of the two persons he affirmed
 B were unarmed in broad daylight in the centre of Ikeja when there was no hold-up, according to him. We rather believe the story of PW4 and conclude that the accused story of being attacked was at best an afterthought and the figment of his imagination. The accused's
 C life was at no time threatened nor was he in any danger before the unfortunate shooting. We therefore, hold that the defence of self-defence will not avail him."

Agreeing with the above the Court of Appeal said:

"In the circumstances, I would want to believe that the trial
 D court martial was absolutely right when it rejected the appellant's defence of self-defence..."

The burden of proof of provocation and self-defence lies on the accused person. See Gabriel v. State (1989) col. 22 NSCC pt. 111 p. 349. By section 286 of the Criminal Code
 E **when a person is unlawfully assaulted and he did not provoke the assault the law expects him to defend himself. He is expected to use such force on his assailant as would be reasonable to make an effective defence. For example if A slaps B and B defends himself by shooting A with a gun, that would be**
 F **a disproportionate response to an unprovoked assault. The defence must not be intended to cause death or grievous harm. Self defence can only be considered if there was an unlawful assault that was not provoked by the accused person.**

G When on the evidence led the court is satisfied that at the time the accused person killed the deceased there was reasonable apprehension of death or grievous harm and by defending himself, death of the deceased resulted, his defence of self defence would succeed and he would be entitled to an acquittal. The onus is on the
 H prosecution to satisfy the court that the defence of self defence is not available to the accused person.

In our adversary system the prosecution is expected to prove its case beyond reasonable doubt and the defence is under no obligation to assist the prosecution to discharge that onus. The defence is

to remain silent, but when the prosecution closes its case it becomes important that the accused person defends himself more so when the prosecution has established that the accused/appellant killed the deceased.

In his testimony in court (pages 586 to 589 of the Record of Appeal) the appellant did not say anything to establish the fact that he was provoked before he shot Peter Edeh (deceased) or that he shot the deceased in self defence. The prosecution thus had no obligation to disprove a defence that was never raised. The evidence led by the prosecution is one way. The appellant did not kill Peter Edeh in self defence, neither was his death as a result of the appellant being provoked. The findings of the Court Martial affirmed by the Court of Appeal were correct.

ISSUE TWO

Whether from the facts and circumstances of this case the Court of Appeal was right in upholding the decision of the General Court Martial on the loss of service property.

Learned counsel for the appellant observed that the misuse of service property is not the same thing as loss of service property. Relying on *Kalu v. Nig. Army* (2010) 4 NWLR pt. 1185 p.433. He further observed that an appeal was allowed against conviction by the Court of Appeal on similar loss of property of the Nigeria Army. He submitted that the appellant handed over the pistol to the police contending, that, that act cannot be regarded as an intentional loss, rather it amounts to intentional preservation of property. He urged the court to resolve this issue in favour of the appellant.

Learned counsel for the respondent observed that the appellant signed for, and was given a pistol No. M479946 and eight rounds of ammunition by PW2, the armoury attendant, further observing that when they were returned four rounds of ammunition were unaccounted for. He submitted that since the appellant was unable to account for four rounds of ammunition he was liable under section 68 (1) (a) of the Armed Forces Act. He urged this court to hold that the Court of Appeal was right in upholding the decision of the Court Martial on the loss of service property.

***Section 68(1)(a) of the Armed Forces Act states that:
“A person subject to service law under this Act who***

loses a public or service property of which he has the charge or which forms part of the property of which he has the charge or which has been entrusted to his care is guilty of an offence under this section and liable, on conviction by a court martial to imprisonment for a term not exceeding two years or any less punishment provided by this Act.

To succeed in a charge under section 68 (1) (a) supra the onus is on the prosecution to prove beyond reasonable doubt that:

- (a) the accused is subject to service law**
- (b) the accused had charge of or was in care of the service property.**
- (c) the said service property is lost.**
- (d) the accused intentionally lost the items.**
- (e) the accused has no defence in law or facts.**

The appellant signed for and was duly issued by PW2, Ibrahim Saliu, the Armoury attendant, a service pistol with Reg. No. M479946 and eight rounds of 9mm live ammunitions. Finding the appellant guilty of count 2 the Court Martial said:

“But the court believed that the accused handed over only three rounds and one expended shell which the Police eventually returned to the Nigerian Navy and admitted before this court as Exhibit C and G respectively. He must therefore, account for those missing bullets. The court therefore unanimously finds him guilty of count 2.”

The reasoning of the Court of Appeal runs thus:

“...In the instant case, out of the 8 rounds of the ammunition signed for and collected by the appellant, only three rounds of ammunition have been returned along with the service pistol to the Navy ... the fact that the service pistol and three of the eight rounds of ammunition were recovered is not sufficient ground to absolve the appellant of culpability for losing the service property in question.”

The appellant is a lieutenant in the Nigerian Navy and so is subject to service law. He had charge of or care of a service pistol and eight rounds of ammunition. Four of the bullets (ammunition) were never returned to the Navy. Finding the appellant guilty on counts 2 the court martial reasoned as follow:

“...The question that agitated the minds of the court is will a

reasonable Naval Officer in the station of life of the accused surrender the gun with which he had killed an assailant to an unknown police officer. The court does not agree with this, because a trained officer remains and dies with his gun... ”

I find this reasoning very instructive. In his extra judicial statement the appellant said he suspected the deceased was an Armed Robber. I also ask the question - would a reasonable Naval Officer surrender his gun he used to kill an Armed Robber to an unknown Police Officer, bearing in mind that a trained officer dies with his gun? The answer is an emphatic No. For the four bullets not unaccounted for, the prosecution has proved beyond reasonable doubt the offence under section 68(1)(a) of the Armed Forces Act.

Section 68(1)(a) of the Armed Forces Act creates a strict liability offence. That is to say a crime that does not require proof of mens rea, e.g. traffic offence. Once a serving officer of the Nigerian armed forces is given arms he is expected to guard them jealously and return them when due or demanded, or explain to the satisfaction of the appropriate authorities where the arms are. Failure to give proper account of the arms entrusted to a serving officer makes such an officer liable under section 68(1)(a) of the Armed Force Act.

On the 25th day of July, 2005, the appellant was given a service pistol and eight rounds of ammunition by PW2, the officer in-charge of the Armoury. After the unbelievable behaviour of the appellant, killing a defenceless civilian, he was unable to account for four rounds of ammunition. The offence created in section 68(1)(a) of the Armed Forces Act is in the circumstances proved beyond reasonable doubt.

