

SUPREME COURT OF NIGERIA
FRIDAY 26TH JUNE, 2015. SC. 500/2012
CORAM:- M. S. MUNTAKA-COOMASSIE,
O. RHODES-VIVOUR, N. S. NGWUTA, C. B. OGUNBIYI,
K. B. AKA'AH, JJSC

HARRISON OWHORUKE APPELLANT
V.
COMMISSIONER OF POLICE RESPONDENT

MURDER - Provocation - The defence would not avail appellant - As his reaction was disproportionate - Hence it is immaterial that he did not intend to hurt the deceased (H1)

MURDER - Self defence - The defence would not avail appellant - Since at the time he stabbed the deceased - He was not in apprehension of death (H2)

APPEALS - Concurrent findings - Supreme Court does not interfere with such findings - Unless the findings are perverse - Or there was serious error which resulted in miscarriage of justice (H3)

FACTS

Accused/appellant was charged before the Delta State High Court Oleh Division for murder punishable under section 319(1) of the Criminal Code law of the defunct Bendel State (as applicable to Delta State). Appellant pleaded not guilty to the count charge. Appellant was drinking in a Bar at the material point in time when he noticed an altercation between PW2 and another person. Appellant intervened and prevented the matter from escalating. He thereafter returned to his drinking. The deceased – Augustine Eveh came into the bar and snatched appellant's bottle of drink and broke it. He held on to a piece of the broken bottle and threatened appellant with it.

A struggle ensued and in the process, appellant overpowered the deceased and stabbed him with the broken bottle on the neck. The deceased died before he could get to the Hospital. A post mortem examination confirmed the death as a result of the stabbing on the

neck. At the trial, prosecution/respondent called four witnesses to support its case. Appellant testified for himself, but called no witness. Appellant admits that he stabbed the deceased, and that act of his resulted in the death, but that the death was not intentional. He raised the defences of self defence, provocation and accident. In its judgment, the court rejected the defences and convicted appellant for murder. Appellant's appeal to the Court of Appeal was unsuccessful. Appellant has now appealed to the Supreme Court.

ISSUE FOR DETERMINATION

1. Whether the learned justices of the Court of Appeal were right in upholding the decision of the trial court that the Appellant is not entitled to the defence of self defence and provocation.

HELD (Unanimously dismissing the appeal per

RHODES-VIVOUR JSC)

MURDER - Provocation

1. The threat to the Appellant's life ended when the Appellant overpowered the deceased and took the broken bottle from him. A reasonable man would have given the deceased a couple of slaps and thrown away the broken bottle. Stabbing the deceased with the broken bottle was clearly disproportionate to the provocation. The stabbing of the deceased was not as a result of temporary loss of control rather the stabbing was for the sole purpose of causing grievous harm. In such a situation it is immaterial that the Appellant did not intend to hurt the deceased. The killing was intentional and the defence of provocation would not avail the Appellant.

(p. 2245 A)

MURDER - Self defence

2. 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 believe 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.

The defence of self defence would avail the Appellant if he can show that at the time he stabbed Augustine Eveh (deceased), he was in apprehension of death or grievous bodily harm from Augustine Eveh (deceased). By his own admission, the Appellant was no longer in apprehension of death or grievous bodily harm since he stabbed the deceased after he had overpowered him and retrieved the broken bottle from him. At the time of the stabbing, the Appellant was no longer in apprehension of death but rather an unjustified aggressor that retaliated in a disproportionate manner. The killing was intentional.

It is lawful if the nature of the assault on the Appellant is such as to cause reasonable apprehension of death or grievous harm for him to use such force on the deceased as is necessary to defend himself, but this does not arise since the danger had passed after the Appellant overpowered the deceased, retrieved the broken bottle from him and stabbed him on the neck with it. The stabbing was clearly unnecessary. The killing was intentional. The defence of self defence fails. (p. 2245 E)

APPEALS - Concurrent findings

3. In view of concurrent findings of fact by the two Lower Courts, this court will not interfere with such findings unless special circumstances are shown, such as the findings are perverse, or there was a serious error of procedural or substantive law which has resulted in a miscarriage of justice. (p. 2246 B)

