

SUPREME COURT OF NIGERIA
FRIDAY 18TH MARCH, 2016. SC. SC.104/2013
CORAM:- M. MOHAMMED CJN, S. GALADIMA,
O. RHODES-VIVOUR, N. S. NGWUTA,
M. D. MUHAMMAD, JJSC

ADEBIYI FAMAKINWA APPELLANT
V.
STATE RESPONDENT

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

MURDER - Evidence - Proof - Murder can be established by direct or circumstantial evidence - And any of such evidence must establish guilt of accused beyond reasonable doubt (H2)

MANSLAUGHTER - Sentence - From circumstances surrounding the stabbing and death of the deceased - CA was right in substituting conviction of murder with that of manslaughter against appellant (H3)

MANSLAUGHTER - Self defence - Appellant has failed to bring his conduct to be entitled to the defence - To exonerate him from conviction for the offence of manslaughter (H4)

FACTS

At the High Court of Ondo State, accused/appellant was arraigned on a count charge of murder. Appellant pleaded not guilty to the charge. The case for prosecution/respondent is that appellant came to the house of the deceased to challenge the deceased in respect of allegation of mismanagement of money given to appellant by the brother of the deceased. In the process, a fight ensued between appellant and the deceased. The dispute was reported to the Oba of the town who sent his Police orderly to invite the quarreling parties to his palace.

While the deceased was on his way to the Oba's palace with

the police orderly and other relations of the deceased, appellant came from behind with a knife and stabbed the deceased causing him injuries which resulted in the death of the deceased. In his own confession – Exhibit ‘B’ and in his oral evidence in court, appellant admitted stabbing the deceased but set up self defence. To support its case, respondent called 7 witnesses and tendered 3 Exhibits, while appellant called one witness. In his judgment at the end of the trial, the learned trial Judge convicted appellant and sentenced him to death for murder. Appellant appealed to the Court of Appeal. The court allowed the appeal in part by substituting the conviction for murder with that of manslaughter and sentenced appellant to 15 years imprisonment. Aggrieved, appellant appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether after finding that the prosecution’s case at the trial Court was inconclusive and contradictory, the learned Justices of the Court of Appeal ought to have resolved the doubt thereby created in favour of the Appellant and to discharge and acquit him rather than reduce his conviction from murder to manslaughter?”

2. Whether from the evidence on record the Appellant is availed with the defence of self defence and thereby was entitled to discharge and acquittal rather than conviction for manslaughter?”

HELD (Unanimously dismissing the appeal per **MOHAMMED CJN**)

MURDER - Ingredients - Proof

1. In order to secure a conviction in a charge of murder under Section 319(1) of the Criminal Code Cap 30 Vol. II of the Laws of Ondo State of Nigeria 1978, the prosecution must prove -

“(a) that the deceased had died;

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

(c) that the act or omission of the accused was intentional with the knowledge that death or grievous bodily harm as its probable consequence.”

It is also the law that in a charge of murder, the prosecution is required to prove beyond reasonable doubt not only that the act of the accused person could have caused the death

of the deceased but that it actually did. If there is any possibility that the deceased died from other causes than the act of the accused, the prosecution has not established the case against the accused person.

Also in every case where it is alleged that death has resulted from the act of the accused person, a causal link between the death and the act must be established and proved beyond reasonable doubt. (p. 2083 B)

Evidence - Proof

2. As for the quality of evidence to be relied upon to establish a charge of murder, the evidence may be direct or circumstantial. Whether the evidence is direct or circumstantial, it must establish the guilt of the accused person beyond reasonable doubt. (p. 2083 H)

MANSLAUGHTER - Sentence

3. A person who causes the death of another is guilty of involuntary manslaughter. In other words, manslaughter is the unintentional killing of a human being. Such a killing is not premeditated but accidental in the sense that it was not intentional. In the instance case therefore, where the stabbing of the deceased by the Appellant took place in the course of a fight and in the night, the Court below was right in substituting the conviction of murder with that of manslaughter against the Appellant and passing the sentence of 15 years imprisonment on him. (p. 2085 A)

MANSLAUGHTER - Self defence

4. The Law is well settled that the defence of self-defence, if successful, is a complete defence or answer to the charge of murder or manslaughter as in the instant case.