Learned counsel for the appellant relied on *Kalu v. Nigerian Army* 2010 4 NWLR Pt.1185 p.433 to support his submissions that the facts therein are on similar loss of property of the Nigerian Army. The facts in *Kalu v. Nigerian Army* (supra) are very different from the facts in this case. In *Kalu*’s case ammunitions were kept in an Army State. Other items were also kept in the same store and Lieutenant Colonel E. M. Kalu was not the only officer who had keys to the store. That is to say he did not have exclusive control of the store. Now, some items were missing, he was convicted by the Court Martial. I sat on the panel of the Court of Appeal that reversed the judg-

ment of the Court Martial.

We reasoned, Dongban-Mensen, JCA delivering the leading judgment that:

“...the appellant ought to be given the benefit of the doubt as it was never established that the appellant was responsible for the loose and porous control of the store...”

In this case the appellant had exclusive control and possession of the arms given to him, he alone only is accountable for its loss. *Kalu v. Nig. Army* supra is irrelevant in determining the guilt of the appellant for the loss of service property. In the circumstance the decision of the General Court Martial on the loss of service property is correct.

ISSUE THREE

Whether the appellant was afforded fair hearing by the learned justices of the Court of Appeal who based their judgment on personal sentiments and extraneous conclusions (including allusions to findings of the General Court Martial which were not appealed against) and thereby refused to quash the conviction nor reduce the sentence.

Under this issue the sub-issues addressed by learned counsel for the appellant are:

- (a) Appellant’s right to fair hearing
- (b) Contradictions in evidence of prosecution witnesses.
- (c) Excessive prison sentence.

On (a) learned counsel for the appellant observed that after the decision of the Court Martial had been confirmed the appellant was not given the Record of proceedings in time to enable him appeal for review of the findings, contending that this amounted to denial of fair hearing.

Learned counsel for the respondent observed that the appellant lost the first opportunity to petition the confirming authority as required under sections 149, 150(1) and 151 of the Armed Forces Act due to the non availability of the records but that by section 154(6) of the Armed Forces Act he had a second opportunity to but chose not to avail himself of the second chance for review of his sentence, contending that in the circumstances he was not denied fair hearing. Reliance was placed on *Akingbade v. African Paints (Nig.) Ltd.* (2008) 10 NWLR Pt. 1096 p.570.

Audi alteram partem means hear the other side. It is a maxim denoting basic fairness and a canon of natural justice. Once it can be shown that a party was given an opportunity of being heard but he refused to avail himself of the opportunity he cannot be heard to complain that he was not given a fair hearing.

By the provisions of section 149 of the Armed Forces Act after sentence by a court martial the accused person has three months to appeal to the confirming authority for a review of the sentence. According to learned counsel for the respondent if the accused/appellant fails to appeal for a review of his conviction and sentence, he still has a second opportunity as provided by section 154(6) of the Armed Forces Act.

An examination of section 154(6) of the Armed Forces Act is important. Section 154(6) states that:

“(6) If an appeal or application for leave to appeal is lodged with the Registrar of the Court of Appeal under the provisions of Part XVI of this act so much of subsection (2) of this section as requires the review of a finding or sentence against which a petition has been presented shall thereupon cease to apply to the finding to which the appeal or application for leave to appeal relates and to the sentence passed in consequence of that finding.”

Section 154(6) and Part XVI of the Armed Forces Act does not afford the accused/appellant a second opportunity to petition for a review of his conviction and sentence, but it affords the convict an opportunity to appeal to the Court of Appeal and thereafter to the Supreme Court. Since the appellant was not denied an opportunity to appeal and he appealed he was not denied fair hearing.

On (b) learned counsel for the appellant observed that while PW4 on whose evidence the conviction of the appellant was anchored said the deceased was shot twice, the Post-mortem Report disproved two shots contending, that the court below substituted its own findings. He submitted that the lower court resorted to guesswork and prejudicial speculation to fill the yawning gaps in the prosecution's case and make up for the patent deficit of proof beyond reasonable doubt.

Learned counsel for the respondent observed that PW4 was

an eyewitness who the court martial evaluated his evidence and found it credible, contending that since the court martial had the opportunity of watching his demeanour, an appeal court should not interfere. Concluding he observed that the inconsistencies are not fundamental to lead to a miscarriage of justice.

B Evidence contradicts another evidence when it says the opposite of what the other evidence say on a material point. The contradictions must be fundamental and substantial before it can affect the prosecution's case. Discrepancies on the other hand are minor differences in details and these are allowed in proceedings. See Adele v. State (1995) 2 NWLR Pt. 377 p. 269, Kwagshie v. State (1995) 3 NWLR Pt. 386 P.651.

C If a witness gives evidence on oath which contradicts his previous statement in writing his evidence should be treated as unreliable. See Onubogu v. State 1974 P. SC 358

D On the other hand minor discrepancies between previous written statement and subsequent testimony on oath do not in any way affect the credibility of the witness. If in my view there are no discrepancies there would be strong inference or suspicion that the witness has been tutored.

On this issue the Court Martial said:

F "In the instant case, the court believes that that there were no material contradictions in the evidence of PW4 to render same unreliable. The minor inaccuracies of PW4 in that momentary confused situation as to the rank of the accused, colour of his case and insignificant difference in time, in our view does not go to the writ of the charge of murder in this instance case"

And the Court of Appeal-

G "...the alleged inconsistencies inherent in the evidence of PW4 were in my view not sufficiently material, thus incapable of rendering the said evidence unreliable. And I so hold..."

H PW4 gave evidence on oath that the appellant shot Peter Edeh (deceased). This fact was never denied by the appellant. In fact the appellant agreed that he shot the deceased and the deceased was not armed. The post-mortem report also confirms that Peter Edeh died of gunshot wounds. Whether he was shot once or twice fades into insignificance as to the cause of death in the light of the appellant's admission that he shot

the deceased. PW4's evidence contained some minor inconsistencies that do not amount to contradictions. The evidence of PW4 was corroborated by the post-mortem report, in that the deceased died from gunshot wounds.

Where documentary evidence (post-mortem report) supports oral testimony (PW4's testimony) oral testimony becomes more credible. This is premised on the position of the law that documentary evidence serves as a hanger from which to assess oral testimony. See *Kindley v. M.G. Gongola State* (1988) 2 NWLR Pt. 77 p.473, *Omoregbe v. Lawani* (1980) 3-4 SC P.117. B
C

To my mind there are no contradictions in the evidence of the prosecution witnesses. The evidence of PW4 (eye-witness) is very compelling and as quite rightly pointed out by the courts below there were inaccuracies in the evidence of PW4 which only amount to minor discrepancies. D

(c) Excessive Prison Sentence.

