

SUPREME COURT OF NIGERIA
FRIDAY 27TH FEBRUARY, 2015. SC. 315/2012
CORAM:- S. GALADIMA, M. U. PETER-ODILI,
O. ARIWOOLA, J. I. OKORO, C. C. NWEZE, JJSC

EMMANUEL OGAR AKONG EDOKO APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Confession - Conflicting versions - Where accused makes two statements voluntarily - Trial Judge will be right to take the one less favourable to the accused (H1)

CRIMINAL PROCEDURE - Defence - Consideration of - Any defence of which accused is entitled to should be considered - However unreasonable for what it is worth (H2)

CRIMINAL LAW - Self defence - Conditions CC s. 286 - For the defence to avail an accused - There must be an unlawful assault - Which was not provoked by the accused (H3)

CRIMINAL PROCEDURE - Provocation - Conditions - Accused must clearly state the facts - Show that the provocation deprived him of self control - And must show a proportionate retaliation (H4)

FACTS

Accused/appellant was arraigned before the High Court of Cross River State for murder of the deceased one Ajing Bisong. The version of the case as presented by prosecution/respondent is that appellant left his village for a burial ceremony taking place in a neighbouring village. Appellant upon his arrival at the vicinity where PW1 and some of his friends were sitting, started smoking Indian hemp. The deceased who was serving food and drinks at the material time to PW1 and his friends then approached appellant and asked him to leave the area. Appellant felt unhappy and refused to leave.

A scuffle therefore ensued leading to appellant stabbing the deceased. PW1 immediately rushed the deceased to the hospital, but he died on the way. Appellant fled the crime scene but was later

apprehended and charged before the court. At the trial, respondent called three witnesses. Appellant was the sole witness for the defence. He raised the defences of self defence and provocation. The learned trial judge at the end of trial rejected his defences, convicted and sentenced him to death. Aggrieved, appellant lodged appeal in the Court of Appeal Calabar Division. The appeal was dismissed and judgment of the trial court affirmed. In his further quest for justice, appellant appealed to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether the court below was right to have upheld the decision of the trial court to wit: that the defence of self-defence and provocation did not avail the appellant.”

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

CRIMINAL PROCEDURE - Confession - Conflicting versions

1. From the two sets of evidence adduced by the appellant to defend himself, in one i.e. exhibit B, he admits to stabbing the deceased in the course of the struggle when he overpowered him and took the knife to stab him. In the other piece of evidence he said that the knife pierced the deceased in the heat of the struggle, thus exculpating himself from blame. The law is quite clear that where an accused person makes two statements voluntarily, with full knowledge of what he is doing and without any form of inducement, a trial Judge will be right to take the one which is less favourable to the accused, particularly when that one is first in time. The second one will in my opinion be an afterthought. (p. 387 D)

CRIMINAL PROCEDURE - Defence - Consideration of

2. I am at one with the court below which upheld the decision of the trial court that it was the refusal of the appellant to take his Indian hemp elsewhere that resulted in the altercation between them. Ordinarily, one would have dismissed the defence put up by the appellant without much ado. The reason being that it is unreasonable to think or accept that the appellant

under the circumstances of this case, would have lost his self control just because he was asked to stop smoking Indian hemp at the venue of a burial ceremony. But the law is settled that any defence to which an accused person is, on the evidence entitled to, should be considered however stupid or unreasonable for what it is worth. (p. 388 B)

CRIMINAL PROCEDURE - Self defence - Conditions

3. The law is quite clear that by virtue of section 286 of the Criminal Code, when a person is unlawfully assaulted or attacked, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make an effective defence against the assault, provided that the force used is not intended and is not such as is likely to cause death or grievous harm. In other words, for the defence of self-defence to avail an accused person, there must be an unlawful assault which the unlawful assault was not provoked by the accused.

In this case, I agree with the two courts below that the appellant failed woefully to show that his life was threatened or in danger at the time he stabbed and killed the deceased. Secondly, the force the appellant used in retaliation to the supposed slap on him by the deceased was disproportionate and falls short of the allowance given under Section 286 of the Criminal Code. Also, the appellant knows and/or ought to know that the smoking of Indian hemp is unlawful and that if the deceased actually requested him to go and smoke it elsewhere, that was not enough to provoke him to kill the deceased.

(pp. 389 E/390 G)

CRIMINAL PROCEDURE - Provocation - Conditions

4. For an accused to successfully invoke the defence of provocation, he must state clearly the fact or act of provocation to enable the court to determine how much he was provoked. Secondly, he has to show that the said provocation was enough to deprive him of self-control and thirdly, he must show a retaliation which is proportionate to the provocation offered him by the deceased to the accused.

The appellant herein failed to show how a simple request for him to stop smoking Indian hemp at a party provoked him to the extent of losing his self-control.

In the instant case, the appellant has failed to successfully plead any. He is not entitled to any of the two defences raised.

I accept, agree and uphold the judgment of the court below which also affirmed the judgment of the trial court. The lone issue submitted by the appellant, as it stands is hereby resolved against him. (p. 391 D/H)

C NOTABLE POINT OF INTEREST

OKORO JSC

1. Self defence and provocation – Distinction

It may be necessary to state here that the distinction between the defence of self-defence and that of provocation is that while a plea of self-defence if successfully raised will completely absolve the offender from criminal responsibility, a plea of provocation on the other hand, if successful, reduces the offence of murder to manslaughter. (p. 391 G)

REPRESENTATION

A. U. Mustapha Esq., with M. D. Ogualeana-Nkanga, Esq., O. Ehikioya, Esq., and Chief Joshua Aloba, for the Appellant

F M. N. O. Olopade, Esq, with Chuma Ajaegbu Esq., for the Respondent

CASES REFERRED TO

Laoye v. State (1985) 10 SC 177

G Baridan v. State (1994) 1 NWLR (pt. 320) 250

Aganmwonyi v. A-G of Bendel State (1987) 1 SC 77

Njoku v. State (1993) 6 NWLR (pt. 299) 272

Stephen v. State (1998) 12 SC 450

Abaji v. State (1965) 4 NSCC 210

H Ikemson v. State (1989) 3 NWLR (pt. 110) 455

Sule v. State (2009) 17 NWLR (pt. 1169) 33

Williams v. State (1992) 10 SCNJ 74

R. v. Fadina (1958) SCNLR 250

Udofia v. State (1984) 12 SC 139

Ojo v. State (1972) 12 SC 147

Bozin v. State (1985) 2 NWLR (pt. 8) 465

Ada v. State (2008) 13 NWLR (pt. 103) 149

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

B

STATUTE REFERRED TO

Criminal Code Act Cap. C38 LFN 2004, ss. 283, 284, 286, 287

BOOKS REFERRED TO

Criminal Law in Nigeria 2nd Ed. p. 240

The Nigerian Bar Journal vol 11 (1973) 93-97

Law & Administration of Justice in the 21st Century pp. 75-98

C

LEAD JUDGMENT BY OKORO JSC

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This is an appeal against the judgment of the Court of Appeal sitting at Calabar which was delivered on 13th July, 2009 wherein the court below upheld the conviction and sentence to death of the appellant by the High Court of Cross River State.

