

SUPREME COURT OF NIGERIA
FRIDAY 16TH DECEMBER, 2016. SC. 370/2014
CORAM:- O. RHODES-VIVOUR, M. D. MUHAMMAD,
C. B. OGUNBIYI, C. C. NWEZE, A. SANUSI, JJSC

SHUAIBU ABDU APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Appeals - Provocation - Issue of - The defence cannot avail appellant - As he neither raised it at trial - Nor sought for leave to raise same on appeal (H1)

MURDER - Ingredients - Proof - Prosecution must prove death of a human being - That the death was caused by accused - And that the act leading to the death was intentional (H2)

CRIMINAL PROCEDURE - Proof - Standard of - Burden is on prosecution to prove ingredients of offence beyond reasonable doubt - And where doubt exists - It is resolved in favour of accused (H3)

CRIMINAL PROCEDURE - Proof - Means of - Prosecution can prove offence through evidence of eye witness - Confessional statement of accused - And circumstantial evidence (H4)

EVIDENCE - Confession - Validity - A free and voluntary confession of guilt which is direct - Is enough to establish a conviction - Provided Court is satisfied with its truth (H5)

CRIMINAL PROCEDURE - Provocation - Proof - Accused must inter alia show that the act he relied upon is really provocative - And that the provocative act deprived him of self control (H6)

FACTS

Accused/appellant was arraigned at the High Court of Jigawa State on the allegation of causing the death of his wife Binta at Falgore village in Jahun Local Government of Jigawa State by using a machete to cause her death, which offence is contrary to section 221 of

the Penal Code of Jigawa State. At the trial, prosecution/respondent called five witnesses and tendered some exhibits in order to prove its case, while appellant did not give evidence or call any witness but instead, he rested his case on that of respondent.

Both parties at the end of the trial waived their rights of address. At the conclusion of the trial, the Court found appellant guilty as charged and sentenced him to death. Aggrieved, appellant filed an appeal before the Court of Appeal Kaduna Division. The appeal was heard and dismissed. The decision of the trial Court was thus affirmed. Aggrieved further, appellant appealed to the Supreme Court. He raised the defence of provocation in the Court for the first time.

ISSUE FOR DETERMINATION

“Whether considering the evidence adduced before the trial Court, the learned Justices of the Lower Court were right in dismissing the appeal of the convict/Appellant and affirming the judgment of the High Court of Jigawa State in Suit No. JDU/24C/2007 delivered by Honourable Justice A. M. Nakullum on the 24th of September, 2008 convicting the appellant for the offence of culpable homicide punishable with death”

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

CRIMINAL PROCEDURE - Appeals - Provocation - Issue of

1. It needs to be stressed here, that the appellant did not testify nor did he call any witness for his defence at the trial Court. Rather, he chose to rely or rest his case on the case of the prosecution i.e. the respondent herein. Surprisingly and quite strangely too, the appellant decided to raise the defence of provocation on appeal which said defence was never raised at the trial Court and which was also obviously never considered by the trial Court in its judgment which was appealed against to the Lower Court and such defence could not have been contemplated by the trial Court. To my mind, such defence could not have availed the appellant since he never raised it at the trial Court and also because he never applied to the lower Court for leave and was obliged one by the Lower Court

to raise it as a fresh issue on appeal for the lower Court's consideration. Although it can be noted from particular(b) of Grounds No.7 of the Notice of Appeal, I am unable to see any issue for determination flowing from Ground No.7 raising the defence of provocation. Even at that, as I said above, the issue of provocation was never raised by the defence at the trial Court for it to address. Now, since the appellant did not seek leave to raise it as a fresh issue before the Lower Court, such defence can not avail the appellant. Be that as it may, since it was raised in the appellant's confessional statement I shall still consider it here for whatever it is worth. (p. 3927 G)

MURDER - Ingredients - Proof

2. The charge the accused/appellant stood trial on is culpable homicide punishable with death, Contrary to Section 221 (b) of the Penal Code. The ingredients of the offence that of necessity, must be proved by the prosecution in order to obtain conviction are:

- (a) That death of a human being was caused;**
 - (b) That such death was caused by the accused person.**
 - (c) That the act that led to the death of the victim was intended to cause death or grievous hurt or that the accused knew or had reason to believe that by his action, death will be the probable and not only likely consequence of his act.**
- (p. 3928 D)*

CRIMINAL PROCEDURE - Proof - Standard of

3. In all criminal cases the burden of proof squarely lies on the prosecution which always has a duty to prove all the above mentioned ingredients of the offence charged and by the provisions of Section 138 of the Evidence Act, the standard of such proof is nothing less than proof beyond reasonable doubt. In fact, it is settled law that if there is any doubt in the evidence produced by the prosecution such doubt shall be resolved in favour of the accused person. (p. 3928 F)

CRIMINAL PROCEDURE - Proof - Means of

4. It is apposite to say that in order to prove an offence the prosecution can use any of the following modes of proof namely:-

- B (1) Evidence of eye witness or witnesses or
 (2) Confessional statement of the accused, or
 (3) Through circumstantial evidence.

 However, in the case of proof by circumstantial evidence, the circumstantial evidence to be relied upon by the prosecution must be credible, cogent and must irresistibly point to the guilty of the accused and to no other person. In fact it is stated in criminal jurisprudence, that circumstantial evidence is often regarded as a reliable and acceptable mode of proof of a case and the Court can accept and act on it provided it is D cogent and admissible. (p. 3928 H)

EVIDENCE - Confession - Validity

5. As I stated supra, the prosecution heavily relied on the confession of the accused/appellant in proof of its case. I am mindful of the fact that a free and voluntary confession of guilt whether judicial or extra judicial which is direct, positive and properly proved is enough to establish a conviction, so long as the Court is satisfied with its truth.

F It is equally settled law, that there is no evidence stronger than a person's own admission or confession. However, even though a person can be convicted solely on his confessional statement, it is still desirable to look for evidence, no matter how slight outside the confession which would make it G probable that the confession was true. (p. 3930 B)

CRIMINAL PROCEDURE - Provocation - Proof

6. The law is well settled that a defence of provocation can only avail an accused person in the following circumstances or when the underlisted conditions are met and such conditions must be shown or proved by the accused person. The conditions are

 (i) That the act relied on by the accused is really provocative.

(ii) That the provocative act deprived him of self-control.

(iii) That the provocative act came from the deceased.

(iv) The sudden fight between the accused and the deceased was instantaneous and continuous with no time for passion to cool down, and; B

(v) The force used by the accused in repelling the provocation is not disproportionate in the circumstance.

The defence of provocation would not be available to an accused person who acted with calculation and was no longer in the heat of passion even though there was a provocative incident which angered him at first. C

Applying the above tests, there is no how the defence of provocation could avail the present appellant. Firstly, the acts of the victim which he perceived to be provocative as mentioned above, are far from being provocative. Also, there was time for heat of passion to cool down. Again, the attack on her with machete on an armless, helpless, feeble woman is disproportionate especially the machete cuts on vital parts of her body which clearly shows that he intended the consequences of his act and he ought to have known that her death would be the probable consequences of his dastardly and cruel act. D E
(p. 3930 H)

REPRESENTATION

N. A. Dangari with A. L. Likko, for the Appellant
Sani Huseini Garun Gabbas (Hon. AG. Jigawa State) with Musa M. Imam, (DPP/MOJ), Yahaya Abdullahi (CSC/MOJ) and Muhammad El-Usman (SSC/MOJ Jigawa State), for the Respondent F G

CASES REFERRED TO

Akpan v. FRN (2012) 1 NWLR (pt. 1281) 403
Amadi v. NNPC (2000) 6 SC (pt. 1) 66
Ibetor v. Barakuro (2001) 9 NWLR (pt. 1040) 475 H
Chami v. UBA Plc (2010) LPELR 841 (SC)
Unilorin v. Olawepo (2012) 52 WRN 42
Oseni v. Bajulu (2010) All FWLR (pt. 571) 813
Ossai v. FRN (2013) 13 WRN 87