Learned counsel for the appellant observed that Count Two carries a maximum sentence of two years but that on this count the appellant was dismissed from service and the Navy Board added to his punishment by stripping him of his rank and depriving him of his entitlements. He contended that there are additional punishments. Referring to section 151(3) of the Armed Forces Act, he submitted that the Navy Board cannot increase the sentence except the original sentence was invalid. Relying on *Thomas v. State* 1994 4 NWLR Pt. 337 p.129, he observed that this court has the power to reduce the sentence. E
F

Learned counsel for the respondent observed that the appellant was convicted for manslaughter under section 105 of the Armed Forces Act, contending that a convict faces life imprisonment without an option of fine. He submitted that dismissal from service does not amount to an excessive sentence. G

Thomas v. State 1994 4 NWLR Pt.337 P.129 was relied on by learned counsel for the appellant to justify a reduction in sentence. In *Thomas v. State* (supra) Mr. Thomas was charged for murder in a regular court. He was convicted for manslaughter and sentenced to 10 years in prison. The sentence was reduced on appeal. The maximum conviction for manslaughter in a regular court is life H

imprisonment, but the trial judge has discretion. He can sentence a convict for manslaughter, to pay a fine or even to prison for a few days. Is the case the same with a person subject to Military Law?

The appellant was charged with Murder contrary to section 106 of the Armed Forces Act, but found guilty of manslaughter under section 105 of the Armed Forces Act. Section 105 states that:

"105. A person subject to service law under this Act who-

(a) unlawfully kills another person in such circumstances as not to constitute murder; or

(b) with intent to kill or do some grievous harm to another person, unlawfully kills that person in the heat of passion caused by sudden provocation and before there is time for his passion to cool is guilty of manslaughter and liable, on conviction by a court - martial to imprisonment for life."

Under the Penal Code (Sections 222, and 224), and the Criminal Code (Sections 317 and 325) a person convicted for manslaughter shall be punished with imprisonment for life or any less term or with fine or with both. It is clear that a trial judge has the discretion when sentence is considered. But under section 105 of the Armed Forces Act the trial judge has no discretion but to sentence the appellant to life imprisonment. That is the correct sentence under section 105 of the Armed Force Act.

Before I conclude this judgment I must comment on the defence of provocation and not calling a vital witness. Section 264 of the Criminal Code is relevant in considering section 518 of the Criminal Code and so they should be read together. When an accused person relies on provocation as his defence the court must consider the force or weapon used in relation to the provocation received to see if it was disproportionate, or reasonable. If the reaction of the accused to the provocation was disproportionate the defence of provocation fails. If on the other hand his response was reasonable the defence of provocation is sustained. Reasonableness or disproportionate response by the accused is a decision for the judge to make.

Once the defence of provocation is sustained in a charge for murder, the accused would be found guilty of manslaughter

ter and the judge has discretion to impose sentence bearing in mind that the maximum sentence is life. On the facts, a defence of provocation could be considered but it does not avail the appellant. See Stephen v. State (1986) 5 NWLR pt. 46 p. 978, Ukwunnenyi v. State (1989) 4 NWLR pt. 114 p. 131.

Furthermore the evidence of the Court Martial reads: B

Count 1 - imprisonment for life

Count 2 - dismissal from the service of the Nigerian Navy

The confirming authority confirmed the sentence of life imprisonment and dismissal from the service of the Nigerian Navy. It further stripped the appellant of his rank and directed that he was not entitled to his financial entitlements. Was this sentence excessive? Dismissal means rejection, discarding. Once an officer is sentenced to life imprisonment and dismissed from the services of the Armed Forces it would be naive of him to expect to be entitled to his entitlements. Dismissal and forfeiture of entitlement go together. C

The well laid down position of the law is that this court will not interfere with concurrent findings of the courts below except where the findings are perverse, or not supported by credible evidence, or where miscarriage of justice has occurred. See Ibodo v. Enarofia (1980) 5 - 7 SC p.42, Ebba v. Ogodo (1984) 1 SCNLR p. 372. E

This is so since the trial court had the opportunity to hear, see and examine the demeanour of the witnesses. An appellate court does not have the opportunity of hearing and seeing the demeanour of witnesses and so should be slow to disturb the findings of the trial court. See further Popoola v. Adeyemo (1992) 6 NWLR pt. 257 p. 1. F

My lords, the General Court Martial found that the appellant shot and killed Mr. Peter Edeh in the evening of the - 25th day of July 2005. It was further found that the appellant was assigned a pistol and eight round of ammunition but was unable to account for four rounds of ammunition. These are concurrent findings by the court below that have been scrupulously examined by this court and found to be true and correct, ascertained by credible and compelling evidence. In the circumstances the said facts affirmed by the Court of Appeal would not be disturbed by this court. G

The Court Marital did not believe the appellants narration of events, and I agree with both courts below that the appellant's narra- H

tion of events was wrong. The mob that descended on the appellant was attracted to the scene when the appellant shot the deceased. This appeal has no merit. It is hereby dismissed.

B

MOHAMMED JSC

I have had the opportunity before today of reading the lead judgment of my learned brother Rhodes-Vivour, JSC which has just been delivered. I entirely agree with my learned brother in the manner he tackled the issues arising for determination in this appeal before arriving at the final conclusion that the appeal lacks merit and ought to be dismissed. The evidence on record clearly supports the conviction of the Appellant of the offences of manslaughter and loss of service property under Sections 105 and 68(1)(a) of the Armed Forces Act by the Nigerian Navy General Court Martial in its judgment which was affirmed on appeal by the Court below.

Consequently, I have nothing useful to add in my concurring judgment other than to further emphasize that having regard to the overwhelming evidence against the Appellant put in place by the prosecution, the Appellant's dream of seeking refuge under the defence of self-defence, cannot materialize into reality. Accordingly, I also dismiss the appeal and further affirm the conviction and sentence as passed on the Appellant by the General Court Martial and affirmed by the Court of Appeal.

F

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Bode Rhodes-Vivour, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal is devoid of merit and certainly deserves to be dismissed.

The appellant, an officer, was arraigned before the General Court Martial (GCM) of the Nigerian Navy on three counts for the murder of one Peter Ede, (an okada rider) loss of service property and conduct prejudicial to service discipline.