The facts of this case, as can be gathered from the record of appeal shows that on the 26th day of November, 2004, the appellant left Edor, his village in Ikom Local Government Area to attend the burial of one late Gregory Awam at Nkonfab, a neighbouring village. Between 10.00pm and 11.00pm, the appellant went close to the vicinity where PW1, an eye witness to the crime and some of his friends were sitting and started smoking Indian hemp.

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The deceased, Ajing Bisong who was serving food and drinks to PW1 and his friends, approached the appellant and told him to leave the area. A scuffle ensued and from the account of the prosecution, the appellant brought out a jack knife and stabbed the deceased who shouted and collapsed. The appellant on the other hand presented two versions of the incident. In his confessional statement to the police - Exhibit B, he claimed that the jack knife fell from the deceased in the course of the struggle, he then used it to stab the deceased on the left side of his ribs. In his oral testimony in court he stated that he was attacked by the deceased and five of his friends. According to him, the deceased sat on top of him, removed a jack knife and they continued to struggle. That as they were struggling,

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the knife pierced the deceased who shouted that the appellant had stabbed him. At that stage, the appellant ran away. PW1 rushed the deceased to the hospital but he died on their way to the hospital. The appellant was later arrested and arraigned in court after investigation. The prosecution called three witnesses to prove its case against the appellant. The appellant gave evidence in his defence and called no other witness.

The learned trial judge accepted the evidence of the prosecution especially that of the eye witness Ekom Francis Abaji (PW1). He considered but rejected the defences of provocation and self defence canvassed for the appellant.

In the circumstance, the learned trial judge convicted the appellant of the murder of the deceased and sentenced him to death.

Dissatisfied with the verdict, the appellant appealed to the Court of Appeal which found no merit in the appeal. The Lower Court accordingly affirmed the conviction and sentence of the appellant by the trial High Court. Again, not being satisfied with the stance of the Lower Court, the appellant has appealed to this court via a notice of appeal dated and filed on 11th August, 2009. Three grounds of appeal are contained therein out of which the learned counsel for the appellant has distilled one issue for the determination of this appeal. The lone issue states:

“Whether the court below was right to have upheld the decision of the trial court to wit: that the defence of self-defence and provocation did not avail the appellant.”

In the respondent’s brief, the learned counsel for the respondent M. N. O. Olopade Esq., adopts the lone issue as formulated by the appellant. I shall, in the circumstance determine this appeal based on the said issue.

Learned counsel for the appellant, A. U. Mustapha Esq., in the brief settled by him argued that when an accused person, as in this case, raises defence of self-defence, the onus remains throughout upon the prosecution to establish the guilt of the accused. He cited the cases of Adeyinka Albert Laoye V. The State (1985) 10 SC 177 at 204 - 205 and Sunday Baridan V. The State (1994) 1 NWLR (Pt.320) 250 at 262. It is his view that although there is a slight difference between the statement of the appellant in Exhibit B and his oral testimony in court it did not detract from the fact that it was the

deceased that attacked the appellant first and that the jack knife in question, that is, the killer weapon, originated from the person of the deceased and that the deceased actually aimed at using the weapon on him.

In his further argument, he contended that from the evidence led by the appellant, it is glaring that the deceased was apparently about to attack the appellant in a manner that grievous hurt and/or death was possible and the appellant had to defend himself. In support, he cited the cases of *David Aganmwonyi V. Attorney-General of Bendel State* (1987) 1 SC 77 at 94 and *Sunday Baridan V. The State* (supra). Relying further on the case of *Sampson Uwaekweghinya V. The State* (supra), the learned counsel submitted that the appellant was entitled to defend himself against unprovoked attack by the deceased.

Learned counsel submitted further that the facts disclose that the self-defence was instantaneous or contemporaneous with the threatened attack. That it happened in the course of the altercation and that there was no time break for frayed nerves to calm, relying on the cases of *Njoku V. The State* (1993) 6 NWLR (Pt.299) 272 at 279 and *Uwaekweghinya V. The State* (supra).

It was further argued by the appellant that the self-defence was not greater or disproportionate with the threatened attack. Furthermore, that no reasonable man could have done contrary to what the appellant did in the circumstance, referring to the case of *David Aganmwonyi V. Attorney-General of Bendel State* (1987) 1 SC 77 at 94. According to him, it was wrong for the Lower Court to affirm the decision of the trial court on this issue.

On provocation, he submitted that there was a wrongful act against the appellant by the deceased and that it was of the nature such as would deprive an ordinary person of the power of self control. That even merely requesting the appellant to cede his seat for an acolyte of the deceased's was sufficiently insulting, not to talk of following the insult up with a blow to the eye. He submitted that the act of provocation was sufficient to induce the appellant to assault the deceased and that the fatal stabbing occurred in the heat of passion. The appellant relied on the following cases: *Isaac Stephen V. The State* (1998) 12 SC. 450 at 498 499, *Abaji V. State* (1965) 4 NSCC 210 at 215.

In all, the learned counsel for the appellant urged this court to resolve this lone issue in favour of the appellant.

In his response, the learned counsel for the respondent submitted that the court below rightly affirmed the decision of the trial court that the defence of self-defence and provocation did not avail the appellant. That a confessional statement that is at variance with the accused's testimony at the trial cannot be rejected by the court and does not affect its admissibility; relying on the case of *Ikemson V. The State* (1989) 3 NWLR (Pt.110) 455 at 473.

Learned counsel further submitted that the court below was right to accept the trial court's very clear understanding of the law on provocation that a fist blow on the eye cannot be said to have been proportionately responded to by a stab with a jack knife and that the retaliation by the appellant to the deceased was in excess of what the law allows for him to succeed under the law of provocation.

It was further submitted that it is unreasonable for a man of the ilk of the accused under the circumstances of this case to have lost his self-control just because he was asked to stop smoking Indian hemp at a party. Also, that the defence of self-defence will not avail the appellant as it has been shown by the evidence that the alleged attack on the appellant was not in a manner that grievous hurt and for death was possible. He relies on the case of *Uwaekweghinya V. The State* (2005) 1 NCC 369 at 384.

Learned counsel also submitted that the court below was right when it held that the trial court was right to have disbelieved the testimony of the appellant at the trial because of its contradiction with exhibit B. He opined that the appellant failed to convince the court as to why the appellant's testimony in court that is a contradiction to exhibit B should be believed.

In conclusion, learned counsel submitted that the appellant failed to convince this court that there were insufficient evidence to support the findings of the trial court that the appellant killed the deceased deliberately and not under provocation and/or self-defence. He then urged this court to resolve this issue against the appellant.

My Lords, it seems to me most convenient to start resolving the sole issue in this appeal by considering the evidence adduced by the appellant upon which his defence of provocation and self-defence are predicated vis-à-vis the evidence provided by the prosecu-

tion. In his statement to the police, being first in time, the appellant said, inter alia in exhibit B.