Adebiyi v. State (2013) 7 NWLR (pt. 1354) 397

Kola v. Potiskum (1998) 3 NWLR (pt. 540) 1

Abaje v. State (1976) ANLR 139

Usman v. State (2013) 3 NWLR (pt. 1342) 607

Maigari v. State (2010) 16 NWLR (pt. 439) 49

B Nwabueze v. State (1996) 2 NWLR (pt. 428)

Ekong v. State (2013) All FWLR (pt. 685) 353

Odey v. FRN (2008) 3 - 4 SC 147

STATUTES REFERRED TO

C Penal Code of Jigawa State, s. 221(b)

Evidence Act, s. 138

BOOKS REFERRED TO

D Criminal Law in Nigeria (2nd Ed.) Ibadan: Spectrum Books, 2000

The Unlawful Act Doctrine and the Defence of Accident in The Nigerian Bar Journal vol. 11 (1973) 93 - 97

NIALS Laws of Nigeria (Annotated) Criminal Justice Administration vol. One (Lagos; NIALS, 2008) 686

E

LEAD JUDGMENT BY SANUSI JSC

This is an appeal against the Judgment of Court of Appeal Kaduna division (“the Lower Court”) delivered on 21st February, 2014 which affirmed the judgment of Jigawa State High Court of Justice (hereinafter called the trial Court).

F

The appellant was arraigned before the trial High Court on allegation of causing the death of his wife Binta, on 30th April, 2007 at Falgore village in Jahun Local Government of Jigawa State by matchetting her to death on the head, contrary to Section 221 of the Penal Code of Jigawa State.

G

At the trial, the prosecution called five witnesses and tendered some exhibits in order to prove its case, while the appellant did not give evidence or call any witness but instead, he rested his case on that of the prosecution/respondent.

H

Both parties at the end of the trial, waived their rights of address. In the end, the trial Court found the appellant guilty as charged and sentenced him to death.

Dissatisfied with the judgment of the trial Court, the appel-

lant filed an appeal before the Lower Court which heard his appeal and affirmed the judgment of the trial Court. Further aggrieved with the judgment of the Lower Court, the appellant has now appealed to this Court by filing a notice of appeal containing nine grounds of appeal.

In keeping with the rules and practice in this Court, parties filed and exchanged briefs of argument. The appellant's brief of argument settled by Nassir Abdu Dangiri was filed on 3rd of July, 2014 wherein, one issue was raised by him for the determination of the appeal. The lone issue for determination raised by the appellant in his brief of argument reads thus:-

"Whether the learned Justices of the Lower Court were right in affirming the death sentence passed on the appellant by the trial Court after holding that the learned trial judge completely abdicated its responsibility and did not approach the task of determining the guilty of the appellant with any sense of duty and did not appear to know what he was doing."

On his part, the respondent also formulated lone issue for the determination of this appeal as reproduced hereunder:-

"Whether considering the evidence adduced before the trial Court, the learned Justices of the Lower Court were right in dismissing the appeal of the convict/Appellant and affirming the judgment of the High Court of Jigawa State in Suit No. JDU/24C/2007 delivered by Honourable Justice A. M. Nakullum on the 24th of September, 2008 convicting the appellant for the offence of culpable homicide punishable with death"

Before delving into the determination of this appeal, I think it will apposite to make, what I consider to be salient observation. As I said supra, the appellant herein, filed a notice of appeal containing nine grounds of appeal out of which he raised only one issue for determination.