The brief facts of the matter appear pathetic; in the main. The appellant's car was hit from the rear by the deceased's motor-cycle. While the deceased was trying to pacify the appellant on his

knees, the appellant shot him in the mouth. The man died instantly. Hell was let loose by other okada riders who beat the appellant to a state of coma and set ablaze his vehicle along with the deceased's motorcycle. The appellant was rescued by a police-man to a nearby Police Station.

The appellant was tried by the GCM and found culpable for the offences of manslaughter and loss of service property. He was discharged on the 3rd count of conduct prejudicial to service discipline. He was sentenced to life imprisonment and dismissed from military service.

The appellant felt dissatisfied and appealed to the Court of Appeal, Lagos Division (court below) which heard the appeal and dismissed it on 31st January, 2011. This is a further and final appeal by the appellant to this court against his conviction and sentence.

The first issue canvassed by both sides of the divide is whether from the facts and circumstances of this case, the court below was right in holding that the defence of self defence did not avail the appellant.

Learned senior counsel for the appellant submitted that since the prosecution failed to call Corporal Ugbekile who was an eye witness to the incident, such failure should have counted against the respondent on the appellant's plea of self defence.

I must observe here that this submission is not based on a solid foundation. It has been variously held that the prosecution in criminal cases is not bound to call a host of witnesses or a particular witness. It is only to call enough witnesses to discharge the onus of proof incumbent on it to prove the case beyond reasonable doubt. The provision of the applicable section 149 (d) of the Evidence Act which the senior counsel had in view has to do with withholding of evidence and not failure to call a particular witness.

PW.4, the pillion rider with the deceased, testified and depicted all that happened in the matter. That was alright. See: *Akalonu v. The State* (2002) 6 SCNJ 332 at 337, *Ekpenyong v. The State* (1991) 6 NWLR (Pt. 200) 683, *Asariyu v. The State* (1987) 4 NWLR (Pt. 67) 709 at 716; *Udo v. The State* (2006) 15 NWLR (Pt. 1001) 179 at 195; *Oduneye v. The State* (2001) 2 NWLR (Pt. 697) 331 and *Alonge v. Police* (1959) SCNL 2003.

Perhaps it should be stated here that where the prosecution

failed to call a particular witness, the accused is at liberty to call him. See: Ekpenyong v. The State (supra).

As such, it was the responsibility of the appellant to call Corporal Ugbekile to testify on his behalf to sustain his made-up plea of self-defence.

B From the evidence of PW.4 which was believed by the GCM, it was found that the appellant's life was at no time threatened nor was he in any danger before the unfortunate shooting'. It held 'that the defence of self-defence will not avail him'. The court below rightly, C in my considered view, affirmed the stance taken by the trial GCM. The deceased, from the cold facts record, was not armed. The appellant shot the deceased in the mouth while he was being pacified. He wasted the deceased's life for no just cause. The findings of fact by the trial GCM as affirmed by the court below are concurrent. They D have not been shown to be perverse. I shall not interfere with same. See: Igwe v. The State (1982) 9 SC 114 and Shorumo v. The State (2010) 12 SC (Pt. 1) 73 at 96, 102.

I wish to chip in a few words of my own in respect of issue 3. It is 'whether from the facts and circumstances of this case, the Court E of Appeal was right in refusing to quash the conviction and also refusing to reduce the sentence on the appellant by the General Court Martial'.

With the gruesome act by the appellant which caused the instant death of the deceased, it was still contended on his behalf that F his conviction should have been quashed by the court below and the sentence pronounced by the GCM should have been reduced.

I must say it that same appear far-fetched, in the extreme. This episode reminds me of the pronouncement of this court in G Okegbu v. The State (1979) 11 SC 68 per Aniagolu, JSC which goes as follows:-

"It so often happens that in murder cases the defence usually talks of justice only in relation to the accused person. Very often justice as it affects the victim of the murder charge is either forgotten or H ignored by the defence. But just as it is essential that justice be done to the prisoner, so must it also be done to the deceased who, even in the lonely depths of his grave, cries out loudly for the circumstances of his death to be justly examined and justice meted to him."

Further, in Josiah v. The State (1985) 16 NSCC (Pt. 1) 132

at 145, this court, per Oputa, JSC in his 'Notion of justice' pronouncement, maintained that it is not a one way traffic but a three-way bestowal. It is -

"Justice for the appellant accused of a heinous crime of murder, justice for the victim, the murdered man... 'whose blood is crying to heaven for vengeance' and justice for the society at large - the society whose norms and values had been desecrated and broken by the criminal act complained of."

To say the least, the act of the appellant which caused the untimely death of the deceased was most callous and unjustified. Such should not be tolerated in any sane society. The appellant should thank his star for being let off on the count of murder for a lesser offence of manslaughter by the GCM which found that the defence of self-defence did not avail him. As well, there was no provocation by the deceased to precipitate being shot in the mouth while trying to pacify the appellant. The sentence by the GCM as affirmed by the court below was clearly warranted in the prevailing circumstance of this matter. In the main, it will serve as deterrence to other would-be trigger happy officers like the appellant.

As an aside, I note that in paragraph 5.02 at page 24 of the respondent's brief of argument, learned counsel urged that the appeal be dismissed with substantial costs in favour of the respondent. This is unheard of in a criminal matter as same is not provided for in the applicable Rules of court. Counsel should note same. It should not be repeated.

For the above reasons and more especially the detailed ones clearly adumbrated in the lead judgment, I too feel that the appeal is devoid of merit and should be dismissed. I order accordingly. It is hereby dismissed.

PETER-ODILI JSC, CFR

I am in total support with the judgment just delivered by my learned brother, Bode Rhodes-Vivour, JSC. To further emphasise the reasoning from which that decision came about, I shall chip in some comments.

This is an appeal against the decision of the Court of Appeal (sitting in Lagos) Coram: I. M. Saulawa, Raphael Chikwe Agbo, Rita

Nosakhare Pemu JJCA delivered on 31st January, 2011 wherein the learned justices unanimously dismissed the Appellant's appeal against the decision of the General Court Martial. That Court martial holden at Western Naval Command, Naval base, Apapa, Lagos had sentenced the Appellant to life imprisonment and dismissed him from the Nigerian Navy.

The appellant dissatisfied with the judgment of the Court of Appeal has appealed to the Supreme Court.