NOTABLE POINTS OF INTEREST

RHODES-VIVOUR JSC

1. Provocation – Meaning of

Section 283 of the Criminal Code defines provocation to include not only wrongful acts but also spoken words. There is thus an objective and subjective element in provocation. It must be kept in mind that the provocative act should be capable of depriving a reasonable man and did deprive the accused/Appellant of self control to make him

for a moment not master of his mind. There is no set standard of retaliation expected from a reasonable man. It all depends on the accused/Appellant's station in life. A reasonable man is a reasonable man of the accused person's standing in life and to a large extent his cultural background. (p. 2243 G)

B

2. Investigation of crime – Transparency in

The Court of Appeal described the defence of the Appellant as confused. This is true. The reason is simple. The Appellant did not have the service of a legal practitioner when he wrote exhibit E, a day after the incident. It must be noted that most crimes are committed by people with little or no education, consequently they are easily led along by the Investigating Police Officer to write incriminating statements which legal minds find almost impossible to unravel and resolve. Confessional Statements are most times beaten out of suspects, and the courts usually admit such statements as counsel and the accused are unable to prove that the statement was not made voluntarily. A fair trial presupposes that police investigation of the crime for which the accused person stands trial was transparent. In that regard it is time for safeguards to be put in place to guarantee transparency. It is seriously recommended that confessional statements should only be taken from suspect if, and only if his counsel is present, or in the presence of a legal practitioner. Where this is not done such a confessional statement should be rejected by the court.

F

(p. 2246 E)

REPRESENTATION

Ayo Asala with E. M. Odje, for the Appellant

G

O. E. Enemmo DDPP of Delta State Ministry of Justice with Mrs. N. B. Emakpor, SSC Ministry of Justice Delta State, for the Respondent

CASES REFERRED TO

Ahmed v. State (1999) 7 NWLR (pt. 612) 641

H

Ogba v. State (1990) 3 NWLR (pt. 139) 505

Uwagboe v. State (2008) 12 NWLR (pt. 1102) 621

Lasisi v. State (2013) 3-4 SC (pt. i) 58

Ndulue v. Ojiakor (2013) 1-2 SC (pt. ii) 91

Ibodo v. Enorofia (1980) 5-7 SC 42

Efe v. State (1976) 11 SC 75

Lokoyi v. Olojo (1983) 8 SC 61

Ekpenyong v. State (1991) NWLR (pt. 200)

Amaka v. State (1995) NWLR (pt. 399)

Laoye v. State (1985) 2 NWLR (pt. 10) 832

Ogbolu v. State (1987) 2 NWLR (pt. 54) 20

Jideonwo v. State (1997) 1 NWLR (pt. 480) 209

Onyejekwe v. State (1992) 3 NWLR (pt. 230) 444

Abogede v. State (1996) NWLR 223

Onyejekwe v. The State (1992) 3 NWLR (pt. 230) 444

Abogede v. The State (1996) NWLR 223

Garba V. The State (2000) FWLR (pt.24) 1448

Laoye Vs. The State (1985) 2 NWLR (Pt.10) 832

Uwagboe Vs. The State 13 NWLR (Pt.1102) 621

STATUTE REFERRED TO

Criminal Code Cap. 48, Vol. ii Laws of defunct Bendel State 1976
(as applicable to Delta State), ss. 283, 286, 319(1), 316 (1) - (6)

LEAD JUDGMENT BY RHODES-VIVOUR JSC

This is an appeal from the judgment of the Benin Division of the Court of Appeal which affirmed the decision of an Oleh High Court Delta State that sentenced the Appellant to death. On the 18th day of January, 2006 the Appellant was arraigned on one count for murder. The charge read:

STATEMENT OF OFFENCE

Murder punishable under Section 319(1) of the Criminal Code Cap 48, Vol.ii Laws of the defunct Bendel State of Nigeria 1976 as applicable to Delta State.