The learned appellant's counsel unfortunately did not tie or link his lone issue to any of the nine grounds of appeal. If he had done that, this Court would have no difficulty in knowing to which of the grounds of appeal his lone issue relates. As a general rule, issue(s) for determination formulated in a brief of argument must be based on a particular ground or grounds of appeal. Where such issue is not so linked or tied to any ground or grounds of appeal, then it be-

comes irrelevant and goes to no issue and is even liable to be struck out. See *Akpan v. FRN* (2012) 1 NWLR (Pt.1281) 403; *Amadi v. NNPC* (2000) 6 SC (Pt.1) 66 at 172, *Ibetor v. Barakuro* (2001) 9 NWLR (Pt.1040) 475; *Chami v. UBA Plc* (2010) LPELR 841 (SC).

In this instant appeal, it would appear difficult for this Court
B to know to which of his nine grounds of appeal, his lone issue flows from so that the rest grounds of appeal which it does not relate or linked to can be deemed abandoned and thereby strike them out. This is because it is trite law that any ground or grounds of appeal
C from which no issue for determination is raised is/are deemed abandoned. See *Unilorin v. Olawepo* (2012) 52 WRN 42; *Oseni v. Bajulu* (2010) All FWLR (Pt.571) 813; *Ossai v. FRN* (2013) 13 WRN 87.

The learned counsel for the respondent did not help matters either, because he also fell into the same trap of his learned colleague
D for the appellant. In his brief of argument, the sole issue for determination formulated by the respondent was also not shown to have flowed from any of nine grounds of appeal filed in the appellant's notice of appeal. Well, ordinarily I should have struck out the appellant's lone issue for this lapse or anomaly, but I will however be hesitant to
E do so, especially because this appeal is on a criminal matter and it involves serious offence which attracts a capital punishment. I will therefore still venture to consider the appeal on its merit for these important reasons and in doing so, I will be guided by the lone issue
F raised in the respondent's brief of argument as it is more relevant and was also more elegantly couched.

In his submission on this sole issue, the learned counsel to the Appellant referred to the evidence of PW1 to PW5 at pages 1-16 and stated that there was no eye witness to the commission of the
G crime and that the learned trial Judge failed to consider all the defence available to the Appellant. He referred to the judgment of the Lower Court at pages 10-11 of the record. He then submitted that the Lower Court erred in law, in affirming the conviction and sentence passed on the Appellant. He argued that the defence of provocation raised by the Appellant was never considered by the two Courts.
H He stated that this defence was raised in his extra judicial statement. He further stated that the Lower Court ought to have ordered a retrial by the trial Court having failed to consider the said defence of provocation. In conclusion, he urged this Court to allow his appeal.

As stated supra, the Respondent has also formulated one issue for determination which said issue relates to whether the Lower Court was right in dismissing the Appeal of the Appellant. The learned counsel to the Respondent submitted that the lower Court was right in affirming the conviction and sentence of the Appellant, notwithstanding their comment on the learned trial judge, that he does not know what he was doing. On the contention of the Appellant that the trial Court failed to consider their defence raised in his extra judicial statement contained in Exhibits 1 and 2 he contended that provocation can only avail an accused person when the act complained of occurred instantly on the suddenly of moment and before the passion cools down. He argued that provocation defence cannot avail the Appellant in this circumstance. He argued further, that there was nothing in the record to show that the Appellant was provoked, hence the defence cannot avail the Appellant, and also because the degree of retaliation was not proportionate to the alleged provocation. He stated that the Appellant slapped the deceased and he still went ahead to inflict machet cut on her. He contended that the Appellant did not adduce any evidence to support the defence of provocation. He referred to the evidence of PW1, PW2 and PW3 and submitted that the Respondent has proved all the ingredients of this offence. He argued further, that an accused person can even be convicted solely on his confessional statement, whether judicial or extra judicial, especially where it is direct, positive and unequivocal. He submitted that the Lower Court was right in affirming the conviction and sentence of the Appellant. In conclusion, he urged this Court to dismiss the appeal and to also affirm the conviction and sentence of the Appellate by the two Lower Courts.

