

**SUPREME COURT OF NIGERIA**  
FRIDAY 17TH FEBRUARY, 2017. SC. 514/2012  
**CORAM:- O. RHODES-VIVOUR, M. D. MUHAMMAD,**  
**C. B. OGUNBIYI, C. C. NWEZE, A. SANUSI, JJSC**

ANSELEM AGU ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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MURDER - Proof - Ingredients - Prosecution must prove that deceased died - That the death was caused by accused - And that accused intended to kill deceased or cause grievous bodily harm (H1)

MURDER - Self defence - Provocation - Difference - Self defence exonerates accused - While provocation does not exonerate - But only reduces the punishment for murder to manslaughter (H2)

ALIBI - Plea of - Condition - Accused must raise the defence at earliest time - Giving unequivocal particulars of his whereabouts and those present with him (H3)

MURDER - Judgment - Validity - Concurrent findings that prosecution proved it's case beyond reasonable doubt is correct - Hence judgment of Court of Appeal affirming conviction of appellant is valid (H4)

**FACTS**

Accused/appellant was arraigned before the High Court of Imo State, Iho Ikeduru Judicial Division on one count of murder contrary to section 319 (1) of the Criminal Code, Cap 30, vol. 11, Laws of Eastern Nigeria (as applicable to Imo State). He pleaded not guilty to the charge. The case against appellant is that on 2<sup>nd</sup> May 1992, PW3 took her bicycle to a repairer for repairs. As she was there, she overheard the deceased calling on her. She left to meet the deceased, who thereupon instructed her to go home and

prepare for dinner. As she was about to go, she saw appellant emerge from a track road with a machete.

PW3 gave a testimony of how appellant relentlessly dealt the deceased machete blows which eventually led to the latter's death. Upon being arrested by the Police, appellant made confessional statement. At the trial, prosecution/respondent called a total of seven witnesses to support its case. On his part, appellant gave evidence in his own defence and closed his case. At the end of the trial, the learned trial Judge in a considered judgment, found appellant guilty as charged. He was therefore sentenced to death by hanging. Aggrieved, appellant approached the Court of Appeal on appeal. The Court heard his appeal and dismissed same. Still dissatisfied appellant has come to the Supreme Court on appeal.

### **ISSUE FOR DETERMINATION**

Whether the Prosecution proved its case beyond reasonable doubt against the appellant?

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

*MURDER - Proof - Ingredients*

***1. My Lords, it would seem obvious that, more than other aspects of our corpus juris, the offence of murder under the Criminal Code (culpable homicide punishable with death under the Penal Code) has been the subject of the generous and consistent espousal of this Court in cases too numerous to mention here. Indeed, so frequent has this phenomenon become that I am constrained, in this judgment, to resort to my previous exertions in this regard. Your Lordships must bear with me.***

***In Tajudeen Iliyasu v. The State (2015) LPELR - 24403 (SC) 24 -26, G-C, speaking for this Court, I intoned as follows:***

***The three constitutive elements or ingredients of the offence which must be proved in order to secure a***

***conviction under this Section have been, generously, outlined in case law.***

***Under the said Section, the prosecution is obliged to prove; (1) that the deceased died; (2) that his/her death was caused by the accused; (3) that she/he intended to either kill the victim or cause her/him grievous bodily harm, These ingredients have witnessed consistent espousal in many jurisdictions. (p. 27 H)***

***MURDER - Self defence - Provocation - Difference***

***2. Whereas the Criminal Code provides for self defence in Sections 286 and 287, the same Code provides for the defence of provocation in Section 284. Whilst the former (the defence of self defence) is an exculpatory defence because, where it is established, it exonerates the accused person, the latter is, merely, an attenuating or a mitigating defence. Where available, it merely, attenuates; dis-rates or demotes the offence from murder to manslaughter.***

***In effect, the defence of provocation does not exonerate the accused person. It, only, earns him a mitigation of the punishment due for the offence of murder to a sentence for manslaughter.***

***It is, thus, the dissimilarity in the consequences of the availability of these defences that make them, mutually exclusive, that is, that make them inconsistent defences - defences that cannot avail an accused person at the same time. (p. 32 F)***

***ALIBI - Plea of - Condition***

***3. Now, to the question of alibi. As pointed out earlier, the trial Court found at pages 89 -90 of the record, that: this defence of alibi that he went to the market on the date of the incident was raised for the first time in the witness box in Court, it was not ever contained in Exhibit B...***

***The best defence and evidence of alibi is one pleaded at the first opportunity (usually to the Police when making a statement) and not at the time of trial...***