PARTICULARS OF OFFENCE

Harrison Owhoruke (M) on or about the 14th day of November, 2004 at Uroto Quarters, Ozoro, within the Oleh Judicial Division murdered one Augustine Eveh (M)

The Appellant as the accused person pleaded not guilty to the one count charge of murder. In support of its case the prosecution called four witnesses, they are:

PW1 - The medical doctor who performed the post mortem examination on the deceased

PW2 - gave evidence of what he saw and heard when the deceased was stabbed by the Appellant

PW3 - the father of the deceased. He identified the corpse of his dead son to PW1.

PW4 - The Investigating Police Officer

B Documents marked exhibits, A, B, C, D, E, were admitted in evidence. The Appellant gave evidence, but did not call any witness. The facts are these.

C Augustine Eveh (deceased) and PW2, Joel Eriewe were outside the E. T. O. Bar at Uroto Quarters, Oleh, in Delta State at about 8.pm on the 4th of November, 2004. The Appellant was inside the Bar having a drink. There was an altercation outside the Bar between a man called Uzezi and Joel Eriewe over a girl who goes by the name Blessing. The Appellant was attracted to the scene and was D able to restrain Joel Eriewe and Uzei from fighting. The Appellant thereafter returned to the Bar to resume drinking. The deceased came into the bar and snatched the Appellant's bottle of drink and broke it. He held on to a piece of the broken bottle and threatened the Appellant with it. A struggle ensued. The appellant overpowered the E deceased and stabbed him with the broken bottle on his neck. He died before he could get to the Hospital. The medical Doctor who performed the postmortem examination on Augustine Eveh said on oath that the stab wounds were on the left side of the neck, and that F the major blood vessels, carotid arteries and jugular veins were cut into two. He concluded that the wound was not self inflicted. The Appellant admits that he stabbed the deceased, and that act of his resulted in his death, but that the death was not intentional.

G The learned trial judge reviewed evidence led in detail, examined the defences of self defence, provocation and accident and rejected all of them in these words.

H *"I totally reject the defence of the accused. I hold that this case was proved beyond reasonable doubt against the accused. ...I find the accused guilty as charged and convicted (sic) accordingly for the offence of murder punishable under Section 319(1) of the Criminal Code Cap 48, Vol. ii. Laws of the defunct Bendel State 1976 as applicable in Delta State..."*

The Appellant lodged an appeal. The Court of Appeal Benin Division affirmed the judgment of the trial High Court. The Court

concluded thus:

“From the fact of this case the trial judge had considered all the facts before coming to the conclusion reached. The prosecution has proved the case of murder against the accused person and the conclusion is not perverse therefore not liable to be interfered with... The judgment of the trial court i.e. Delta State High Court of Justice at Oleh delivered on 10th August, 2006 is affirmed.” ^B

This appeal is against that judgment. Briefs were subsequently filed and served. The Appellant’s brief was filed on the 12th day of February, 2013, while the Respondent’s brief was filed on the 24th day of May, 2013. ^C

Learned counsel for the Appellant formulated a sole issue for determination. It reads:

1. Whether the learned justices of the Court of Appeal were right in upholding the decision of the trial court that the Appellant is not entitled to the defence of self defence and provocation. ^D

Learned counsel for the Respondent also formulated a sole issue for determination. It reads:

1. Whether having regard to the state of Evidence the Court of Appeal was right in law when it affirmed the judgment of the trial court. ^E

After examining the issues formulated by counsel I am of the view that learned counsel for the Appellant is firmly of the view that the defence of provocation and, or self defence ought to avail the Appellant. He is in the circumstances aggrieved by the judgment of the two courts below which in his view are wrong. On the other hand the sole issue formulated by the Respondent is rather too wide and clearly not as concise as the Appellant’s sole issue. I shall consider the Appellant’s sole issue in resolving this appeal. ^F

At the hearing of the appeal on the 2nd day of April, 2015 learned counsel for the Appellant Mr. A. Asala adopted his brief filed on the 12th day of February, 2013 and urged the court to allow the appeal. ^G

Mr. O. F. Enenmo adopted the Respondent’s brief filed on the 24th day of May, 2013 and urged this court to dismiss the appeal. ^H

It is not in dispute that the Appellant was responsible for the death of Augustine Eveh (m) (deceased).