It needs to be stressed here, that the appellant did not testify nor did he call any witness for his defence at the trial Court. Rather, he chose to rely or rest his case on the case of the prosecution i.e. the respondent herein. Surprisingly and quite strangely too, the appellant decided to raise the defence of provocation on appeal which said defence was never raised at the trial Court and which was also obviously never considered by the trial Court in its judgment which was appealed against to the Lower Court and such defence could not have been contemplated by the trial Court. To my mind, such de-

fence could not have availed the appellant since he never raised it at the trial Court and also because he never applied to the lower Court for leave and was obliged one by the Lower Court to raise it as a fresh issue on appeal for the lower Court's consideration. Although it can be noted from particular(b) of
 B *Grounds No.7 of the Notice of Appeal, I am unable to see any issue for determination flowing from Ground No.7 raising the defence of provocation. Even at that, as I said above, the issue of provocation was never raised by the defence at the trial*
 C *Court for it to address. Now, since the appellant did not seek leave to raise it as a fresh issue before the Lower Court, such defence can not avail the appellant. Be that as it may, since it was raised in the appellant's confessional statement I shall still consider it here for whatever it is worth.*

D *The charge the accused/appellant stood trial on is culpable homicide punishable with death, Contrary to Section 221(b) of the Penal Code. The ingredients of the offence that of necessity, must be proved by the prosecution in order to obtain conviction are:*

E (a) *That death of a human being was caused;*
 (b) *That such death was caused by the accused person.*

(c) *That the act that led to the death of the victim was intended to cause death or grievous hurt or that the accused*
 F *knew or had reason to believe that by his action, death will be the probable and not only likely consequence of his act.*

In all criminal cases the burden of proof squarely lies on the prosecution which always has a duty to prove all the
 G *above mentioned ingredients of the offence charged and by the provisions of Section 138 of the Evidence Act, the standard of such proof is nothing less than proof beyond reasonable doubt. In fact, it is settled law that if there is any doubt in the evidence produced by the prosecution such doubt shall be*
 H *resolved in favour of the accused person. See Adebisi v. The State (2013) 7 NWLR (Pt. 1354) 397; Kola v. Potiskum (1998) 3 NWLR (Pt. 540) 1; David Abaje v. The State (1976) A NLR 139.*

It is apposite to say that in order to prove an offence the prosecution can use any of the following modes of proof

namely:-

- (1) Evidence of eye witness or witnesses or**
- (2) Confessional statement of the accused, or**
- (3) Through circumstantial evidence.**

However, in the case of proof by circumstantial evidence, the circumstantial evidence to be relied upon by the prosecution must be credible, cogent and must irresistibly point to the guilty of the accused and to no other person. In fact it is stated in criminal jurisprudence, that circumstantial evidence is often regarded as a reliable and acceptable mode of proof of a case and the Court can accept and act on it provided it is cogent and admissible. See *Usman v. State* (2013) 3 NWLR (Pt. 1342) 607; *Maigari v. State* (2010) 16 NWLR (Pt. 439) 49; *Nwabueze v. State* (1996) 2 NWLR (Pt. 428).

Admittedly, in this instant case, there was no eye witness called by the prosecution. However, the evidence relied upon by the prosecution is basically the confessional statement of the accused/appellant. The said statement, Exhibit 2, was admitted without any objection from the defence. Its voluntariness was never questioned throughout the trial. In the said statement the accused now appellant stated, inter alia, as follows:

“I asked her to wash my cloths but she answered me that she will not wash it. I insulted her father and she retaliated after that I was annoyed and slapped her, she attempted to revenge but she did not do so, I was very angry with her, I then brought out a matchet in the room and cut her on her chick and her jaws for the first time, the second time she was trying to block the matchet with her hand and I cut her the second time. I left her in blood rushing out of her body and dropped the matchet inside the room and ran to the bush behind the village.”