FACTS BRIEFLY STATED:

The Appellant was a lieutenant in the Nigerian Navy serving on board NNS Beecroft. He was also the Officer-in-Charge of Anti-Pollution under the Lagos State Ministry of Environment, Alausa, Ikeja. On the 25th July, 2005, he was on his way from the State Secretariat, Ministry of Environment Alausa, Ikeja to his base at NNS Beecroft, Apapa when from appellant's version he was attacked by two armed men on a motorcycle. In the process of defending himself, he shot and killed the deceased.

The version of the incident as put forward by the Respondent is that while Appellant was driving to Apapa in his Mercedes benz 190 Car, the car was hit from the rear by a commercial motorcycle ridden by Mr. Peter Ede. That appellant alighted from the car and when Peter Ede noticed that he was a military officer knelt down and started pleading with him. That rather than accede to the pleas, the appellant in a misconceived superiority and show of power brought out his service pistol and shot peter Ede in the mouth and Mr. Ede died instantly on the spot.

From here, the parties are agreed that a mob gathered and beat up the appellant while his car and the motorcycle were lynched and appellant was rescued by a police constable, Richard Ugbekile. He was taken to a nearby police station and the case subsequently transferred to the Nigerian Navy for investigation as the appellant was subject to service Law by virtue of Section 270 (1) (a) Armed Forces Act Cap. A20 LFN 2004.

The Nigerian Navy convened a General Court Martial which eventually tried the Appellant on three (3) Count Charge comprising:-

Count 1: Murder under Section 106 Armed Forces Act Cap. A20 LFN, 2004.

Count 2: Loss of service property under Section 68 Armed Forces Act Cap. A20 LFN, 2004.

Count 3: Conduct to the prejudice of good service and discipline under Section 103 Armed Forces Act Cap. A20 LFN, 2004,

The Court Martial found the Appellant guilty of Count 2 but found that the charge of murder under Count 1 was not proved and thereby convicted the appellant of a lesser offence of manslaughter. B

The respondent did not appeal against the decision of the trial court on this lesser crime of manslaughter.

The records were not released on the 18th June, 2008 after receipt of a motion filed by the appellant seeking the Court of Appeal's intervention. By a ruling of the Court below delivered on 9th April, 2009 appellant was granted extension of time to seek leave to appeal and leave to appeal including 20 days to compile the records of appeal. C

However, the Court of Appeal in its judgment after full hearing dismissed the appeal in its entirety. Unhappy with the result of that appeal, the appellant has come before this court on appeal. D

This appeal was heard on the 14th day of March, 2013 at which, A. J. Owonikoko SAN adopted the appellant's Brief of argument which he settled and filed on 22nd November, 2011. In the Brief, were distilled three issues for determination, viz:- E

1. Whether the learned justices of the Court of Appeal rightly DISMISSED the appellant's plea of self-defence instead of death by provocation relied upon by the trial Court Martial? Grounds 3 & 5. F

2. Whether the Court of Appeal rightly upheld the General Court Martial's decision on loss of service property in spite of the evidence on record, by speculating on what might have happened which prosecution failed to prove? Grounds 8 & 9. G

3. Whether the Appellant was afforded fair hearing by the learned justices of the Court of appeal who based their judgment on personal sentiments and extraneous conclusions (including allusions to findings of the General Court Martial which were not appealed against) and thereby refused to quash the conviction nor reduce the sentence? Grounds 1, 2, 4, 6, 7, 10 & 11. H

The Respondent's Brief of Argument settled by A. C. Igboekwe Esq. was adopted by him. That Brief was filed on 16th March, 2012 and deemed filed on 14th March, 2013. Learned coun-

sel raised three issues for determination which are as follows:-

1. Whether from the facts and circumstances of this case, the Court of Appeal was right in holding that the defence of self defence did not avail the Appellant? Grounds 3 & 5.

B 2. Whether from the facts and circumstances of this case, the Court of Appeal was right in upholding the decision of the General Court Martial on the loss of service property? Grounds 8 & 9.

C 3. Whether from the facts and circumstances of this case, the Court of Appeal was right in refusing to quash the conviction and also refusing to reduce the sentence on the Appellant by the General Court Martial? Grounds 1, 2, 4, 6, 7, 10 & 11.

The questions as raised by each party are in the main the same and either version could safely be used. For convenience and easy flow, I shall utilise those as crafted by the Appellant.

D ISSUE ONE:

Whether the learned justices of the Court of Appeal rightly dismissed the Appellant's plea of self defence, instead of death by provocation relied upon the trial court martial.

E Mr. Owonikoko SAN for the appellant submitted that the facts and circumstances made the plea of self defence available to the appellant as it was in apprehension that his life was in danger that appellant had to resort to shooting whereby the victim died. That the prosecution failed to call the vital witness who rescued the appellant from the scene of crime and handed him over to his superior police officer at the nearby police station. That the witness was material and the failure to call him, made the self defence theory acceptable producing a doubt which had to be resolved in favour of the appellant.

F Also that the appellant's statement was corroborated by the statement of one Odeleye Joseph, ASP, the duty officer that placed appellant into custody at Alausa, Ikeja Police Station. He cited *State v. Azeez* (2008) 14 NWLR (Pt. 1108) 439 at 575; *State v. Kwa* (1975) 2 SC 83; *State v. Njoku* (2010) 1 NWLR (Pt. 1175) 243 at 283.

H Learned Senior Counsel also pointed at the evidence of the policeman who visited the scene of the incident moments after the shooting with two consistent statements. That the evidence of PW4 was characterized by material contradictions which conflicts raised such doubt that ought to be resolved in favour of the appellant. Also, that the prosecution failed to investigate the defence set up by the

appellant. He referred to *State v. Ajie* (2000) 11 NWLR (Pt. 678) 434 at 449, *Uwaekweghinva v. State* (2005) 9 NWLR (Pt.930) 227; *Ozaki v. State* (1990) 1 NWLR (Pt. 124) 92 at 116.

It was further submitted for the appellant that the issue of murder was settled and since it was not appealed against the Lower court, reference to it by that appellate court was prejudicial and wrong. That the Court of Appeal has no jurisdiction to make primary finding of fact except where the question revolves around documentary evidence.

Learned counsel said appeal is by way of rehearing and while a trial court must evaluate unchallenged and un-contradicted evidence before accepting, that prerogative does not inure to a Court of Appeal. He referred to *Gonzee (Nig.) Ltd v NERDC* (2003) 13 NWLR (Pt.943) 624 at 650; *Mamman v. Salandeen* (2005) 18 NWLR (pt. 958) 478 at 506 - 507 etc.