“Then the deceased gave me a blow on my left eye. Then I rushed and held him on his waist from behind. The deceased tried to remove a jack knife from his waist. I held the handle of the jack knife and as we were struggling the jack knife fell. Ajing used his leg to match the jack knife, but I was faster and pick the jack knife and stabbed Ajing on the left side of his ribs and removed the jack knife.” B

However, in his evidence in court, he deviated from his earlier admission that he stabbed the deceased. This is what he said C amongst others:

“Ajing sat on top of me and removed a jack knife, I began to struggle with him because he wanted to injure me. As I was struggling the knife pierced Ajing. Ajing began to shout that I have stabbed him with a knife.” D

From the two sets of evidence adduced by the appellant to defend himself, in one i.e. exhibit B, he admits to stabbing the deceased in the course of the struggle when he overpowered him and took the knife to stab him. In the other piece of evidence he said that the knife pierced the deceased in the heat of the struggle, thus exculpating himself from blame. The law is quite clear that where an accused person makes two statements voluntarily, with full knowledge of what he is doing and without any form of inducement, a trial Judge will be right to take the one which is less favourable to the accused, particularly when that one is first in time. The second one will in my opinion be an afterthought. See Sule V. State (2009) 17 NWLR (Pt.1169) 33 at 66 paras F - G and Ikemson V. The State (1989) 3 NWLR (Pt.110) 455 at 473. Learned counsel for the appellant agrees G with this position when he states on page 7, paragraph 3.3 of his brief as follows:

“The law is not recondite on which to believe. It is the one that is less favourable to the Appellant, more so, when it is earlier in time.” H

This is commendable practice by the appellant’s counsel. This means that the evidence of the appellant upon which his defence of provocation and self-defence is anchored is that contained in exhibit B i.e. that he “stabbed Ajing on the left side of his ribs and removed

the jack knife.”

Appellant’s evidence in exhibit B is close to that adduced by the prosecution to the effect that the appellant actually stabbed and killed the deceased. The only difference is that the appellant did not state that he smoked Indian hemp around the vicinity which the deceased was serving food and he was admonished by the deceased to go and smoke the weed elsewhere.

I am at one with the court below which upheld the decision of the trial court that it was the refusal of the appellant to take his Indian hemp elsewhere that resulted in the altercation between them. Ordinarily, one would have dismissed the defence put up by the appellant without much ado. The reason being that it is unreasonable to think or accept that the appellant under the circumstances of this case, would have lost his self control just because he was asked to stop smoking Indian hemp at the venue of a burial ceremony. But the law is settled that any defence to which an accused person is, on the evidence entitled to, should be considered however stupid or unreasonable for what it is worth. See Uche Williams V. The State (1992) 10 SCNJ. 74, R V. Fadina (1958) SCNLR 250, Udofia V. The State (1984) 12 SC 139, Ojo V. The State (1972) 12 SC 147. In Bozin V. The State (1985) 2 NWLR (Pt.8) 465, this court held that it is an essential principle of a criminal trial that a defence however fanciful, stupid or doubtful is deserving of consideration. See also Abdullahi Ada V. The State (2008) 13 NWLR (pt. 103) 149.

The appellant put up the defences of self-defence and provocation. This defence is provided for in sections 286 and 287 of the Criminal Code Act Cap. C. 38 Laws of the Federation of Nigeria, 2004. I shall reproduce the two sections for ease of reference. Section 286 of the Criminal Code provides:

“286 Self-defence against unprovoked assault: When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make effectual defence against the assault.

Provided that the force used is not intended, and is not such as is likely, to cause death or grievous harm. If the nature of the assault is such as to cause reasonable apprehension of death or grievous harm, and the person using force by way of defence believes, on

reasonable ground, that he cannot otherwise preserve the person defended from death or grievous harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous harm. ”

Also, Section 287 of the Criminal Code provides:

“287 Self-defence against provoked assault: If when a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults him with such violence as to cause reasonable apprehension of death or grievous harm and to induce him to believe on reasonable grounds, that it is necessary for his presentation from death or grievous harm to use force in self-defence, he is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous harm.

This protection does not extend to a case in which the person using force, which causes death or grievous harm, first began the assault with intent to kill or to do grievous harm to some person, nor to a case in which the person using force which causes death or grievous harm endeavoured to kill or to do grievous harm to some person before the necessity of so preserving himself arose, nor in either case, unless, before such necessity arose, the person using such force declined further conflict and quitted it or retreated from it as far as was practicable.”

The law is quite clear that by virtue of section 286 of the Criminal Code, when a person is unlawfully assaulted or attacked, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make an effective defence against the assault, provided that the force used is not intended and is not such as is likely to cause death or grievous harm. In other words, for the defence of self-defence to avail an accused person, there must be an unlawful assault which the unlawful assault was not provoked by the accused. See *Apugo V. The State* (2006) 16 NWLR (pt. 1002) 227, *Uwaekweghinya V. The State* (2005) 9 NWLR (Pt.930) 227 at 285.

This court held in *Nwanga Nwuzoke v. The State* (1988) NWLR (Pt.72) 529 that the defence of self-defence in cases of murder such as the instant case is a child of necessity. That it is available to a defen-

dant only when he proves that he was at the time of the killing in reasonable apprehension of death or grievous harm and that it was necessary at the time to use the force which resulted in the death of the deceased in order to preserve himself from the danger. It must be emphasized that the force used by the defendant must also be shown
B to be proportionate to the force used or imminently threatened against him and reasonable in the circumstances in which it was used. There must be reasonable grounds for the accused person to believe that the only way by which he could escape death or grievous bodily harm to himself was to kill the assailant. See also *The State V. Fatai Baiyewunmi* (1980) 1 N.C.R. 183.
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The evidence which the learned trial judge relied to convict the appellant shows that the deceased admonished the appellant to take his Indian hemp and smoke same away from the vicinity of the
D burial party. The appellant refused. Rather, he engaged the deceased in a scuffle. In the process, he brought out a knife and stabbed the deceased on the left side of his ribs and removed it. One may ask, was the admonition enough provocation to cause the appellant to lose self control and engage the deceased in a scuffle which resulted
E in the stabbing and killing of Ajing? I do not think so. Even if one is to believe the version of the appellant's evidence in the circumstance, it is clear, according to him that he held the knife by the handle and he used it to stab the deceased in a very delicate position of his body. At
F that stage, the deceased is not shown to have been in possession of any weapon or even a stick. Even assuming also that the deceased slapped the appellant on his left eye, was stabbing him to death proportionate to the slap he received? With due respect, I posit that the answer is in the negative.