The prosecution led evidence to prove that the deceased died from the machete cuts caused by her husband, the appellant herein, also through the evidence of PW5 the medical officer who examined the body of the deceased victim, PW2, the foster father of the appellant, also confirmed seeing the dead body of the deceased victim. Similarly, the appellant’s mother PW1, also confirmed seeing the dead body of the victim when she testified. All these piece of evidence go a long way in establishing that the deceased victim died and also as a

result of the act of machetting by the accused/appellant and by such dastardly act or attack on the helpless and defenceless victim and that he definitely did so, with knowledge that death will certainly be the probable and not only likely consequence of his act considering the vital parts of her body the appellant inflicted the injuries on her.

B ***As I stated supra, the prosecution heavily relied on the confession of the accused/appellant in proof of its case. I am mindful of the fact that a free and voluntary confession of guilt whether judicial or extra judicial which is direct, positive and properly proved is enough to establish a conviction, so long as the Court is satisfied with its truth.*** See Thomas Akpan Ekong v. The State (2013) All FWLR (Pt.685) 353; Odey v. FRN (2008) 3 - 4 SC 147.

D ***It is equally settled law, that there is no evidence stronger than a person's own admission or confession. However, even though a person can be convicted solely on his confessional statement, it is still desirable to look for evidence, no matter how slight outside the confession which would make it probable that the confession was true.*** In this instant case, the evidence abound from the evidence of PW5, the medical officer who performed autopsy on the body of the deceased victim when testified on the part of her body that was cut by the appellant which also tallies with the appellant's confessional statement with regard to where he hit her with his machete. Also these evidence of PWs 1 and 2 who saw the dead body of the deceased also confirmed the death of the victim support or justifies the trial Court's finding.

I have earlier noted that the appellant herein, raised the issue of provocation in his confessional statement even though such defence was not raised at the trial Court and for that reason, it was not contemplated or dealt with by the trial Court. I shall still consider it here. The appellant in his statement Exhibit 2 stated that the wife/deceased annoyed him when she outrightly refused to wash his cloths because he insulted her father or that when he slapped her, she attempted to retaliate. The question is, could this avail him the defence of provocation? ***The law is well settled that a defence of provocation can only avail an accused person in the following circumstances or when the under listed conditions are met and such conditions must be shown or proved by the accused per-***

son. The conditions are

(i) That the act relied on by the accused is really provocative.

(ii) That the provocative act deprived him of self-control.

(iii) That the provocative act came from the deceased. B

(iv) The sudden fight between the accused and the deceased was instantaneous and continuous with no time for passion to cool down, and;

(v) The force used by the accused in repelling the provocation is not disproportionate in the circumstance. C

The defence of provocation would not be available to an accused person who acted with calculation and was no longer in the heat of passion even though there was a provocative incident which angered him at first. See Frank Uwagboe D v. The State (2008) 12 NWLR (Pt. 1102) 621; Nwede v. State (1985) 3 NWLR (Pt. 13) 444; Akalezi v. State (1993) 3 NWLR (Pt. 273) 1; Okonjo v. State (1987) 1 NWLR (Pt. 52) 659. **Applying the above tests, there is no how the defence of provocation could avail the present appellant. Firstly, the acts of the victim which he perceived to be provocative as mentioned above, are far from being provocative. Also, there was time for heat of passion to cool down. Again, the attack on her with machete on an armless, helpless, feeble woman is disproportionate especially the machete cuts on vital parts of her body which clearly shows that he intended the consequences of his act and he ought to have known that her death would be the probable consequences of his dastardly and cruel act.** E F

From the surrounding circumstances of this case, evidence G also abounded that the appellant had really committed the offence he was charged with and convicted on. The prosecution had, in my humble view, proved its case against the accused/appellant beyond reasonable doubt. The Lower Court had painstakingly considered the entire evidence led by the prosecution which was also relied upon H by the defence when it rested its case on same. The Lower Court was also right in affirming the decision of the trial Court which found the accused guilty as charged and convicted him.

In the result, I adjudge this appeal as meritless. It therefore

fails and is accordingly dismissed by me. The judgment of the Lower Court which affirmed the judgment of the trial Court is hereby affirmed. Appeal is dismissed.