Applying the law on the subject to the present case, the Appellant who admitted stabbing the deceased and causing him injuries that led to his death in the course of a fight, the fact that it was the Appellant who went to the house of the deceased where the fight took place, had failed to bring his conduct and action to be entitled to the defence of self-de-

fence to exonerate him from the conviction for the offence of manslaughter.

It is important to note that as far as the rejection of the evidence of the Appellant on his attempt to set up a defence of self-defence is concerned, both the trial Court and the Court below are in complete agreement. This to my mind constitute concurrent findings of the two Courts which this Court would not ordinarily disturb.

In the instant case, I see no exceptional reasons at all to warrant interfering with the concurrent findings.
 C (p. 2086 A/E)

REPRESENTATION

D Chinonye Edmund Obiagwu with her, Uzoma Aneto (Mrs.), for the Appellant
 Dr. J. Y. Musa with Mrs. Adesola Adeyemi-Tuki (DPP Ondo State) and Taiwo Olubodun - DDPP, M.O. Onyilokwu. Eko Ejembi Irko, J O. Musa and I. W. Zom, for the Respondent

E CASES REFERRED TO

State v. Danjuma (1997) 5 NWLR (pt. 506) 512
 Obi v. State (1991) 7 NWLR (pt. 513) 352
 Ibeh v. State (1997) 1 NWLR (pt. 484) 632
 Enahoro v. The Queen (2007) 5 ACLR 403
 F Ubani v. State (2003) 18 NWLR (pt. 581) 224
 Uguru v. State (2002) 9 NWLR (pt. 771) 90
 Igabele v. State (2006) 6 NWLR (pt. 975) 100
 Oforlete v. State (2000) 12 NW LR (pt. 681) 415
 G Aruna v. State (1990) 6 NWLR (pt. 155) 125
 Ejeka v. State (2003) 7 NWLR (pt. 819) 408
 Chukwu v. State (1992) 1 NWLR (pt. 217) 255
 Ajayi v. State (2014) 10 ACLR 425
 Adeyeye v. State (2014) 10 ACLR 476
 H Baridam v. State (1994) 1 NWLR (pt. 320) 262
 Kim v. State (1992) 4 NWLR (pt. 233) 17

STATUTES REFERRED TO

Criminal Code Cap. 30 vol. II Laws of Ondo State 1978, ss. 316,

319(1)

Evidence Act 2011, s. 167(d)

LEAD JUDGMENT BY MOHAMMED CJN

This appeal is against the Judgment of the Court of Appeal Akure Division delivered on 31st October, 2012, wherein that Court allowed the appeal of the present Appellant against his conviction and sentence of death for murder under Section 319(1) of the Criminal Code CAP 30 Vol. II of the Laws of Ondo State of Nigeria 1978, by the trial Ondo State High Court of Justice sitting at Okitipupa in its judgment delivered on 11th May, 2006. In the Judgment of the Court of Appeal, the Court in allowing the Appellant's appeal substituted the conviction for murder with that of manslaughter and sentenced the Appellant to 15 years imprisonment. The Appellant is now on a further appeal to this Court against his conviction and sentence for the offence of manslaughter.

In the course of the trial at the trial Court, the prosecution called 7 witnesses and tendered in 3 Exhibits while the Appellant who was being tried in his own defence gave evidence and also called one witness who was the Appellant's younger brother. The case of the prosecution was that the Appellant came to the house of the deceased to challenge the deceased in respect of allegation of mismanagement of money given to the Appellant by the brother of the deceased. In the process, a fight ensued between the Appellant and the deceased. The dispute was reported to the Oba of the town who sent his Police orderly to invite the quarrelling parties to his palace. While the deceased was on his way to the Oba's palace with the police orderly and other relations of the deceased, the Appellant came from behind with a knife and stabbed the deceased causing him injuries which resulted in the death of the deceased.