For the appellant it was submitted that a recourse to the spent issue of appellant's supposed guilt for murder to determine appellant's appeal on whether the plea of self defence availed him instead of the defence of provocation as held by the trial court martial offends Appellant's constitutionally protected fundamental right against double jeopardy. That appellant should have a verdict of discharge on the merit instead of conviction of manslaughter. He cited *Nigerian Army v. Aminin-Kano* (2010) 5 NWLR (Pt. 1188) 429 at 467.

Responding, Mr. Igboekwe of counsel for the respondent said there are conditions which must exist before a plea of self defence can successfully avail a defendant which are:-

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

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

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

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

That all these conditions must be established conjunctively. He cited *Gabriel v. State* (1989) 3 NWLR (Pt. 122) 457; *Apugo v. State* (2006) 15 NWLR (pt. 1002) 227; *Ahmed v. State* (2001) 8 NWLR (pt. 746) 622.

It was submitted for the respondent that the defence of self defence is not supported by evidence on record. He cited *Duru v. State* (1993) 3 NWLR (Pt. 281) 283.

That both the General Court Martial and the Court of Appeal found as a fact that the deceased was unarmed. That this court should uphold that concurrent finding. He cited *Omorieg v. State* (2008) 18 NWLR (pt. 1119) 464 at 481; *Annabi v. State* (2008) 13 NWLR (Pt. 1103) 179 at 200-201.

To tackle the question raised here, a reverse movement back to the findings of the two Courts below would offer an anchor. The General Court Martial in its summation during its judgment held thus:-

“The Court considered very seriously the defence of self-defence put forward by the accused. The Court also noted what amounts to self-defence as espoused by both parties and confirmed by both parties and confirmed by the Judge Advocate in his advice.

The court however, did not agree with the story of the accused that the deceased was his assailant. We do not believe that he was being robbed by the deceased and the other imaginary person who he claimed ran away. We do not believe that he was being dragged out of the car by any of the two persons he affirmed were unarmed in broad day light in the centre of Ikeja when there was no hold-up, according to him. We rather believe the story of PW4 and conclude that the accused’s story of being attacked was at best an afterthought and the figment of his imagination. The accused’s life was at no time threatened nor was he in any danger before the unfortunate shooting. We therefore, hold that the defence of self-defence did not avail him.”

The Court of Appeal towing the same line had this to say:-
“In view of the totality of the evidence adduced at the trial vis-a-vis the nature and circumstances surrounding the case, as a whole, there is every reasonable ground for me to believe that the above finding of the trial court martial is unassailable.”

Some basic rules co-exist before the plea of self-defence would prevail. These rules or conditions are thus:-

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

2. There must be present an impending peril/danger to life or of great bodily harm either real or so apparent as to create honest

belief of an existing necessity.

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

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

I place reliance on *Gabriel v State* (1989) 5 NWLR (Pt. 122) 457; *Ahmed v State* (2001) 8 NWLR (pt. 746) 622. B

Now co-relating those conditions with the evidence available to the court, there is no disputing that the appellant shot and killed the deceased who was unarmed. There had been an accident albeit minor in that the deceased as a motorcyclist had had his motorcycle hit the back of the car of the appellant in a free flowing traffic. C

Taking the version thereafter of the appellant that he was in fear of his life and had to shoot to save his life and viewed alongside the version espoused by the prosecution from its witnesses that the deceased caused no threat to the life of the appellant and that in fact deceased was kneeling down before appellant in supplication for the dent to his vehicle who then without justification shot him in an apparent display of arrogance and power. D

Taking these facts in context, the account put up by the appellant does not fit into the circumstances that were present. This is unlike the position of things as put across by the prosecution which takes the steam from the plea of self-defence and lends weight to the blameless concurrent findings of the trial Court Martial and the Court of Appeal, thus holding back the hand of this Court to venture into an interference. Just like my learned brother, Onnoghen, JSC asked in *Annabi v State* (2008) 13 NWLR (Pt. 1103) 179 at 200, “...*The question is where does the learned counsel expect the court to get the facts with which to establish any imaginary defence available to the appellant except by speculation, which is frowned upon by the law.*” See also *Green v. Queen* (1955) 15 WACA 73, *Asanya v. State* (1991) 3 NWLR (Pt. 180) 442. F G

It is clear that the issue herein is resolved against the Appellant.

ISSUE TWO: H

Whether the Court of Appeal rightly upheld the General Court Martial’s decision on loss of service property in spite of the evidence on record, by speculating on what might have happened which prosecution failed to prove.

Learned senior counsel for the appellant stated that the Court of Appeal misunderstood the arguments put forward by the appellant as to the missing three rounds of ammunition. That the General Court Martial rightly identified the elements of the offence as:-

1. That the accused is subject to service law.
- B 2. That the accused had charge of or was in care of the service property.
3. That the said service property was lost.
4. That the accused intentionally lost the items.
- C 5. That the accused has no defence in law or facts.

That while the first two elements were undisputed, the conclusion of the lower court based on the General Court Martial's decision with regard to the three latter element is undoubtedly at variance with the evidence led and the facts of the case. That the lower court failed to appreciate appellant's submissions to it, that the first burden to prove by prosecution was the loss of the service property after which the inference or evidence of recovery could then arise. Learned counsel further submitted that the handing over of the service pistol to the police, an act done to preserve the property cannot be regarded as an intentional loss as required for the fourth element. He referred to *Shehu v. State* (2010) 8 NWLR (Pt. 1195) 112 at 14.

Mr. Owonikoko of counsel contended that since no evidence was led to counter the evidence of the appellant regarding the rounds of ammunition in the pistol as at the time of the handover to the police officer, the position of the law is that such evidence should be accepted and acted upon. He cited *Sunday Modupe v. The State* (1988) 4 NWLR (pt. 87).

Mr. Igboekwe of counsel submitted for the respondent that Section 68 (1) (a) of the Armed Forces Act is the applicable law and the offence thereby created is a strict liability offence. That all the prosecution needs to establish in evidence is that the service property was entrusted to the care of the accused and he lost it. That once the accused cannot return or account for the service property given to him, he has committed the offence as his intention or mens rea is immaterial. The actus reus alone is enough to constitute or prove the commission of the offence. He cited *Black's Law Dictionary Sixth Edition*. He said for the police to have recovered part of the service property entrusted under the care of the appellant constitutes an

offence against appellant by virtue of Section 68 (1) (a) of the armed Forces Act.