In this case, I agree with the two courts below that the appellant failed woefully to show that his life was threatened or in danger at the time he stabbed and killed the deceased. Secondly, the force the appellant used in retaliation to the supposed slap on him by the deceased was disproportionate and falls short of the allowance given under Section 286 of the Criminal Code. Also, the appellant knows and/or ought to know that the smoking of Indian hemp is unlawful and that if the deceased actually requested him to go and smoke it elsewhere, that was not enough to provoke him to kill the deceased.
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Section 284 of the Criminal Code provides for the defence of provocation and provides:

“284 Defence of provocation

A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self-control and acts upon it on the sudden and before there is time for his passion to cool; provided that the force used is not disproportionate to the provocation, and is not intended, and is not such as is likely, to cause death or grievous harm.

Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered, and whether in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact.”

For an accused to successfully invoke the defence of provocation, he must state clearly the fact or act of provocation to enable the court to determine how much he was provoked. Secondly, he has to show that the said provocation was enough to deprive him of self-control and thirdly, he must show a retaliation which is proportionate to the provocation offered him by the deceased to the accused. See Stephen V. The State (1998) 12 SC 450 at 498; Alao Chukwu V. The State (1992) NWLR (Pt.217) 255 at 270; Obaji V. The State (1965) 4 NSCC 210 at 215. **The appellant herein failed to show how a simple request for him to stop smoking Indian hemp at a party provoked him to the extent of losing his self-control.**

It may be necessary to state here that the distinction between the defence of self-defence and that of provocation is that while a plea of self-defence if successfully raised will completely absolve the offender from criminal responsibility, a plea of provocation on the other hand, if successful, reduces the offence of murder to manslaughter. See Ajunwa V. State (1988) SC 110, Albert Laoye V. The State (1985) 2 NWLR (Pt.10) 832.

In the instant case, the appellant has failed to successfully plead any. He is not entitled to any of the two defences

raised. I accept, agree and uphold the judgment of the court below which also affirmed the judgment of the trial court. The lone issue submitted by the appellant, as it stands is hereby resolved against him.

B Having resolved the only issue in this appeal against the appellant, it only remains for me to state categorically, that this appeal is devoid of any scintilla of merit and is hereby dismissed. I affirm the judgment of the Lower Court which uphold the conviction and sentence of the appellant to death by the trial High Court.

C Appeal dismissed.

GALADIMA JSC

My learned brother, OKORO JSC, has obliged me a draft D copy of his judgment, just delivered. I agree with him entirely that this appeal is lacking in merit and must be dismissed.

The concurrent findings of the courts below would appear to me to have been supported by the following facts from the records:

E The appellant herein left his village Edor in Ikom Local Government Area of Cross River State on 26/11/2004 to attend the burial ceremony of one late Gregory Awam of Nkofab, at a neighboring village. It was alleged that between 10am and 11pm the appellant went close to the vicinity where PW1 and some of his friends were F already seated and started smoking substance that was suspected to be Indian hemp.

Meanwhile, the deceased one Ajing Bisong, who was serving some foods and drinks to PW1 and some of his friends, approached the appellant and requested him to leave the area. The appellant, G unhappy about this remonstrated over this demand. A scuffle then ensued and the appellant brought out a jackknife and stabbed the deceased who shouted and collapsed. He was rushed to the hospital by the PW1, an eye witness to the incident, but the deceased died on their way to the hospital. The appellant fled from the scene of crime.

H After the appellant was arrested, and after the conclusion of investigation of the case, he was charged with murder of the deceased at Ikom High Court.

The prosecution called three witnesses. These were PW1, an eye witness who gave a graphic account of the incident, PW2, the

investigating Police officer of the Homicide Section of the Cross River State Police Headquarters Calabar; PW3 the Police officer who carried out the preliminary investigations of the case at Ikom Police Division.

At the close of the case for the prosecution, the appellant as DW1 gave evidence in his defence. He called no other witness. In his well considered judgment delivered on 20/9/2006, the learned trial judge convicted and sentenced the appellant to death.

He concluded thus:

“At the end of the case for the prosecution and the defence, I hold that from the preponderance of evidence before me the prosecution has established a case of murder of the deceased, Ajing Bisong by the accused Emmanuel Ogar Akong Edoko, beyond reasonable doubt. The defences of provocation and self-defence as raised by the accused failed to avail him and are hereby dismissed”

Dissatisfied with the judgment, appellant appealed to the Court of Appeal Calabar Division, which dismissed his appeal and affirmed conviction by the trial court on 13/7/2009.

This is further appeal against the decision of the court below on 3 Grounds of appeal which is reproduced with the Particulars of Errors set out as follows:

“GROUND ONE

1. ERROR IN LAW

The learned justices of the Court of Appeal erred in law in upholding the decision of the trial judge convicting the appellant for murder, when the defence of provocation was not adequately considered.

PARTICULARS OF ERROR

1. The appellant raised the defence of provocation in his confessional statement to the Police admitted in evidence as Exhibit ‘B’.

2. It is on record that the deceased provoked the appellant.

3. Exhibit ‘B’ the confessional statement of the appellant shows that appellant was provoked and attacked by the deceased who was in the company of three of his friends armed with sticks.

4. The attack on the appellant was at night time.

GROUND TWO

The Court of Appeal erred in law in upholding the decision of the trial court that the defence of self-defence proffered by the

appellant does not avail him there by occasioning a miscarriage of justice.

PARTICULARS OF ERROR

1. *The appellant pleaded self-defence in his statement to the Police that he was attacked by the deceased along with three others at night time.*

2. *The appellant affirmed the same plea of self-defence in his evidence on oath.*

3. *The appellant having raised the pleas of self-defence and alleging that the deceased attacked him in company of three of his friends armed with sticks, the prosecution had ample opportunity to have investigated the allegation.*

GROUND THREE

The Court of Appeal erred in law in upholding the decision of the trial court convicting the appellant for murder when the prosecution's case is based on the evidence of a lone witness.

PARTICULAR OF ERROR

1. *The PW1 told the court that they were several persons in the scene.*

2. *The PW1 mentioned one Chief Ndome but could not call him.*

The appellant made his confessional statement to the Police and the Police had enough time to investigate the allegations."

In appellant's brief of argument settled by his learned counsel A.U Mustapha Esq., and filed on 28/9/2012 the lone issue formulated for determination of appeal is:

"Whether the court below was right to have upheld the decision of the trial court to wit: that the defence of self-defence and provocation did not avail the appellant."

On the other hand in the respondents brief settled by his learned counsel M. N. O. Olopade Esq., the sole issue of the appellant formulated for determination of the appeal was adopted.

On 4/12/2014, when the appeal was heard learned counsel for the appellant and respondent respectively adopted their briefs of argument.

The learned counsel for the appellant submitted that where an accused person, as in this case, raised defence of self-defence, the onus remains throughout upon the prosecution to establish the guilt

of the accused. That to successfully ground defence of self-defence an accused person needs to prove that:

(a) The victim was attacking or about to attack the appellant in a manner that grievous hurt and or death was possible and had to defence himself.

(b) The self-defence was instantaneous or contemporaneous with the threatened attack. B

(c) The mode of self-defence was not greater or disproportionate with the threatened attack.