In his own defence contained in his own statement to the Police admitted in evidence in the course of the trial as Exhibit 'B' and his own oral evidence, the Appellant admitted stabbing the deceased but claimed that he was attacked by the deceased and 5 of the deceased relations, one of whom stabbed the Appellant with a knife which the Appellant retrieved from the Appellant's relation. That, while the Appellant was trying to retaliate, the Appellant's relation who testified for the prosecution as PW 5, avoided the knife which

landed on the deceased, thereby setting a defence of self defence.

At the hearing of this appeal on 4th January, 2016, the Appellant and Respondent's briefs of argument filed on behalf of the Appellant and Respondent were duly adopted and relied upon in addition to the oral arguments. In the Appellant's brief of argument, the following two issues were formulated for the determination of the appeal -

"1. Whether after finding that the prosecution's case at the trial Court was inconclusive and contradictory, the learned Justices of the Court of Appeal ought to have resolved the doubt thereby created in favour of the Appellant and to discharge and acquit him rather than reduce his conviction from murder to manslaughter?"

2. Whether from the evidence on record the Appellant is availed with the defence of self defence and thereby was entitled to discharge and acquittal rather than conviction for manslaughter?"

Learned Counsel to the Respondent also adopted the two issues identified in the Appellant's brief of argument. In support of issue 1, learned Counsel to the Appellant argued that the Court below was in error when it failed to resolve the doubt raised by the gaps it found in the prosecution's case in favour of the Appellant; that the law is quite clear that where there is inconsistency or contradiction on material issue in the case of the prosecution against the Appellant, the doubt raised should be resolved in favour of the Appellant as was stated by this Court in the cases of *STATE VS DANJUMA* (1997) 5 NWLR (PT.506) 512 at 528-529. The cases of *OBI VS THE STATE* (1991) 7 NWLR (Pt. 513) 352 at 360 and *IBEH VS STATE* (1997) 1 NWLR (Pt. 484) 632. Learned counsel finally submitted that from the evidence on record, the Court below found contradictions, there was no other evidence from the prosecution to support the conviction of the Appellant for manslaughter and therefore urged the Court to allow the appeal and discharge and acquit the Appellant.

For the Respondent, it was submitted that the decision of the Court below to substitute the conviction of the Appellant from the offence of murder to that of manslaughter, was made because it found that the defence of provocation would avail the appellant; that the doubt that was created was because the prosecution did not resolve the question of where exactly the fight took place in the absence of the evidence of the Police orderly of the Oba of the town who was

said to be present when the Appellant stabbed the deceased. Relying on the case of ENAHORO VS THE QUEEN (2007) 5 ACLR 403 at 427, learned Respondent's Counsel pointed out that for contradictions in the evidence of the prosecution to lead to acquittal of an accused person, the contradictions must be fundamental. Learned Counsel stressed that there was sufficient credible evidence adduced by the prosecution to support the conviction and sentence of the Appellant as substituted by the Court below and therefore urged this Court to dismiss the appeal on this issue.

In order to secure a conviction in a charge of murder under Section 319(1) of the Criminal Code Cap 30 Vol. II of the Laws of Ondo State of Nigeria 1978, the prosecution must prove -

***“(a) that the deceased had died;
(b) that the death was caused by the accused; and
(c) that the act or omission of the accused was intentional with the knowledge that death or grievous bodily harm as its probable consequence.”***

See UBANI VS THE STATE (2003) 18 NWLR Pt. 581) 224, UGURU VS THE STATE (2002) 9 NWLR (Pt. 771) 90 and IGABELE VS THE STATE (2006) 6 NWLR (Pt. 975) 100.