B

RHODES-VIVOUR JSC

I also find no merit in this appeal after reading a draft of the leading judgment delivered by my learned brother Sanusi, JSC. Appeal dismissed.

C

MUHAMMAD JSC

I read the detailed lead judgment of my brother Amiru Sanusi JSC just delivered. I entirely agree with the reasoning and conclusion of his lordship therein. I adopt the judgment as mine in dismissing the unmeritorious appeal. I imbibe the consequential orders contained in the lead judgment.

E

OGUNBIYI JSC

I read in draft the lead judgment of my learned brother Sanusi, JSC. I agree that the appeal is without merit and should be dismissed.

F The High Court of Jigawa State found the appellant guilty on a one count charge of culpable homicide punishable with death under Section 221(b) of the Penal Code. He was alleged to have killed his wife by attacking her with a machete on the head. The two Lower Courts were concurrent on the conviction and sentence of the appellant.

G On a further appeal before this Court the appellant formulated a lone issue from the nine grounds of appeal filed in the following terms:-

H *“Whether the learned Justices of the Lower Court were right in affirming the death sentence passed on the appellant by the trial Court after holding that the learned trial judge completely abdicated its responsibility and did not approach the task of determining the guilt of the appellant with any sense of duty and did not appear to know what he was doing.”*

The main grouse by the appellant against the Lower Court

was, why it affirmed the conviction and sentence of the appellant by the trial Court after holding that the learned trial judge did not know what he was doing and that there was no evaluation of evidence led.

It is pertinent to restate that on the community reading of the record and the proceedings by the two Lower Courts, it's clear and obvious that the respondent's case revolved around unchallenged testimonies of the prosecution witnesses as well as the confessional statement made by the appellant. In other words, regard should be had to the statement recorded from the appellant which was tendered and admitted as Exhibit 2. By nature and the content of the statement, same was confessional and evident that it was the act of the appellant that led to the cause of death of the deceased. Put differently, with reference to Exhibit 2 the appellant herein has categorically and clearly stated the way and manner he macheted the deceased; this was what he said:-

"I asked her to wash my cloth but she answered me that she will not wash it. I insulted her father and she retaliates (sic) after that I was annoyed and slapped her; she attempted to revenge but she did not do so. I was very angry with her; I then brought out a machete in the room and cut her on her chicks and jaws."

On the question as to whether the defence of provocation avails the appellant, same avails only when the act complained of occurs on the spur of the moment, and before there was time for passion to cool off. For provocation to constitute a defence therefore, it must consist of three elements which must co-exist:-

a. The act of provocation must have been done in the heat of passion;

b. The loss of self control both actual and reasonable that is to say, the act was done before there was time for cooling down;

c. The retaliation must be proportionate to the provocation. See *Edoho v. State* (2010) 14 NWLR (Pt.1214) 651 at 683.

It is obvious from the confessional statement, Exhibit 2 that the appellant in the circumstance did not qualify for the defence of provocation. This is moreso especially where the degree of retaliation and infliction of injury cannot be rated as proportionate to the alleged act of provocation. There was also nothing to show that the appellant acted on the spur of the moment and in the heat of passion there was time for his temper to cool. The appellant had enough

time to have reasoned just before he proceeded to get the machete which was not readily and instantly available for use.

The law is trite and well settled that an accused person could be convicted on his confessional statement alone without corroboration, provided it was direct, positive and voluntarily made. See *Emeka v. State* (2001) 5 MJSC at 62.

As rightly submitted by the learned counsel for the respondent, the Lower Court was on the right track when it affirmed the conviction and sentence of the appellant.

With the few words of mine and more particularly on the elaborate conclusions arrived at by my brother Sanusi, JSC, I hereby adopt his lead judgment as mine and in the same vein also dismiss the appeal as lacking in merit. I further affirm and endorse the concurrent decision of the Lower Courts.

NWEZE JSC

My Lord, Sanusi, JSC, obliged me with the draft of the leading judgment just delivered now. I, entirely, agree with His Lordship that this appeal is, wholly, devoid of merit and ought to be dismissed.