Reliance on the foregoing principles was placed on the following cases: C

(i) ADEYINKA ALBERT LAOYE v. THE STATE (1985) 10 SC 177 at 204-205

(ii) SUNDAY BARIDAN v. THE STATE (1994) 1 NLR (Pt.320) 250 at 262; D

(iii) SULE v. THE STATE (2009) 17 NWLR (Pt.1169) 33 at 66; and

(iv) SAMPSON UWAEKWEGHINYA v. THE STATE (2005) 3-4 SC 29 at 41.

It is submitted that in the light of available evidence on record and the peculiar circumstances of the case at hand, the appellant had successfully raised the self-defence and provocation which the two courts below failed to consider and decide in favour of the appellant. E

Learned counsel has submitted that there was a wrongful act and it was intended to deprive the appellant the power of self-control. That the appellant was at a party sitting all alone by himself when the deceased accosted him with a strange request to cede his seat to someone else. This expectably led to some argument which degenerated, with the deceased landing a fist blow on the eye of the appellant. To the learned counsel this was a wrongful act and a very provocative one. That merely requesting the appellant to vacate his seat for another person is sufficiently insulting; more so when it was followed by an unwarranted blow on the appellant's eye. He submitted that regard must be had to the appellant's village standing in life and his cultural background. It is argued that a man of very high educational or urban standards might not have reacted the same way the appellant reacted; such a person might prefer to react differently. Reliance was placed on the case of ISAAC STEPHEN v. THE F G H

STATE (1998) 12 SC 450 at 498. It is submitted that the act of provocation was sufficient to induce the appellant to assault the deceased and that the fatal stabbing occurred in the heat of passion. After the blow to appellant's eye a struggle quite naturally ensued; and the appellant only engaged the deceased to prevent himself from being subjected to further harm. It is argued that appellant noticed the deceased attempting to pull out a jack knife; it then became a matter of who would get the knife first, as it has become quite apparent that whoever loses out in the battle for the knife must become a victim; but the appellant got to the knife ahead of the deceased. That the stabbing of the deceased was caused by sudden provocation and not before there was time for the passion to cool. This was the situation in USMAN KAZA v. THE STATE 33 NSCQR (Pt.2) 1351 at 1418.

As to whether the retaliation by the appellant to what the deceased did to him was proportionate to the provocation offered, learned counsel submitted that having regard to the circumstances under which the stabbing was carried out, the appellant could not have done otherwise. Relying on AHMADU LADO v. THE STATE (1999) 6 SCNJ 1 at p.9 and SAMPSON NKEM UWAEKWEGHINYA v. THE STATE (supra).

It is the submission of learned counsel for the respondent that the court below rightly affirmed the decision of the trial court that the defence of self defence and provocation could not avail the appellant, in the circumstance and fact of this case. Relying on the decision of this court in IKEMSON v. THE STATE (1989) 3 NWLR (Pt.10) 455 at 473, he submitted that a confessional statement that is at variance with the testimony of the accused at trial cannot be rejected by the trial court which rightly held that the retraction of the confessional statement by the appellant in evidence at his trial on oath does not affect the admissibility of the confessional statement; hence both the trial court and the Lower Court were right to have considered the confessional statement of the appellant despite his retraction at the trial.

It is submitted that the court below was right to have affirmed the findings of the trial court and showed a very clear understanding of the law of provocation when it held that a fist blow on the eye cannot be said to have been proportionately responded to by a stab with a jack knife and that the retaliation by the appellant is in excess

of what the law allows.

Relying on the case of *UWAEKWEGHINA v. THE STATE* (2005) 1 NCC 369 at 384, learned counsel submitted that the defence of self-defence will not avail the appellant as he has failed to show that the attack on him was enough that grievous hurt and/or death would occasion and he has no alternative. B

It is finally submitted that the appellant failed to convince this court that there were insufficient evidence to support the findings of the trial court that the appellant deliberately killed the deceased without provocation and/ or in self-defence. C

The relevant and crucial portion of the appellant's confessional statement to the Police in Exhibit 'B' reads as follows:
"The man who is now dead came with three other men. The deceased told me one (sic) to stand up and allow one of the men he came with to sit down. I refused to stand up for the man to sit. The deceased Ajing Bisong pushed me down from the chair I was sitting. I stood up and asked Ajing what I have done to you that you should push me down. I told him he was not the person who invited me to the burial (sic) then the deceased gave me a blow on my left eye. Then I rush (sic) and held him on his waist from behind. The deceased tried to remove a jack knife from his waist. I held the handle of the jack knife and as we were struggling, the jack knife fell. Ajing used his leg to match the jack knife but I was faster and pick the jack knife and stabbed Ajing on the left side of his ribs and removed the jack knife..." F

At his trial, the appellant gave a contradictory statement from his earlier statement admitting that he stabbed the deceased. He said at page 22 of the record of appeal that:

"....Ajing sat on top of me and removed a jack knife, I began to struggle with him because he wanted to injure me. As I was struggling the knife pierced Ajing. Ajing began to shout that I have stabbed him with a knife. Then the other boys ran away." G

Here, the appellant was confronted with his two statements: In Exhibit 'B' he admitted that he stabbed the deceased in the course of the struggle. He overpowered him and stabbed him. At his trial, trying to put up self-defence, he said that the knife pierced the deceased in the course of the struggle. The law is that where an accused person is shown to have made a statement previously which is inconsistent H

with the defence given at the trial, a trial court will be right to conclude that the evidence given at the trial is unreliable, aimed at exculpating the accused from blame: see *AMUSA v. THE STATE* (2005) 1 NCC 87 at 91.

The defence of self-defence will not avail an accused person
 B if he had no reasonable ground for believing that his life was in danger and the force which he applied to defend himself was unrelated or disproportionate to what he claimed the deceased did to him. See *UWAEKWEGHINA v. THE STATE* (supra).

C It is clear that Exhibit 'B', the jack knife used by the appellant was in his possession at a time and circumstances where there was no danger to his life; still he went ahead to stab the deceased who was at the material time disarmed. The trial court adequately considered his self-defence particularly at pp. 31-32 of the records wherein the following was stated:

*"The next defence raised by the accused is that of self-defence. He said he overpowered the deceased, picked the jack knife from the ground and stabbed the deceased. The law requires that for this defence to succeed, the accused must have proved that his life
 E was clearly in danger and he had no alternative. I agree that the accused life may have been in danger. But I do not agree that in the circumstance, he had no alternative. For after he picked up the jack knife, he could have thrown it away or ran away from the deceased. But he preferred to stab the deceased on the ribs. That was certainly
 F dangerous. The court cited ODU v. THE STATE (2001) FWLR part 37 page 1078 at 1081 Holding 7. The decision in SHANDE v. THE STATE (2004) ALL FWLR part 223 page 1955 at 1960 Holding 9 on the plea of self-defence applies to this case and hereby followed."*

G Also in the case of *ODU v. THE STATE* (2001) FWLR part 37, 1078-1081, which is on all fours with this case the court had this to say;

*"In a hand to hand fight where the accused used a knife to stab the other who later died self-defence is negative. I do not see
 H any apprehension of death or grievous harm in this incident for the 2nd appellant to use a dagger and stab the deceased on the ribs. The 2nd appellant received no injuries and was unable to show the trial court any on his person. In these circumstances the assault (if any) from the deceased on the appellant was not such as to cause reason-*

able apprehension of death or grievous harm.”