It is also the law that in a charge of murder, the prosecution is required to prove beyond reasonable doubt not only that the act of the accused person could have caused the death of the deceased but that it actually did. If there is any possibility that the deceased died from other causes than the act of the accused, the prosecution has not established the case against the accused person. See UGURU VS THE STATE (2002) 9 NWLR (Pt. 771) 90.

Also in every case where it is alleged that death has resulted from the act of the accused person, a causal link between the death and the act must be established and proved beyond reasonable doubt. See OFORLETE VS THE STATE (2000) 12 NW LR (Pt. 681) 415.

As for the quality of evidence to be relied upon to establish a charge of murder, the evidence may be direct or circumstantial. Whether the evidence is direct or circumstantial, it must establish the guilt of the accused person beyond reason-

able doubt. The case of ARUNA VS THE STATE (1990) 6 NWLR (Pt.155) 125 easily comes to mind on this requirement.

In the case at hand, the Appellant was charged with the offence of murder under Section 319(1) of Criminal Code for having caused the death of one Chief Monday Sedera on 2nd April, 2002, by stabbing the deceased with a knife which caused injury to the deceased resulting in his death. From the evidence adduced by the prosecution through the 7 witnesses called by it and the 3 Exhibits admitted in evidence including the statement of the Appellant taken under caution by the police, the requirement of proof beyond reasonable doubt had been achieved in establishing that the deceased Chief Monday Sedera was dead and that his death was caused by the act of the Appellant in stabbing him with a knife which caused injuries that resulted in the death of the deceased.

The next question for determination from the evidence on record is whether the circumstances under which the stabbings of the deceased by the Appellant took place disclosed the offence of murder as found by the trial High Court or manslaughter as found the Court of Appeal. The evidence accepted and relied upon by the trial High Court was that while the deceased and the orderly of the Oba and others were on their way to the Oba's palace who invited the Appellant and the deceased who were fighting to the palace of the Oba, the Appellant came from behind and stabbed the deceased. On that evidence therefore, the trial Court rejected the defences of provocation and self defence raised by the Appellant and found him guilty of the offence of murder and sentenced him to death. The Court of Appeal on the other hand was more inclined to accept the other version of the story that the stabbing incident took place in the course of the fight between the Appellant and the deceased which resulted in the Court allowing the Appellant's appeal by substituting the finding of the offence of manslaughter in place of the offence of murder as found by the trial High Court. The contradiction in the evidence of the prosecution as to where the stabbing actually took place was brought about by the failure of the prosecution to call the police orderly of the Oba of the town who was said to be present when the stabbing took place, to give evidence. All the same, the Court of Appeal was right in holding that the contradictions in the evidence of the prosecution were not fundamental to absolve the

appellant of the offence of manslaughter.

A person who causes the death of another is guilty of involuntary manslaughter. In other words, manslaughter is the unintentional killing of a human being. Such a killing is not premeditated but accidental in the sense that it was not intentional. See EJEKA VS THE STATE (2003) 7 NWLR (Pt.819) 408. ^B
In the instance case therefore, where the stabbing of the deceased by the Appellant took place in the course of a fight and in the night, the Court below was right in substituting the conviction of murder with that of manslaughter against the Appellant and passing the sentence of 15 years imprisonment on him. ^C

The second issue is whether from the evidence on record the appellant is availed with the defence of self defence, and thereby entitled to discharge and acquittal rather than conviction for manslaughter. Learned Counsel to the Appellant has argued that the defence of self defence will avail an accused person who retaliated to unprovoked attack in order to ward off the attack against him and to defend himself from further attack relying on the cases of UWAEKWEGBUNYA VS THE STATE (2005) 23 WRN 1 AT 28 and CHUKWU VS THE STATE (1992) 1 NWLR (Pt. 217) 255. Counsel therefore urged the Court to accept that the Appellant acted in self defence and to discharge and acquit him. ^D