Under Section 316 of the Criminal Code the Appellant, would

be guilty of Murder if he killed Augustine Eveh (m) under any of the circumstances in Section 316 (1) -(6) of the Criminal Code. Section 316 states that:

“316. Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say:-

B *(1) If the offender intends to cause the death of the person killed, or that of some other person;*

(2) If the offender intends to do to the person killed or to some other person some grievous harm;

C *(3) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such nature as to be likely to endanger human life.*

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

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

E *(6) If death is caused by willfully stopping the breath of any person for either of such purposes.*

By his own admission in both his statements the Appellant said that he stabbed the deceased on his neck. This was corroborated by
F *PW1, the Medical Doctor who performed the postmortem examination on the deceased when he said on oath that:*

“...upon examination I found a young man with two stab wounds on the left side of the neck... cause of death was severe hemorrhage secondary to stab wounds.”

G The above falls into the circumstances in either 1, 2, or 3 above. It is immaterial if the Appellant did not intend to hurt Augustine Eveh (deceased). It becomes clear, that the Appellant killed Augustine Eveh in circumstances that amount to Murder under the Criminal Code, applicable to the Southern Part of Nigeria. In his brief of argument,
H learned counsel for the Appellant concedes that the Appellant was responsible for the death of the deceased but argues that it was not intentional, as the defence of self defence and/or provocation avails the Appellant. Reliance was place on the extra judicial statements of the Appellant, Exhibit C and E and his testimony on oath in court.

He observed that there was not credible evidence from the prosecution to dislodge the defence raised by the Appellant in exhibits C and E and confirmed by his oral evidence. He further argued that the trial judge ought to have accepted the version of the story as told by the Appellant, on the defence of self defence. Reliance was placed Ahmed v. State (1999) 7 NWLR (Pt.612) p.641, Archibald 14 Edition paragraph 2472. Learned counsel submitted that even if the defence of self defence is rejected the Appellant may still be convicted of the lesser offence of manslaughter.

Learned counsel for the Respondent submitted that the defence of self defence would avail the Appellant only if he can show that he was in apprehension of death or grievous bodily harm and if the means of retaliation was not disproportionate in the circumstance. Reliance was place on Ogba v. State (1990) 3 NWLR (Pt.139) p.505.

Concluding he observed that at the time the Appellant stabbed the deceased he was not in danger of death and the act of stabbing was disproportionate, contending that the defence of self defence is not available to the Appellant. On the defence of provocation learned counsel observed that for the defence of provocation to succeed the Appellant must have done the act for which he is charged in the heat of passion and the act must have been committed before there is time for his passion to cool. Reliance was placed on Uwagboe v. State (2008) 12 NWLR (Pt.1102) p.621.

He submitted that learned counsel for the Appellant failed to show that the findings of the two courts below are perverse or not in line with laid down rules of law. He urged this court to dismiss the appeal.

The Appellant's grievance is that the courts below did not properly consider the defences of provocation and self defence that he relied on. When then does the defence of provocation or self defence succeed in a charge of murder?

Section 283 of the Criminal Code defines provocation to include not only wrongful acts but also spoken words. There is thus an objective and subjective element in provocation. It must be kept in mind that the provocative act should be capable of depriving a reasonable man and did deprive the accused/Appellant of self control to make him for a moment not master of his mind. There is no set standard of retaliation expected from a reasonable man. It all de-

pendes on the accused/Appellant's station in life. A reasonable man is a reasonable man of the accused person's standing in life and to a large extent his cultural background.

In *R v. Afonja* (1955) 15 WACA p.26 the West African Court of Appeal accepted the definition propounded by Delvin J in *R v. Duffy* 1949 1 ALL England Report p.932 that:

"Provocation is some act or series of acts done by the deceased to the accused which would cause in any reasonable person and actually does cause in the accused a sudden and temporary loss of self control rendering the accused so subject to passion as to make him for the moment not master of his mind. See also Annabi v. State (2008) 4 -5 SC (Pt.ii) p.229, Kaza v. State (2008) 1 -2 SC p.151, Shall v. State (2007) 7 -10 SC p.107.

Provocation consists of the following:

- D (a) the act of provocation;
- (b) the loss of self control;
- (c) the retaliation must be proportionate to the provocation.