As correctly stated by OWOADE JCA at page 77 of the record the findings of the learned trial judge in rejecting both the defences of provocation and self-defence for the appellant are unassailable.

“In terms of the defence of provocation, truly, in order to set up provocation as a defence it is not enough to show that the accused was provoked into losing self control, it must be shown that the provocation was such as would in the circumstances have caused a reasonable man to go to lose his control: See KWAKWU MENSAH v. R (1946) AC 83 PC, R v. DUFFY (1949) 1 ALL ER (CCA) (SIC) R. V. IBRAM (1981) CR. APP REP. 154 CA. For this purpose the reasonable man means an ordinary person of either sex not exceptionally excitable, or pugnacious, but possessed of such powers of self control as everyone is entitled to expect that his fellow citizens will exercise in society. See DPP v. COMPLIN (1978) AC 705, 67 CR. APP. REP 14 D (HL). In addition that the provocation must be sudden, done in the heat of passion and before there is time for passion to cool under the provisions of section 283 and 318 of the Criminal Code, the nature of retaliation be the accused must also be proportionate to the nature of the provocation offered.”

Talking about the English decision in R. V. DUFFY (supra) I have always been impressed by the definition of the doctrine of provocation of learned Lord Goddard CJ when he said thus:

“I have defined it; there are two things, in considering it, to which the law attaches great importance. The first of them is whether there was what is sometimes called time for cooling, that is, for passion to cool and for reason to regain dominion over the mind. That is why most acts of provocation are cases of sudden quarrels, sudden blows inflicted with an implement already in the hand, perhaps being used, or being picked up, where there has been no time for reflection. Secondly, in considering whether provocation has or has not been made out, you must consider the retaliation in provocation that is to sag, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation has been given. Fists might be answered with fists, but not with a deadly weapon, and that is a factor you have to bear in mind when you are considering the question of provocation.”

Under sections 286 and 287 of the Criminal Code, the na-

ture of the provocation must be as such as to deprive of the person provoked of the power of self control; and that he acts upon sudden circumstance and before there is time for his passion to cool, provided that the force is not intended and is not such as likely to cause death or grievous harm.

B Under the Criminal Code the defence of provocation contains 3 main elements:

(i) The fact of provocation

(ii) The loss of self-control, actual and reasonable

C (iii) The act of retaliation being proportionate to the provocation.

The mode of resentment must bear some proper and reasonable relationship to the kind of provocation that has been given. Fist must be answered with fist, but definitely not with a lethal weapon.

D This has ever been the doctrine of provocation that I know; for long that has ever been with us in our Criminal Law.

From the above and the more detailed reasoning in the lead judgment, the fact that the appellant was properly convicted of murder according to law is not in doubt. Therefore this appeal fails. I

E affirm the judgment of the court below.

PETER-ODILI JSC

F I agree with the judgment and reasoning just delivered by my learned brother, Inyang John Okoro. Underscore the support, I shall make some comments.

This is an appeal arising from the judgment of the Court of Appeal sitting at Calabar, Cross River State delivered on the 13th day of July, 2009 wherein the Court of Appeal or court below upheld the conviction of the appellant for murder and sentenced him to death. The appellant not satisfied with the decision of the court below has appealed to the Supreme Court.

FACTS

H The appellant left Edor, his village in Ikom Local Government Area to attend the burial of late Gregory Anam at Nkonfab, a neighbouring village on the 26th day of November, 2004. Between 10pm and 11pm, the appellant got close to the vicinity where PW1, on eye witness to crime and some of his friends were sitting and

started smoking Indian hemp. The deceased, Ajing Bisong was serving food and drinks to PW1 and his friends then approached the appellant asking him to leave the area. The appellant was unhappy and refused whereby a scuffle ensued and the appellant brought out a jackknife and stabbed the deceased who shouted and collapsed. Ekam Francis Abaji, the PW1 said he rushed the deceased to the hospital and he died on the way. The appellant fled the crime scene but was later arrested and at the close of investigation the appellant was charged before the High Court of Justice, Ikom. B

The prosecution called three witnesses. The appellant was the sole witness for the defence and raised the defences of self defence and provocation. At the end, the learned trial judge found for the prosecution, convicted and sentenced the appellant whose appeal to the court below failed hence the current appeal to this court. C

On the 4th December, 2014 date of hearing, learned counsel for the appellant, Mr. A. U. Mustapha adopted appellant's Brief of Argument filed on 28th September, 2012 wherein he crafted a sole issue, viz: D

Whether the court below was right to have upheld the decision of the trial court to wit: that the defence of self defence and provocation did not avail the appellant. E

For the respondent, M. N. O. Olopade Esq. adopted its Brief of Argument filed on 31/1/2013 and deemed filed on 8/1/14. He equally adopted for use the issue as formulated by the appellant. F

The lone issue so identified is good enough to use in the determination of this appeal.

Mr. Mustapha of counsel for the appellant referred to what constitutes self defence as defined in sections 286 - 288 of the Criminal Procedure Code Act Cap C38 Laws of the Federation of Nigeria, 2004. He cited *Iheanyighichi Apugo v. The State* (2006) 16 NWLR (Pt.1002) 227 at 232; *Samson Nkemji Uwaekweghinya v The State* (2005) 9 NWLR (Pt.930) 227 at 235 etc for the interpretation of those statutory provisions. G

He stated that even when an accused person raises the defence of self defence, the onus remains throughout with the prosecution to establish the guilt of the accused and that a perusal of the record would show that the killer weapon originated from the person of the deceased and that it was the deceased who first set on the H

attack. That he appellant acted on impulse to defend himself and the doubts that exist should be resolved in favour of the appellant. He cited *Baridan v State* (1994) 1 NWLR (pt.320) 250; *Sule v State* (2009) 17 NWLR (Pt.1169) 33 at 66 etc. That the statement of the appellant to the Police, Exhibit B was acceptable as the true narration
B of what happened. He referred to *David Aganmwonyi v A. G. Bendel State* (198) 1 SC 77 at 94.

Also submitted for the appellant is the defence of provocation provided for in Sections 283 and 284 of the Criminal Code Act.
C Learned counsel cited *Alochukwu v. The State* (1992) NWLR (Pt.217) 255 at 270; *Isaac Stephen v. The State* (1998) 12 SC 450 AT 498 - 499; *Obaji v. State* (1965) 4 NSCC 210 at 215 - 216.

That the act of provocation from the deceased was sufficient to induce the appellant to assault the deceased and the fatal stabbing
D occurred in the heat of passion and the act was proportionate to the provocation given the circumstances. He relied on *Ahmadu Lado v The State* (1999) 6 SCNJ 1 at 9.