The offence for which the appellant is charged in this count is pursuant to Section 68 (1) of the Armed Forces Act wherein it is provided:-

“A person subject to service law under this Act who loses a public or service property of which he has the charge or which forms part of the property of which he has the charge or which has been entrusted to his care... is guilty of an offence under this section and liable, on conviction by a Court Martial to imprisonment for a term not exceeding two years or any less punishment provided by this Act.”

The trial Court Martial interpreted this statute to be a strict liability offence on the grounds that the appellant could not explain the missing rounds of ammunition or how his service pistol came to be recovered by the police officer, the ingredients of the offence were complete, the mens rea not being a factor. This position, the Court of Appeal went along with. I am of the same mind and also agreeing with learned counsel for the respondent that since the appellant admitted being entrusted with the service pistol of 8 rounds of ammunition and four rounds of ammunition of which have remained lost till date, the implication is that the offence was complete. This is the principle of strict liability properly embedded within Section 68 (1) of the Armed Forces Act, thus making it a non-issue that he handed the pistol and the unexpended ammunition to the police officer. The point I am trying to make is that whether he had handed the pistol over or it was taken from him, the offence was complete on the weapon and any of its components leaving appellant's custody.

The case of *Kalu v. Nigerian Army* (2010) 4 NWLR (pt.1185) 433 at 449 - 450, a Court of Appeal decision would not apply here because of the difference in the circumstances. This is because in the case at hand, the appellant himself admitted handing over the remaining ammunitions while in the *Kalu's* case there was a doubt as to the type of weapon the accused signed for. Also doubtful was whether he alone or with other officers had custody of the missing 520 rounds of ammunition, a scenario that evoked some possibilities not clearly discerned especially since he was in company of other officers.

From the above, this issue is settled against the Appellant.

ISSUE THREE:

Whether the Appellant was afforded fair hearing by the learned justices of the Court of Appeal who based their judgment on personal sentiments and extraneous conclusions (including allusions to findings of the General Court Martial which were not appealed against) and thereby refused to quash the conviction nor reduce the sentence.

For the appellant it was submitted that the law is now settled that the right of a convicted accused to appeal for review of the findings of the court martial is an essential part of post trial procedure before the decision of the court martial is confirmed and becomes final. That the appellant was denied this facility and opportunity as it took the order of the Lower Court after the decision of the court martial had been delivered to avail the appellant of the record of proceedings which clearly was a violation of appellant's right to fair hearing. He said the Navy Board not only confirmed the finding as well as the sentence but in count 2 imposed a severe punishment than that imposed by the court martial. He cited *Nigerian Army v. Iyela* (2008) 18 NWLR (pt.1118) 115 at 134 - 135; *Orji v. State* (2008) 10 NWLR (Pt. 1094) 31 at 50.

Learned counsel for the appellant said the Court of Appeal resorted to guess work and speculation to fill gaps in the prosecution thereby sponsoring the case of the prosecution which is wrong. He relied on *Osundele v. Agiri* (2009) 18 NWLR (pt. 1173) 219 at 251 - 252; *Bello v. State* (1966) 2 NSCC 268 at 274; Section 149 (1), (2) Armed Forces Act.

It was further submitted for the appellant that the refusal of the confirming authority to give the appellant the opportunity to make representation before it was a fundamental denial of fair hearing and this court under Section 22 of the Supreme Court can rightly redress the anomaly by reducing the sentence passed on the appellant by the Court Martial and as affirmed by the Court below.

He stated that this court can set aside the sentences of those earlier courts and replace them by say a loss of promotion for a specified period. He cited Section 22 of the Supreme Court Act; Sections 151 (3) and 201 of the Armed Forces Act.

The grouse of the appellant herein is that his right to fair hearing was denied him when the Record was not made available to

him during the confirmation of the confirming authority and so he lost the opportunity to petition the sentence meted out to him. That this was an infringement under Sections 149, 150 (1) and 151 of the Armed Forces Act. This, the respondent countered and I would go along with the stance of the respondent since even after confirmation, the right of petition to a reviewing authority has been provided for and this without a limited time frame. This is within the provision of Section 154 (1) - (7) of the Armed Forces Act. B

The right to be heard is not a position that can be questioned however it must be understood for what it is and that is really an opportunity to be heard. Therefore where a party with the right to be heard or a legal representation on his behalf fails to utilize it, then the condition has been adequately met, that he had the open channel but chose not to utilize it. He cannot complain of an infringement on that basic fundamental natural law concept. See *Akingbade v. African Paints (Nig.) Ltd* (2008) 10 NWLR (Pt. 1096) 570; *Ogene v. Ogene* (2008) 2 NWLR (Pt. 1070) 29 at 44. C

Also appellant complained of the views expressed by the Court of Appeal over the conviction for the lesser offence of manslaughter based on provocation. I see nothing wrong with those remarks by the Court below albeit now passing remarks since there was nothing they could do about it. The reasons are that the conclusive finding of provocation which the trial court said availed the appellant could not be supported by either the findings based on evidence before that court and the fact that the lesser sentence not having been appealed against by the respondent, the hands of the appellate court were tied. It is in the face of that emasculation or impotence that all the Court of Appeal could do was to voice its discomfort on what brought about the final destination and not having anything against the final decision had to go along with it. In this regard, I would rely on *Daino v. UBA Plc* (2007) 16 NWLR (pt. 1059) 99 at 161, a decision of this court per Ogbuagu, JSC thus:- F

"It is now firmly settled that where a decision of a court is right, the reason given for so holding is immaterial." G H

In the light of the foregoing and the well articulated reasoning in the lead judgment, I too dismiss this appeal as lacking in merit.

AKA'AH'S JSC

This is an appeal against the decision of the Court of Appeal, Lagos Division, which dismissed the appellant's appeal against the decision of the General Court Martial holden at Western Naval Command, Naval Base, Apapa.

B The appellant was initially charged for the murder of one Peter Ede and the loss of service property but was found guilty by the Nigerian Navy General Court Martial for manslaughter and loss of service property. The General Court Martial sentenced him to life imprisonment and he was dismissed from military service.

C Dissatisfied with his conviction and sentence, the appellant appealed to the Court of Appeal Lagos Division (hereinafter referred to as the lower court). The lower court dismissed the appeal and affirmed the judgment of the General Court Martial on 31st January, D 2011. Again dissatisfied with the judgment of the lower court, the appellant appealed to this Court against his conviction and sentence. The Notice of Appeal containing 11 grounds of appeal was filed on 2nd March, 2011 and the reliefs sought were "an order allowing the appellant's appeal and quashing the conviction and sentence of the E appellant to life imprisonment for manslaughter and instead acquitting the appellant of all the charges upon which he was arraigned before the General Court Martial, Alternatively the appellant sought the following reliefs:

F 1. An order allowing the appeal and returning a verdict of acquittal for the appellant on the two counts of manslaughter and loss of service property.