Like the leading judgment, I hold that the defence of provocation did not avail the appellant [as an accused person at the trial Court]. This Court has, insightfully, illuminated the nuances of the Code provisions on the defence of Provocation, *R v. Blake* (1942) WACA 118; *Shande v. State* [2005] 12 NWLR (Pt.939) 301; *Uwaekweghinya v. The State* (2005) 9 NWLR (pt 930) 227; *Musa v. State* [200] 51 WRN 1, 21-22; *Mancini v. DPP* [1942] AC 1; *R v. Duffy* [1949] 1 All ER 893]

What emerges from my survey of the extant authorities on this point is that provocation is definable as an act or series of acts which could cause in a reasonable person [and actually does cause in the defendant], a sudden and temporary loss of self-control rendering him vulnerable or susceptible to passion so much so that, for the moment, he is no longer the master of his mind.

The three conjunctive elements which a defendant, who wants to avail himself of this special defence, must prove are that:

(a) There was the deceased person's act of provocation which caused his loss of self-control;

(b) He killed the deceased in the heat of passion and;

(c) At the time of killing, the heat of passion had not waned,
Amala v. State (2004) 12 NWLR (Pt.888) 520; *R v. Afonja* (1955) 15 WACA 26.

These Trinitarian elements, which must be read conjunctively, require the defendant to prove that due to the deceased person's sudden act of provocation, he [defendant] killed him [the deceased person] on the spur of the moment before his [defendant's] passion could abate or vapourise, *Uluebeka v. State* [2000] 7 NWLR (Pt. 665) 404; *Nwede v. State* [1985] 3 NWLR (Pt. 13) 444; *Yusuf v. State* (1988) 4 NWLR (Pt. 86) 96; *R v. Afonja* (supra).

In a word, the provocative act must be such that would deprive him of self-control suddenly and temporarily. *Ahmed v. The State* [1999] 7 NWLR (Pt.612) 641; *Wonaka v Sokoto Native Authority* [1956] SCNLR 79; *Kumo v. State* [1967] 5 NSCC 286; *Akalezi v. State* [1993] 2 NWLR (Pt.273) 1; *Queen v. Akpakpan* (1956) SCNLR 3; *Musa v. State* (supra).

Put differently, the situation must have been such that, at the twinkle of that interval, he was no longer the master of his mind. *Musa v. State* (supra) 20-21, citing *R v Duffy* (supra) and *Mancini v. DPP* (supra). In effect, his act of killing the deceased person must have been done in the heat of passion and before his temper could cool off. In any event, his act must be proportionate to the provocation, *R v. Blake* (supra), cited, approvingly, in *Musa v State* 20-21.

Above all, an act of savage temper rules out a plea of provocation, *Sadiku v. The State* (1972) 2 SC 169; *Yaki v. State* (2009) 1 WRN 1, 37; also, C. O. Okonkwo, *Criminal 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; *NIALS Laws of Nigeria* (Annotated) *Criminal Justice Administration Vol One* (Lagos; NIALS, 2008) 686.

In the instant case, there can be no doubt that the appellant's, rather, savage act of savage temper must rule out his weak-kneed plea of provocation, *Sadiku v. The State* (supra); *Yaki v State* (supra). As, demonstrably, shown in the leading judgment, the machete attack on the un-armed, helpless, feeble woman was unarguably disproportionate. Worse still for the appellant, the machete cut on the

vital parts of the hapless woman's body evinced his intention of the consequences of his voluntary act for he ought to know the probable consequences of that inhumane act, *Hyam v. DPP* (1974) 2 All ER 41; Frank I. Asogwah, *Criminal Liability in Accidental Discharge in Murder Cases and the Right of the Police to Use Force*, (2003) 2 Port
B *Harcourt Law Journal*, 198.

It is for these reasons and the more detailed, reasons in the leading judgment that I too shall dismiss this appeal. Appeal dismissed. I abide by the consequential orders of my Lord.

C

D

E

F

G

H