The learned counsel for the appellant urged that the appeal be allowed.

E For the respondent, Mr. Olopade of counsel contended that the court of Appeal was right to have affirmed the findings of the trial court. That the fact that the deceased's friends and family members were present was not enough justification for the accused to stab the
F deceased to death in order to escape from the scene of the hand to hand fight.

Also that self defence as an anchor did not avail the appellant as it was disproportionate to the attack on the appellant. That since the appellant overpowered the deceased according to Exhibit B, in
G the hand to hand fight going on to stab him was overboard.

That the concurrent findings of the two Lower Courts should be upheld. He cited *Solola v. State* (2005) 11 NWLR (Pt.930) 467 at 488.

H In a nutshell, what is in issue between the two contending parties is, on the one part, appellant invoking self defence as a first line of defence and if that failed, provocation as a defence would be available to him. On the other part, for the respondent is that none of those two defences availed the appellant as the evidence supporting the findings of the two courts below that the appellant killed the

deceased deliberately were unassailable.

I would like to cite the relevant statutory provisions on the defences put forward by the appellant, which are sections 283, 284 and 286 of the Criminal Code Act which are as follows:

“283 Provocation: The term “Provocation” used with reference to an offence of which an assault is an element, includes except as hereinafter stated any wrongful act or insult of such nature as to be likely, when done to an ordinary person, or in the presence of the ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered.

When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation aforesaid, the former is said to give to the latter provocation for an assault.

A lawful act is not provocation to any person for an assault.

An act which a person does in consequence of excitement given by another person in order to induce him to do the act, and thereby to furnish an excuse for committing an assault, is not provocation to that person for an assault.

An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

284: Defence of Provocation

A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self-control and acts upon it on the sudden and before there is time for his passion to cool; provided that the force used is not disproportionate to the provocation, and is not intended, and is not such as is likely, to cause death or grievous harm.

Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered, and whether in any particular case, the person provoked

was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact."

On Section 286 of the Criminal Code Law on self defence, it is provided that when a person is unlawfully assaulted and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make an effective defence against the assault, provided that the force used is not, intended and is not such as is likely to cause death or grievous harm. It is to be noted that if the nature of the assault is such as to cause reasonable apprehension of death or grievous harm and the person using force by way of defence believes on reasonable grounds, that he cannot otherwise preserve the person defended from death or grievous harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous harm. See *Iheanyighichi Apugo v. The State* (2006) 16 NWLR (Pt.2006) 227 at 232; *Samson Nkemji Uwoekweghinya v The State* (2005) 9 NWLR (Pt.930) 27 at 235.

It cannot be lost sight of that even though the accused/appellant as in this case had put up the defence of self defence and alternatively provocation that does not let off from the hook the prosecution from its responsibility of the burden of proof. Therefore, the prosecution still has to discharge the onus that neither the defence of self defence nor provocation can be at the rescue of the appellant and so it is not for the appellant to establish that indeed the self defence or provocation had been proved or not proved. All that is required of the accused/appellant as in this case is to show the following:

1. That the victim was attacking or about to attack the appellant in a manner that grievous hurt and or death was possible and had to defend himself.
2. That the self defence was instantaneous or contemporaneous with threatened attack
3. That the mode of self defence was not greater or disproportionate with the threatened attack.
4. That the provocative act or insult proved in evidence should be one capable of depriving a reasonable man and which did in fact deprive the appellant of the power of self-control to make him

for the moment not master of his mind.

I place reliance on the following cases: Sampson Uwaekwueghinya v The State (2005) 3 - 4 SC 29 at 41; Aganmwonyi v. A.G. Bendel State (1987) 1 SC 77 at 94; Sunday Baridan v. The State (1994) 1 NWLR (Pt.320) 250 at 262.

I shall quote for a clearer understanding some decisions of this court which are thus:

Alochukwu v The State (1992) NWLR (pt.217) 255 at 270 per Karibi-Whyte, JSC stated thus:

"The term 'provocation' as defined in section 283 of the Criminal Code is in relation to an offence of which an assault is an element. It includes 'any wrongful act or insult of such a nature as to be likely to when done to an ordinary person or in the presence of on ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation or in relation of master or servant, to deprive him of the power of self control, and to induce him to assault the person by whom the act or insult is done or offered."

There are three essential elements of provocation. There is the act of provocation and in homicide, it must be grave and sudden; then the loss of self-control both actual and reasonable. Then finally, the retaliation, which must not be disproportionate to the provocation. See sections 284 and 318 of the Criminal Code - See Lee Chun Chuen v. The Queen (1962) 3 WLR 1461. These are all questions of facts to be established by the person relying on the defence. See Section 138 Evidence Act."

In the case of Isaac Stephen v. The State (1998) 12 SC 450 at 498 - 499 Where Oputa, JSC stated:

"The defence of provocation cannot be discussed in vacuo. G There must exist evidence of:

- 1. The fact or act of provocation*
- 2. The loss of self control; and*
- 3. A retaliation proportionate to the provocation offered by the deceased to the accused."*

In our law, Section 283 of the Criminal Code defines provocation to include not only wrongful act but also insult. Sections 283 and 284 indicate that there is both an objective and a subjective element in provocation. The provocative act or insult proved in evi-

dence should be one capable of depriving a reasonable man and which did in fact deprive the accused of the power of self control to make him for the moment not master of his mind: R. V. Duffy (1949) 11 ALL ELR P.932 AT 933"

In the case of *Obaji v State* (1965) 4 NSCC 210 at 215 -
 B 216, the Supreme Court held as follows:

"As we have pointed out earlier, Section 318 of the Criminal Code must be read together with section 283 of the Criminal Code which defines provocation, and for the purpose of section 318 provocation includes (1) any wrongful act or insult (2) of such a nature
 C *when done to an ordinary person as 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. To avail himself of the defence in charge of murder under section 318 of the Criminal Code,*
 D *the accused must have done the act for which he is charged (i) in the heat of passion, (ii) this must have been caused by sudden provocation, and (iii) the act must have been committed before there is time for his passion to cool. There can be no doubt that the attitude of the Nigerian courts has been to interpret Sections 283 and 318 of the*
 E *Criminal Code as impliedly including the mode of resentment or, in other words, that the retaliation must be proportionate to the provocation offered."*

Taking the defences as put forward by the appellant, the law
 F relevant thereto and placing them alongside the facts and evidence in this case, the next line is to see if indeed those defences of provocation and self defence can salvage the case as placed before the trial court and the consequent findings of that court of first instance agreed to by the court below. In fact, the summation by the court of Appeal
 G as anchored by Owoade JCA clearly captured the findings of the trial court and those of the court below as I short restate them from the last paragraph of page 80 - 81 of the Record of Appeal which is as follows:

"In the instant case, what the learned trial Judge did and
 H *rightly too was to consider the defences available to the appellant as contained in his confessional statement Exhibit B, which the learned trial Judge preferred to his story on oath which was totally inconsistent with the appellant's confessional statement -see Ikemson v State (supra). The idea that three or perhaps other 5 boys joined the de-*

ceased to attack the appellant only rose in the appellant's statement on oath which the learned trial Judge considered as an afterthought. In this appeal, the suggestion by the learned counsel for the appellant that the story of the appellant that other boys joined the deceased to attack the appellant arose from the appellant's confessional statement Exhibit B is misleading if not outrightly mischievous on the port of the counsel for the appellant." B

There is nothing in the appellant's confessional statement Exhibit B which was accepted by the trial court as the basis of the appellant's defence to suggest that others joined the deceased to fight the appellant. C

Indeed, I am in agreement with the learned counsel for the respondent that the facts of this case are similar to that in *Odu v The State* (2001) FWLR (pt.32) 1078 at 1081 where the court held:

"In a hand to hand fight where the accused used a knife to stab the other who later died, self defence is negative. I do not see any apprehension of death or grievous harm in this incident for the 2nd appellant to use a dagger and stab the deceased on the ribs. The 2nd appellant received no injuries and was unable to show the trial court any on his person. In these circumstances, the assault (if any) from the deceased on the appellant was not such as to cause reasonable apprehension of death." E

Owoade, JCA went on to say:

"In the instant case, the learned trial Judge adequately considered the defence of self as proffered by the appellant." F

Earlier in the appellate judgment of the court of Appeal, Owoade, JCA had stated:

"In terms of the defence of provocation, truly, in order to set up provocation as a show that the accused was provoked into losing self control, it must be shown that the provocation was such as would in the circumstances have caused a reasonable man to lose his self control. See Kwoku Mensah v. R (1946) AC 83 (PC); R v. Duffy (1949) 1 ALL ER 932 at 933; R. v Ibrams (1981) 74 C. APP Rep 154 (CA). For these purposes, the reasonable man means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self control as everyone is entitled to expect that his fellow citizens will exercise in society. See DPP v Camplin (1978) AC 705, 65 C. App Rep. 14 (HL)." G H

In addition to the fact that provocation must be sudden done in the heat of passion and before there is time for passion to cool under the provisions of Sections 283 and 318 of the Criminal Code, the nature of retaliation by the accused must also be proportionate to the nature of the provocation offered.

B This is because, under the Criminal Code, the defence of provocation contains these main elements:

- (a) The act of provocation
- (b) The loss of self control, actual and reasonable
- (c) The retaliation being proportionate to the provocation.

C Clearly, in the instant case, the defence of provocation could not have availed the appellant because *“a stab with a knife is poles apart from the punch in the eye”*

From the above it easy to see why the Court of Appeal affirmed the findings of the trial High Court as it is difficult indeed to explain how the retaliation commensurate with a blow on the eye could be a stab with a jack knife to the rib of the deceased. Also instructive is that there was no injury on any part of the body of the appellant and so whatever could be taken as a provocation, a stab wound serious enough to result in the death cannot be placed in the compartment under which the defences of provocation can be called up to enure to the advantage of the appellant.

F Also to be noted is that nothing in the evidence has been established to show that the appellant at some point in the encounter was in apprehension of a threat to his life to warrant his response with the stab wound that terminated the life of the deceased. I place reliance on *Uwaekweghina v. The State* (supra) at 384.

G Indeed, what I see is a classic example of where concurrent findings of two Lower Courts should not be interfered with. This is because the appellant deliberately killed the deceased and so the defences he proffers do not avail him and he has in no way presented a case for the disturbance of those concurrent findings of the two courts below and so this court is left with no option than to uphold those findings. See *Solola v State* (2005) 11 NWLR (Pt.937) 467 at 488.

H From the foregoing and the better articulated lead judgment of my brother, Inyang Okoro, JSC, I too dismiss this appeal while I abide by the consequential orders made therein.

ARIWOOLA JSC

I had the opportunity of reading in draft the leading judgment of my learned brother, Okoro, JSC just delivered and I am in agreement with the reasoning and conclusion on the said leading judgment. I also hold that the appeal is devoid of any merit and deserves to be dismissed. B

Accordingly, the appeal is dismissed by me and I affirm the judgment of the court below which had earlier affirmed the conviction and sentence of the appellant to death by the trial court in accordance with the provisions of the law. C

Appeal is dismissed.

NWEZE JSC

I had the advantage of reading the draft of the leading judgment which my distinguished Lord, Okoro JSC, just delivered now. I agree with His Lordship that this appeal is unmeritorious. D

I actually find it curious that the appellant [as accused person at the trial court] set up the defences of self defence and provocation at the same trial. Whereas the Criminal Code provides for self defence in sections 286 and 287, the same code provides for the defence of provocation in section 284, Whilst the former [the defence of self defence] is an exculpatory defence because, where it is established, it exonerates the accused person, *Uwaekweghinya v The State* [2005] 9 NWLR (pt 930) 227, the latter (the defence of provocations) is, merely, an attenuating or a mitigating defence. Where available, it merely, attenuates; dis-rates or demotes the offence from murder to manslaughter. E

In effect, the defence of provocation does not exonerate the accused person. It, only, earns him a mitigation of the punishment due for the offence of murder to a sentence for manslaughter, *Uraku v. State* (1976) LPELR-SC. 300/1975; [1976] 6 SC 128; *Akang v State* (1997) 1 All NLR 47, 49; *Musa v State* (2009) LPELR-SC.323/2006; [2009] 15 NWLR (Pt.1165) 465; *Ada v. State* (2008) LPELR-SC. 300/1975; [2008] 13 NWLR (Pt.1103) 149; [2008] 34 NSCQR 508; *Ajunwa v. The State* (1988) 1 SC 110; *Laoye v The State* [1985] 2 NWLR (Pt.10) 832; *C. O. Okonkwo, Okonkwo and Nash: Crimi-* F
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nal Law in Nigeria (Second Edition) (Ibadan: Spectrum Books, 2000) 240; C. O. Okonkwo, “*The Unlawful Act Doctrine and the Defence of Accident*” in The Nigerian Bar Journal Vol 11 (1973) 93-97.

It is, thus, the dissimilarity in the consequences of the availability of these defences that make them, mutually exclusive, that is, that make them inconsistent defences - defences that cannot avail an accused person at the same time, Ibrahim v. State (1991) LPELR-SC.167/1990; [1991] 4 NWLR (Pt.186) 399; [1991] 5 SCNJ 129; see, also, the very incisive, and the most stimulating, article by the cerebral Professor of Law, F. I Asogwah, “*The Applicability of Some ‘Inconsistent’ Defences in the Nigerian Criminal Code,*” in I. A. Umezulike (ed), Law and Administration of Justice in the Twenty First Century (Enugu: Fourth Dimension Publishing Co. Ltd, 1997) 75-98.

I agree with the leading judgment that the appellant herein is not entitled to any of these, mutually, exclusive defences he canvassed at the trial court. Like the leading judgment, therefore, I affirm the concurrent findings of the trial court and the Lower Court. I equally dismiss the appeal and abide by the consequential orders on my noble Lord.

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