G 2. An order (in the event that the conviction for manslaughter is not upturned) reversing the sentence of life imprisonment pronounced on the appellant and substituting therefore a shorter and more reasonable term of imprisonment.

H 3. An order setting aside the order dismissing the appellant from the Nigerian Navy and directing his reinstatement to his rank without loss of seniority, promotion and other privileges to which he was entitled to at the date of judgment in this appeal" (see pages 1327 - 1343 Vol. 3 of the records).

From the said eleven grounds of appeal the learned counsel for the appellant submitted three issues for determination as follows:

1. Whether the learned Justices of the Court of Appeal rightly

DISMISSED the appellant's plea of self defence, instead of death by provocation relied upon by the trial Court Martial (Grounds 3 and 5).

2. Whether the Court of Appeal rightly upheld the General Court Martial's decision on loss of service property in spite of the evidence on record, by speculating on what might have happened which prosecution failed to prove (Grounds 8 and 9). B

3. Whether the appellant was afforded fair hearing by the learned Justices of the Court of Appeal who based their judgment on personal sentiments and extraneous conclusions (including allusions to findings of the General Court Martial which were not appealed against) and thereby refused to quash the conviction nor reduce the sentence. (Grounds 1, 2, 3, 4, 6, 7, 10 and 11). C

The respondent also distilled the following three issues for determination by this Court: D

1. Whether from the facts and circumstances of this case, the Court of Appeal was right in holding that the defence of self defence did not avail the appellant (Grounds 3 & 5).

2. Whether from the facts and circumstances of this case, the Court of Appeal was right in upholding the decision of the General Court Martial on the loss of service property (Grounds 8 & 9). E

3. Whether from the facts and circumstances of this case the Court of Appeal was right in refusing to quash the conviction and also refusing to reduce the sentence on the appellant by the General Court Martial (Grounds 1, 2, 4, 6, 7, 10 and 11). F

My Lord, Rhodes - Vivour JSC meticulously considered the issues arising in the appeal and arrived at the conclusion that the appeal lacked merit and so proceeded to dismiss it. I am in total agreement with his reasoning and conclusions that the appeal is devoid of merit and so deserves to fail. The facts of the case are too sordid and the murder was a gruesome one. The appellant by putting a gun in the deceased mouth and pulling the trigger did not give him any chance to survive. It would have been a miracle if the deceased had survived. Those paid to safeguard life and property have turned themselves into vampires. The story concocted by the appellant that he shot at the deceased in self defence was a cock and bull story which was rightly rejected by the General Court Martial when it said at pages 1039 - 1040 Vol. II of the record: G H

"The Court considered very seriously the defence of self - defence put forward by the accused. The Court however, did not agree with the story of the accused that the deceased was his assailant. We do not believe that he was being robbed by the deceased and the other imaginary person whom he claimed ran away. We do not believe that he was being dragged out of the car by any of the two persons he affirmed were unarmed in broad day light in the centre of Ikeja when there was no hold up according to him. We rather believe the story of PW4 and conclude that the accused's story of being attacked was at best an afterthought and the figment of his imagination. The accused's life was at no time threatened nor was he in any danger before the unfortunate shooting. We therefore, hold that the defence of self-defence will not avail him."

Mr. Owonikoko learned SAN submitted in his brief and in oral argument that the Prosecution failed to call Corporal Ugbekile who was an eye witness to the incident and that such failure should have counted against the respondent on the appellant's plea of self defence. He further submitted that, where as in this case, circumstantial evidence is capable of two interpretations one against and the other in favour of the accused, there is no proof beyond reasonable doubt, the doubt should be resolved in favour of the accused. He cited the cases of *State v. Kura* (1975) 2 SC 83 and *State v. Njoku* (2010) 1 NWLR (Part 1175) 243 at 283 in support.

I agree that the burden of proving self defence guaranteed an accused under section 33 (2) of the Constitution is not proof beyond reasonable doubt. It is however not enough for the accused to rely on self defence without leading evidence to show the circumstances under which he is claiming self-defence to exculpate him from the offence of murder. As decided by this Court in *Uwaekweshinya v. State* (2005) 9 NWLR (part 930) 227 at 250 (supra) per Musdapher JSC (as he then was):

"Before the defence is available, it must be shown by the person relying upon it that he reasonably believed that there was no other way of saving himself from death or grievous bodily harm other than by using such force as he did and that he tried to disengage from the event which led to the application of such force or in the instant case the use of cutlass. See: Umana v. The State (1972) 4 SC 161; Bassey v. The State (1963) 1 ALL NLR 280. For an accused to

avail himself of the defence of self - defence, he must show by evidence that he took reasonable steps to disengage from the fight or make some physical withdrawal”.

To my mind the reasonable belief is not subjective but rather objective. A trial court faced with a defence of self - defence would ask itself whether from the surrounding circumstances in which the weapon was used, in this case the gun, if that was the only option left for him to save his life. The Court Martial dutifully carried out its assignment by weighing the evidence adduced by the Prosecution and the claim to self- defence by the accused and rightly rejected the story put forward by the appellant and came to the conclusion that it was the brutal murder of the deceased by the appellant that ignited the reaction of the mob and not that it was the mob that first attacked him and it was because he feared for his life that he fired the fatal shot that killed the deceased.

If the appellant considered the evidence of Corporal Ugbekile was going to strengthen his claim to self defence, it was his duty to call him to testify on his behalf.

I am surprised that the respondent did not file a cross - appeal against the verdict of the Court Marshal in not finding the appellant guilty of murder but manslaughter and sentencing him to life imprisonment. The facts as revealed by the Prosecution are a case of pre - meditated murder borne out of pride, arrogance and lack of respect for human life. The appellant valued his car more than the life of the deceased. He therefore did not realise the heinous crime he had committed and instead of thanking his God from saving him from the hangman's noose, has had the temerity to ask for an order of this Court to set aside the order dismissing him from the Nigerian Navy and directing his reinstatement to his rank without loss of seniority promotion and other privileges to which he is entitled. The only privilege he is entitled to is to be kept away for the rest of his life in prison in the hope that he will show remorse for what he did to unjustly take away a precious life and beg God for forgiveness.

I find no merit in the appeal and I adopt the fuller reasons contained in the judgment of my learned brother, Rhodes - Vivour JSC in dismissing the appeal.