When the defence of provocation is raised, the question is whether the Appellant was in fact provoked to lose his self control. If the answer is yes, the next question is whether the provocation was enough to make a reasonable man do as he did. That is, stab the deceased to death.

There is no doubt that the act of the deceased in snatching the Appellant's bottle of drink and breaking it, then proceeding to threaten the Appellant with the broken bottle is enough to provoke a reasonable man to lose his self control.

Was the retaliation proportionate to the provocation?

Learned counsel for the Appellant never denied that the Appellant was responsible for the death of the deceased. On page 4 of the Appellant's brief learned counsel says:

"From the evidence on record, the issue of the death of the deceased was not in contention. It was also not in dispute that the act of the Appellant was responsible for the death of the deceased..."

H The Appellant made two confessional statements. There was no objection when they were tendered in court. In Exhibit C the Appellant said:

"...I overpower (sic) the deceased and collected the broken bottle from him and used it to stab him the neck."

In Exhibit E the Appellant said:

“...I later overpowered him and seized the bottle from him. And I used it to stab him on his neck.”

The threat to the Appellant’s life ended when the Appellant overpowered the deceased and took the broken bottle from him. A reasonable man would have given the deceased a couple of slaps and thrown away the broken bottle. Stabbing the deceased with the broken bottle was clearly disproportionate to the provocation. The stabbing of the deceased was not as a result of temporary loss of control rather the stabbing was for the sole purpose of causing grievous harm. In such a situation it is immaterial that the Appellant did not intend to hurt the deceased. The killing was intentional and the defence of provocation would not avail the Appellant.

Section 286 of the Criminal Code states that:

“286. 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 believe 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.

The defence of self defence would avail the Appellant if he can show that at the time he stabbed Augustine Eveh (deceased), he was in apprehensive of death or grievous bodily harm from Augustine Eveh (deceased). By his own admission, the Appellant was no longer in apprehension of death or grievous bodily harm since he stabbed the deceased after he had overpowered him and retrieved the broken bottle from him. At the time of the stabbing, the Appellant was no longer in apprehension of death but rather an unjustified aggressor that retaliated in a disproportionate manner. The killing was inten-

tional.

It is lawful if the nature of the assault on the Appellant is such as to cause reasonable apprehension of death or grievous harm for him to use such force on the deceased as is necessary to defend himself, but this does not arise since the danger had passed after the Appellant overpowered the deceased, retrieved the broken bottle from him and stabbed him on the neck with it. The stabbing was clearly unnecessary. The killing was intentional. The defence of self defence fails.

In view of concurrent findings of fact by the two Lower Courts, this court will not interfere with such findings unless special circumstances are shown, such as the findings are perverse, or there was a serious error of procedural or substantive law which has resulted in a miscarriage of justice. See Lasisi v. State (2013) 3-4 SC (pt.i) p. 58, Ndulue & anor v. Ojiakor & 2 Ors (2013) 1-2 SC (pt.ii) p.91.

This is not the case as no special circumstances have been shown in this case to warrant any interference with these concurrent findings of fact.

The Court of Appeal described the defence of the Appellant as confused. This is true. The reason is simple. The Appellant did not have the service of a legal practitioner when he wrote exhibit E, a day after the incident. It must be noted that most crimes are committed by people with little or no education, consequently they are easily led along by the Investigating Police Officer to write incriminating statements which legal minds find almost impossible to unravel and resolve. Confessional Statements are most times beaten out of suspects, and the courts usually admit such statements as counsel and the accused are unable to prove that the statement was not made voluntarily. A fair trial presupposes that police investigation of the crime for which the accused person stands trial was transparent. In that regard it is time for safeguards to be put in place to guarantee transparency. It is seriously recommended that confessional statements should only be taken from suspect if, and only if his counsel is present, or in the presence of a legal practitioner. Where this is not done such a confessional statement should be rejected by the court.

In the end, I find myself in complete agreement with the judgment of the Court of Appeal, which affirmed the judgment of the

Trial High Court. The appeal is dismissed.