***I, entirely, endorse this view which was affirmed by the lower Court. True, indeed, to be entitled to the beneficial effect of the defence of alibi, an accused person must raise it at the earliest opportunity. This is to offer the Police an opportunity either to confirm or confute its availability to the accused person.***

***What is more, the said defence must be unequivocal as to the particulars of his whereabouts and those present with him.***

***It is only where an accused person, such as the appellant, raised the said defence at the earliest opportunity without any ambiguity that a burden is cast on the Prosecution to investigate it. Failure to investigate the defence of alibi raised in such circumstance will lead to an acquittal. However, the said defence would be unavailing in a situation, as in this case, where the accused person raised it during the trial. (p. 33 F)***

*Judgment - Validity*

***4. In all, like the lower Courts, I hold that the Prosecution, sufficiently, proved the case as required by law, that is, beyond reasonable doubt.***

***Accordingly, I hereby endorse the concurrent findings of the lower Courts. I find no merit in this appeal. In consequence, I shall enter an order dismissing it as lacking in merit. I, further, affirm the judgment of the lower Court which affirmed the conviction and sentence of the appellant. (p. 34 F)***

**REPRESENTATION**

Chief Henry Akunebu, Esq., for the Appellant  
C. N. Akowundu, Esq., for the Respondent

**CASES REFERRED TO**

- Udo v. State (2005) NWLR (pt. 928) 521  
 Shande v. State (2005) 12 NWLR (pt. 937) 301  
 Aigbadion v. State (2007) 7 NWLR (pt. 666) 636  
 Ndukwe v. State (2009) 37 NSCQR 425 B  
 Onah v. State (1985) 3 NWLR (pt. 12) 236  
 Ogba v. State (1992) 2 NWLR (pt. 222) 164  
 Amayo v. State (2002) FWLR (pt. 91) 1571  
 Bakare v. State (1987) 1 NWLR (pt. 53) 579 C  
 Buje v. State (1991) 4 NWLR (pt. 185) 287  
 Ndiike v. State (1994) 8 NWLR (pt. 360) 33  
 Ehot v. State (1993) 4 NWLR (pt. 290) 663  
 Madu v. State (2012) 15 NWLR (pt. 1324) 405  
 Durwode v. State (2000) 15 NWLR (pt. 691) 467 D  
 Idemudia v. State (2001) FWLR (pt. 55) 549  
 Akpan v. State (2001) FWLR (pt. 56) 735

**STATUTES REFERRED TO**

- Criminal Code Cap 30 Vol. 11 Laws of Eastern Nigeria, s. 319 (1) E  
 Evidence Act, s. 135

**BOOKS REFERRED TO**

- Criminal Law in Nigeria (2nd Ed.) Okonkwo and Naish, p. 240 F  
 The Unlawful Act Doctrine and the Defence of Accident in The  
 Nigerian Bar Journal Vol 11 (1973) C. O. Okonkwo, pp. 93-97  
 The Applicability of Some Inconsistent Defences in the Nigerian  
 Criminal Code F. I. Asogwah G  
 Law and Administration of Justice in the 21st Century Umezulike  
 (ed), p. 75-98

**LEAD JUDGMENT BY NWEZE JSC**

At the High Court of Imo State, Iho Ikeduru Judicial Division, the appellant (as accused person) was arraigned on Information which charged him with the offence of murder. Upon his plea of not guilty before the said Court (hereinafter, simply, re-

ferred to as “*the trial Court*”), the matter went to trial.

While the Prosecution relied on the testimonies of its seven witnesses in proof of its case, the appellant (as accused person), who did not call any witness, testified in his defence. At the end, being satisfied with the Prosecution’s compelling evidence, the trial Court found him guilty of the said offence contrary to Section 319 (1) of the Criminal Code, Cap 30, Vol 11, Laws of Eastern Nigeria. It accordingly, convicted, and sentenced him to death. His appeal to the Court of Appeal (hereinafter referred to as “*the lower Court*”) was unsuccessful; hence, this appeal to this Court.

He distilled two issues from his Notice and Grounds of Appeal of December 6, 2012: issues which were framed in these terms:

1. Whether the Court below is (sic) right in applying the inconsistency rule as resulting in making the appellant’s viva-voce evidence and cautioned statement as both unreliable and therefore held the viva-voce evidence of the appellant as having totally contradicted Exhibit B qua cautioned statement of the appellant.

2. Is (sic) the Court below right in holding that there was no legal duty on the Police to investigate the appellant’s plea of self defence and particulars therein furnished for reasons of the existence of eye witness account, denial of the cautioned statement by the appellant and that the viva-voce evidence, totally contradicted the cautioned statement.