For the Respondent however, it was pointed out that the trial Court considered the defence of self defence raised by the appellant in its Judgment but came to the conclusion that there were no facts or evidence before the Court that suggested that the appellant was in any danger or apprehension of death or grievous hurt as a result of the attack by the deceased. It was observed by the learned Counsel that even the Court of Appeal also rejected the defence of self-defence raised by the appellant thereby disclosing concurrent finding on the issue by the trial Court and the Court of Appeal which this Court is called upon not to disturb having regard to the cases of AJAYI VS THE STATE (2014) 10 ACLR 425 at 451 and ADEYEYE VS THE STATE (2014) 10 ACLR 476 at 518. Learned Counsel therefore concluded that since the findings of the trial High Court and the Court of Appeal are not perverse, the appeal deserves to be dismissed. ^F ^G ^H

The Law is well settled that the defence of self-defence, if successful, is a complete defence or answer to the charge of murder or manslaughter as in the instant case. See BARIDAM VS THE STATE (1994) 1 NWLR (Pt.320) 262, KIM VS THE STATE (1992) 4 NWLR (Pt.233) 17 at 49 and DURU VS THE STATE (1993) 3 NWLR (Pt.281) 283 at 291-292. With regard to the duty of an accused person raising the defence of self defence in his trial for the offence of murder, the law is as stated by Iguh, JSC (as he then was) in BARIDAM VS THE STATE (1994)1 NWLR (Pt.320) 250 at 262 where he said-

“There can be no doubt that self defence in an appropriate case is a complete answer to a charge of murder or manslaughter. The Appellant, to avail himself of this defence, however, must show that his life was so much endangered by the act of the deceased that the only option that was open to him to save his own life was to kill the deceased. He must show that he did not want to fight and that he was at all material times prepared to withdraw.”

See also STEPHEN VS THE STATE (1986) 5 NWLR (Pt.46) 987 and ITESHI ONWE VS THE STATE (1975) 9-11 S.C 23.

Applying the law on the subject to the present case, the Appellant who admitted stabbing the deceased and causing him injuries that led to his death in the course of a fight, the fact that it was the Appellant who went to the house of the deceased where the fight took place, had failed to bring his conduct and action to be entitled to the defence of self-defence to exonerate him from the conviction for the offence of manslaughter.

It is important to note that as far as the rejection of the evidence of the Appellant on his attempt to set up a defence of self-defence is concerned, both the trial Court and the Court below are in complete agreement. This to my mind constitute concurrent findings of the two Courts which this Court would not ordinarily disturb. See MANAWA OGBODU VS THE STATE (1981) 2 NWLR (Pt.54) 20. ***In the instant case, I see no exceptional reasons at all to warrant interfering with the concurrent findings.***

In the final result, it is for the forgoing reasons that I find no merit in this appeal. The appeal is hereby dismissed and the convic-

tion and sentence of 15 years imprisonment passed on the Appellant by the Court of Appeal for the substituted offence of manslaughter are hereby affirmed

GALADIMA JSC

B

I have the privilege of reading in advance the lead judgment of my learned brother MAHMUD MOHAMMED CJN, just delivered. My Lord has dealt with the main issue on this appeal in most admirable manner. How on earth the Appellant who by mere dint of luck escaped the hangman's noose, fought his case all through to this Court, arguing vehemently that the defence of self-defence in law should avail him thereby entitling him to discharge and acquittal, rather than conviction for manslaughter.

C

Self-defence will only avail an accused person who reacted spontaneously to unprovoked attack in order to avoid or ward off the said attack against him and to defend himself from further attack: CHUKWU v. THE STATE (1992) 1 NWLR (Pt.217) 255. DURU v. THE STATE (1993) 3 NWLR (Pt.281) 283 at 292; KIM V. THE STATE (1992) 4 NWLR (Pt.2331 17 at 49. BARIDAM V. THE STATE (1994) 1 NWLR (Pt.320) at 262, REGINA V. ONYEAMIZU (1958) 1 NWLR 93 at 94-95.