MUNTAKA-COOMASSIE JSC

I have been opportuned to have read before now this illuminating lead judgment rendered by my noble lord Justice Rhodes-Vivour JSC. I entirely agree with his lordship that the court below was perfectly right when it affirmed the judgment of the trial court. Appeal before us therefore lacks merit and same is hereby dismissed.

NGWUTA JSC

I read in draft the lead judgment prepared and just delivered by my learned bother, Rhodes-Vivour, JSC.

I entirely agree with the reasoning leading to the conclusion that the appeal is bereft of any merit. To emphasise my agreement, I will add a few remarks.

It is not in dispute that the deceased died at the hands of the appellant. In the struggle that ensued between the appellant and the deceased, the former overpowered the latter. Appellant snatched from the deceased the broken bottle with which he, the appellant, was threatened by the deceased. In the circumstance, appellant should have disposed of the very dangerous weapon. Rather, appellant used the broken bottle to stab the deceased after he had already disarmed, and beaten the fight out of him.

Where did the appellant choose to stab his conquered victim? He chose the neck - a most vulnerable part of the body. Did the appellant intend to kill his victim after he disabled him in the struggle that ensued? Why not? That is the reason he stabbed the neck of the victim after disarming him.

My Lords, if this is not murder in terms of Section 316(1) of the Criminal Code in the sense that the appellant intended to cause death of the person killed, the facts fall within the ambit of Section 316 (2) of the Code. It is obvious that the appellant intended to do to the deceased some grievous harm.

In *R v. Maye Nungu* (1953) 14 WACA 329, the appellant struck his brother with the blunt edge of an axe, causing his death. While conceding the point that appellant had no intention to kill his brother,

Verity, CJ said, *inter alia*, “but we do not think it would be reasonable to conclude therefrom that the appellant did not believe that to strike the deceased on the head with the haft of the axe heavily weighed as it was with an iron head... would not do grievous harm” to the deceased.

B In my humble view, there is nothing to choose between an axe struck on the head and a jagged piece of broken bottle struck to the neck.

C In *R v. Adi* (1955) 15 WACA 6, appellant stabbed the victim in the abdomen “to make him feel pain” as a result of which the victim died. It was held to be murder under Section 316 (2) of the Code. In *R v. Aliechem* (1-956) FSC 64 appellant came across a suspected thief in the night and dealt him a severe machete cut in the abdomen not to kill him but “so that everyone would know him as a thief.” He D was found guilty of murder under Section 316 (2) of the Criminal Code.

On the facts of this case the defence of self-defence relied on by the appellant is untenable. What was he defending himself against in stabbing the deceased after he had disarmed and overpowered E him? Of the appellant and the deceased, the one under imminent danger at the time was the deceased and the danger materialized in his death at the hand of the appellant.

F Appellant sought refuge in provocation. In any particular case the question whether there was provocation, whether the person provoked was actually deprived by the provocation of the power of self-control and whether the weapon and force used were disproportionate to the provocation, are of facts not law, which are in the domain of the trial Court.

G The trial Court made findings on the said facts, which findings were affirmed by the Court below. The appellant did not show any perversity in the said findings and, *ipso facto*, this Court has no duty to interfere with the concurrent findings of the two courts below. See *Ibodo v. Enorofia* (1980) 5-7 SC 42. It was not shown by the appellant that there was no sufficient evidence to support the findings. H

There is no substantial error whether in substantive or procedural law which, if not corrected, will lead to miscarriage of justice. This court has therefore no duty and/or reason to disturb the concurrent findings of facts of the two courts below. See *Efe v. State* (1976)

11 SC 75, Lokoyi & Anor v. Olojo (1983) 8 SC 61 at 68.

Based on the above, my Lords, and the more elaborate reasoning and analysis in the lead judgment I also dismiss the appeal and affirm the judgment of the Court below which affirmed the judgment of the trial Court.

Appeal dismissed.

B

OGUNBIYI JSC

I read in draft the lead judgment of my learned brother Rhodes-Vivour, JSC. I agree with the reasoning and conclusion arrived thereat that the appeal is devoid of any merit and should be dismissed.

C

The appeal is against the judgment of the Court of Appeal, Benin Division which affirmed the decision of High Court Delta wherein the appellant was convicted of murder of one Augustine Eveh and sentenced him to death.

D

The appellant, one Harrison Owhoruke was charged with the offence of murder contrary to Section 319(1) of the Criminal Code Laws Cap 48 Laws of the Defunct Bendel State of Nigeria as applicable to Delta State. The particulars of the offence are that:-

E

Harrison Owhoruke (m) on or about the 14th day of November, 2004 at Uruto Quarters, Ozoro within the Oleh Judicial Division murdered one Augustine Eveh (m).

At the trial, the prosecution called four witnesses while the appellant gave evidence in support of his case and called no witness. The trial court convicted the appellant of the one count charge. On appeal to the Court of Appeal Benin Division, the appellate court affirmed the conviction and sentence of the appellant. The appellant has now again appealed to this court vide a notice of appeal containing two grounds and dated 2nd day of August, 2012; a lone issue was formulated as follows:-

F

Whether the learned justices of the Court of Appeal were right in upholding the decision of the trial court that the appellant is not entitled to the defence of self defence and provocation.

H

For the defence of self defence and provocation to avail the appellant, regard must be had to the evidence led before the court.

The law is well settled that the raising of a defence of self defence presupposes that the accused admits that he did the act which

resulted in the death of the deceased and he was justified in doing so for purpose of protecting his own life. In other words that he was at the risk of imminent danger of death and except he took the immediate precautionary measures, he stood the risk of being killed or was in such fear when he committed the act; that the only alternative
 B open for sparing the accused's life was the action he took. The defence serves complete and total exoneration from culpability.

For such defence to avail the appellant, he must first ensure and show by evidence that he was so much endangered by the act of
 C the deceased that the only means of escape from imminent death was to kill the deceased. See the case of Ekpenyong V. The State (1991) NWLR (Pt.200) and Amaka Vs. State (1995) NWLR (Pt.399).

To succeed on the defence of self defence, the accused/appellant must show:

D (a) That the nature of the attack by the deceased was such as to cause a reasonable apprehension of death or grievous harm to the accused.

(b) That the accused in fact apprehended death or grievous
 E bodily harm. See Laoye Vs. The State (1985) 2 NWLR (Pt.10) 832 at 842; Uwagboe Vs. The State 13 NWLR (Pt.1102) 621 at 648.

On the defence of provocation also, same can only avail an accused person where he can prove that the act for which he is charged must have been done in the heat of passion caused by sudden provocation and also that the act must have been committed before there
 F is time for his passion to cool. See Uwagboe Vs. State (2008) 12 NWLR (Pt.1102) 621 at 638. Provocation, is some act or series of acts, done by the victim to the accused person which would cause in any reasonable person, a sudden temporary loss of self control rendering the accused so subject to passion as to make him for the moment not master of his mind. See Ogbolu V. The State (1987) 2
 G NWLR (Pt.54) 20 at 33, also Jideonwo V. State (1997) 1 NWLR (Pt.480) 209 at 21.

None of the defences is available to the appellant in the circumstance.
 H

The evidence of P.W. 2 was uncontradicted and which proved beyond reasonable doubt that the appellant caused the death of the deceased. On the totality of the evidence of P.W.1, P.W.2 and P.W.4 conclusively linked the appellant to the cause of Augustine Eveh's

death.

P. W. 2 (Joel Eriewe) for instance was an eye witness who gave a direct, cogent and credible evidence of how the appellant was directed by one Omede Christopher to stab the deceased with a beer bottle. He stated that the said Omede Christopher tied the deceased's hands and instructed the appellant to stab the deceased with a beer bottle because he (P.W.2) was able to escape through the assistance of the deceased. He also testified that he ran to call the deceased's elder brother - Victor Eveh; and when they came back they met the deceased shouting that the appellant had stabbed him with a beer bottle. Efforts to rush the deceased to the hospital was too late and he died. See pages 4 - 5 of the record.

P. W. 1 was the Medical Doctor whose evidence is at page 5 of the record at lines 17 - 26, he said amongst others that:

"The wound went through the skin, the muscles. The major blood vessels - carotid arteries and jugular veins were transacted cut into two. ...The wound was not self - inflicted. In my opinion the cause of death was severe hemorrhage secondary to the stab wound."