D

In this case, the Appellant admitted that he stabbed the deceased (one Chief Monday Sedera) and causing him injuries that resulted in his death, in the course of a fight. The conduct of the Appellant on the fateful day is being called to question. He admitted he went to the house of the deceased where the fight ensued.

F

In view of this fact alone, the Appellant cannot avail himself the defence of self-defence.

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The concurrent findings of the two Courts below on the rejection of evidence of the Appellant based on self-defence cannot be disturbed by this Court as there is no exceptional circumstances to warrant our interference, with these concurrent findings.

In sum, I too dismiss this appeal for lacking in merit. It is dismissed. The conviction and sentence of fifteen years handed down by the Court below for the substituted offence of manslaughter are hereby affirmed.

H

RHODES-VIVOUR JSC

I have had the benefit of reading in draft the leading judgment delivered by His lordship M. Mohammed, the Chief Justice of Nigeria (CJN). So completely do I agree with it that I have been reluctant to say anything more, before finally deciding to add a few paragraphs of my own.

The full facts and circumstances have already been set out in the judgment just delivered and need not be repeated. The Appellant was charged for murder under Section 319 (1) of the Criminal Code Law Cap 30, Laws of Ondo State.

Section 319 (1) of the Criminal Code of Ondo State provides for the punishment for Murder. It reads

319(1) - Subject to the provisions of this Section any person who commits the offence of murder shall be sentenced to death. While Section 316 of the Criminal Code of Ondo State provides for the definition of Murder. A charge for Murder can be filed under Section 316 or 319 (1) supra but it is desirable that a charge for Murder is brought under Section 319(1) supra. In this case, the Appellant was charged under Section 319 (1) supra.

To succeed the prosecution is required to prove beyond reasonable doubt that the act of the accused person which resulted in the death of the deceased falls within the circumstances in Section 316 of the Criminal Code Law, Cap 30. Laws of Ondo State.

Section 316 of the Criminal Code supra states that:

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

(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 harms;

(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 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 lost aforesaid;

(6) If death is caused by willfully stopping the breath of any person for either of such purposes; is guilty of murder.”

Section 317 of the Criminal Code states that:

“317. A person who unlawfully kills another in such circumstances as not to constitute murder is guilty of manslaughter.”

Akpabio v State (1994) 7 NWLR (Pt.359) P.635, Queen v Jinobu (1961) vol 2 NSCC p.280.

An accused person who kills a person in any of the circumstances in Section 316 of the Criminal Code would be acquitted and discharged if he can show that he killed in self defence, or under provocation in which case he would be convicted for manslaughter. Killing in self defence is thus a complete defence to a charge of Murder.

The Court of Appeal found that in the course of a fight, the Appellant stabbed the deceased, and he died from wounds resulting from the stabbing. When will the defence of self defence avail the Appellant? I must explain self defence. If “A” attacks “B”, “B” is expected to defend himself, but there is a very thin line between “B” defending himself and fighting. “B” is expected to use necessary and reasonable force to protect himself from harm. A man defending himself does not want to fight. He tries to avoid a fight. But in the process of defending himself he may fight depending in the severity of the attack from “A”. If “B” finds himself in a position where he has to fight to defend himself and “A” dies, the defence of self defence would be available to “B”. “A’s” death would in law be unintentional, i.e. not premeditated.

In the penultimate paragraph, the Court of Appeal said:

“...Having found that the evidence of the prosecution was inconclusive as regards their version of the incident the prosecution having also failed to eliminate the possibility that the defence version was the correct version; the Appellant not be given the benefit of the doubt.”

On this reasoning, the Court of Appeal reduced the sentence of death to manslaughter and a sentence of imprisonment for 15 years.

The Appellant went to the house of the deceased and was involved in a free for all fight involving himself, the deceased and about three other persons. The Appellant was the aggressor and he was not the only one with a knife. He was not defending himself. He was fighting. During the course of the fight, he stabbed the deceased in circumstances that do not appear intentional. On these facts, the defence of self defence was not available to the Appellant. Giving the Appellant the benefit of the doubt is justified, and the conviction for manslaughter instead of Murder by the Court of Appeal is correct.

For this, and the more detailed reasoning in the leading judgment, I too, dismiss this appeal and affirm the sentence of 15 years imprisonment passed on the Appellant by the Court of Appeal for manslaughter.

D

NGWUTA JSC

I read with delight a draft of the lead judgment just delivered by the Honourable Chief Justice of Nigeria, Mahmud Mohammed, CJN. I agree with, and adopt the profound, reasoning affirming the judgment of the Court below.

As expected in cases where the accused person does not plead guilty to a charge of murder, there are two diametrically opposed version of the facts of the incident resulting to a charge of murder.

The parties herein are ad idem on the following:

- F (a) that the deceased died;
- b) that the death of the deceased was caused by the accused; but the parties sharply disagreed on the 3rd element which must be proved to secure a conviction in a murder charge -
- G (c) that the act or omission of the accused was intentional with the knowledge that death or grievous bodily harm as its probable consequence.

In criminal trials, the prosecution has a duty to prove the constituent elements of the offence charged beyond reasonable doubt (though not to a mathematical or scientific certainty). See *Miller v. Minister of Pension* (1947)2 All ER 372; *Agbo v. State* (2006) 1 SC (pt 11) 73 at 74; *State v. Onyeukwu* {2004} 7 SC (Pt 1) at 31-32.

For the 3rd element, the prosecution has to prove to secure a conviction in a charge of murder, as illustrated in the lead judgment;

there is a break in the chain of evidence. The evidence of the police Orderly of Oba of the town, who was alleged to have witnessed the stabbing, would have settled the matter one way or the other.

That evidence was not called for no apparent reason. Since the prosecution withheld that evidence, it is presumed that the effect of it, if it had been offered, would have been fatal to the murder case law against the appellant. See S. 167 (d) of the Evidence Act, 2011. B

May be the trial Court was influenced in its decision by the fact that it was the appellant who went to the house of the deceased with arm, the Court below took a more dispassionate stand and reduced the offence from murder to manslaughter. This is justified. The deceased died; he died at the hands of the appellant but prosecution failed to prove, beyond reasonable doubt, that the stabbing from which the deceased died was inflicted by the appellant intentionally either to kill the deceased or to inflict on him grievous bodily harm. D C

Learned Counsel for the appellant urged the Court to acquit and discharge the appellant because he retaliated to unprovoked attack. Self-defence and retaliation or fighting back do not mean the same thing, nor do they mean the same thing as accident. There is a very thin line between self-defence and fighting. E

However, a person defending himself does not want to fight but defends himself to avoid fighting. See *R v. Knock* (1877) 14 COX CCI; *R v. Deana* (1909) 2 Cr. App. R 75. A man who is retaliating to something done to him cannot be said to avoid fighting. If he is avoiding fighting, he will leave the scene and/or report to the Police. F

A fight must result when he retaliates and if in the process of retaliation he kills his opponent, he cannot, in my view, plead self-defence

By the International law principle of hot pursuit, an aggressor can be pursued even into its domain and for purposes of retaliation but this principle is not applicable in municipal criminal law. G

For the above and the fuller reasons in the lead judgment, I also dismiss the appeal and affirm the judgment of the Court below. H

MUHAMMAD JSC

I had a preview of the lead judgment of my learned brother Mahmud Mohammed, the Hon. Chief Justice of Nigeria just deliv-

ered. I adopt the judgment as mine in dismissing the unmeritorious appeal. I abide by the consequential orders made in the lead judgment.

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