The cause of death could, no doubt be inferred from the totality of the evidence adduced before the trial court from which the court is entitle to draw necessary inference there from: see the case of Onyejekwe v. The State (1992) 3 NWLR (pt. 230) 444 at 456.

The appellant and his colleagues knew and intended the probable result of their action from the evidence adduced by the prosecution, there is a direct nexus between the injuries received by the deceased as described by the eye witness P.W.2 and those described by the Medical Doctor P.W.1

The act of the appellant was intentional with the knowledge that death or grievous harm was its probable consequence. The appellant is deemed to intend the natural consequences of his act. A man who stabs another on the neck region with a bottle is deemed to have intended to kill or cause grievous bodily harm. See Abogede v. The State (1996) NWLR 223 at 238. The intention to kill or cause grievous harm can be inferred from the nature of the weapon used. See Garba V. The State (2000) FWLR (pt.24) 1448 at 1459.

Having regard to the evidence led at the trial, the learned trial judge was therefore right in holding that the prosecution proved its case against the appellant beyond reasonable doubt as the judgment

of the learned trial judge is supported by the evidence on record.

Also on the concurrent findings by the two Lower Courts, the law is trite that the appellate court is entitled to accept and affirm the findings of the trial court, which have not been shown to be perverse or not supported by the evidence. See *Durugo V. The State* (1992) 7 B NWLR (Pt.255) 525 at 535.

My learned brother Rhodes-Vivour, JSC has dealt with the issue raised comprehensively in his lead judgment and I agree completely with the reasoning and conclusion arrived thereat that the appeal lacks merit and I also dismiss same. The judgment of the Court of Appeal which affirmed that of the trial court is unassailable.

AKA'HS JSC

I was privileged to read in draft the leading judgment prepared by my learned brother, Rhodes-Vivour JSC. I entirely agree with him that all the defences available to the appellant were well considered by the learned trial Judge including the defence of accident. The court below however did not deal with that defence and the appellant did not raise the issue before this court as he concentrated his arguments on self defence and or provocation.

Learned counsel for the appellant submitted that having regard to the evidence on record especially Exhibit “E” and the oral evidence of the appellant, the defence of self defence and provocation are available to him.

The learned trial Judge after evaluating the facts held at page 40 of the record:-

“Besides, the accused pleads the defence of self defence. In Ogba v. State (1990) 3 NWLR (Pt.139) 505 it was held that the defence of self defence will avail the accused only if he can show that he was in apprehension of death or grievous bodily harm and if the means of retaliation is not disproportionate. In the circumstance in exhibit “E” the accused said:-

“And I used it to stab him on the neck”

As reasoned by the learned trial Judge, the accused having seized the broken bottle from the deceased, the deceased was now harmless and so the injury the accused inflicted on the deceased could only be described as savage. This prompted the learned trial Judge

to query what instigated the accused to mortally attack the deceased on the neck with the broken bottle. PW1 who conducted the post-mortem examination on the deceased found that the major blood vessel-carotid arteries and jugular veins were transected or cut into two. In his opinion the cause of death was severe hemorrhage, secondary to the stab wounds.

B

The court below considered the two defences of self defence and provocation and expressed the view that the appellant was not serious in putting up the defence of provocation. He held that a pre-meditated murder is incompatible with provocation and concluded that an accused who kills intentionally cannot be said to have been provoked citing *Inyama v State* (1972) 35 C 94 and *Uwaekweghinya v. State* (2005) 9 NWLR (Pt.930) 227. The conclusion reached by the court was that the prosecution proved the case of murder against the accused and since the findings are not perverse, the court found no reason to interfere with the judgment.

C

D

I have gone through the record and I am of the view that the learned trial Judge meticulously considered all the defences available to the appellant and found that the prosecution proved the case of murder against the appellant and there are no extenuating circumstances that would warrant any court to tamper with the conviction of the appellant for the offence of murder. The Lower Court was right to hold self defence and/or provocation could not avail the appellant. I find no merit in the appeal and it is accordingly dismissed.

E

F

The conviction and sentence of death by hanging passed on the appellant which was affirmed by the Lower Court is further affirmed by me.

G

H