On their part, the respondent framed the issues thus:

1. Whether the Prosecution proved its case beyond reasonable doubt against the appellant.

2. Whether the statement of the appellant, admitted in Court as Exhibit ‘B’ is (sic) not at variance with his testimony in Court and if the answer is in the affirmative, what is the legal position.

My Lords, I take the view that, though the issues framed by the respondent are more succinct apropos, the appellant’s main complaint in his Notice and Grounds of Appeal, only the first issue is truly, determinative of this appeal. Thus, only the sole issue, expressed as the respondent’s first issue would be adopted in the determination of this appeal. In effect, the sole issue for the determination of this appeal is the very commodious one couched

thus:

Whether the Prosecution proved its case beyond reasonable doubt against the appellant?

Before dealing with this issue, however, a statement of the factual background would not be out of place.

#### FACTUAL BACKGROUND

The fateful day was May 2, 1992; the time was between 4 - 5pm. The Prosecution's case was that on the said day and time, PW3 took her bicycle to one Fabian Ugwushie for repair. As she was there, she overheard the deceased person calling on her. She left the repairer to meet her (the deceased person). On her way, she met the deceased person who asked her to go home and prepare for dinner. As she was about to go, she saw the accused person emerging from a track road with a machete.

As she (the deceased person) turned to move on her way, the accused person charged at her, cutting her with a machete on the neck. As she (the deceased person) ran, shouting as she was running away, the accused person pursued her, dealing further machete cuts all over her body.

She ran into the compound of one George Opara with the accused person still following and cutting her. All this while, PW3 was shouting and following them closely until all of them got into that compound. However, when the appellant turned to the direction of the PW3 with the machete, she ran to the backyard of the said compound, where she saw Emelia Opara, PW1. She related the story of the incident to her (Emelia Opara). As a result, PW1 ran to the frontage of the compound. She (PW3) later went to the frontage of the compound where she found the deceased person in a pool of her blood, dead.

The accused person, on being arrested by the Police, volunteered a statement which was confessional in nature. At the trial Court, as indicated earlier, the prosecution called a total of seven witnesses. On his part, the accused person (now, appellant) gave evidence in his own defence and closed his case. Following his unsuccessful attempt to quash his conviction and sentence at the lower Court, he approached this Court entreating it to overturn the

verdict sentencing him to death.

ARGUMENTS ON THE SOLE ISSUE

Whether the Prosecution proved its case beyond reasonable doubt against the appellant.

B        At the hearing of this appeal on November 24, 2016, Chief Henry Akunebu, adopted the appellant’s brief filed on February 8, 2013. Arguing this issue, which was treated as the appellant’s second issue, learned counsel explained that, on May 2, 1992, while the accused person was returning from the mission, near his house, C he was accosted by the deceased person. She (the deceased person) attacked him while in the company of one Okeuchi, Clifford Ejioba, Robbert Opara, and Chinasa. While Chinasa had a knife, Okeuchi and the deceased person held sticks with which they all attacked him, citing the appellant’s statement, Exhibit B.

D        Counsel submitted that the graphic details relating to the particulars of the attackers, contained in the appellant’s statement, ought to have been investigated by the police for purpose of factual balance and fair hearing which doctrine to be observed even E in enquiry or investigation.

In his view, where a plea of self defence was made at the earliest opportunity, the Police had the onus of disproving it. He maintained that, as the Police were, already, seized with the particulars of the appellant’s attackers, they should have invited them F and obtained their statements to determine the veracity or otherwise of the appellant’s plea of self defence.

He submitted that the Police, abysmally, failed in discharging the duty of investigating the said plea. In his view, this alleged G failure was fatal to the Prosecution’s case as it resulted in a miscarriage of justice, as his defence was neither confirmed nor repudiated by investigation. He opined that the said failure amounted to a denial of fair hearing, *Udo v. State* (2005) & (sic) NWLR (pt, 928) 521.

H        He, further, maintained that the said failure created a doubt in the prosecution’s case as to whether or not the appellant acted in self defence: a doubt that should have resulted in the acquittal of the accused person (now, appellant), *Shande v. State* (2005) 12



NWLR (pt 937) 301.

He observed that the appellant's graphic account as to how he was attacked by the deceased person with a stick and knife, along with other named persons, showed the role played by the named attackers. He explained that these named attackers were never investigated by the police to confirm or repudiate the plea as contained in the appellant's statement. B

He pointed out that, since the said plea had the prospect of absolving the appellant from criminal responsibility, the dereliction of the Police negatively impacted on the investigation and the subsequent trial, citing *Aigbadion v. The State* (2007) 7 NWLR (pt 666) 636. C

He contended that, notwithstanding the statement of PW3, the eye witness and her evidence in Court, the Police still had the duty of, thoroughly, investigating the appellant's plea of self defence, as the allegation related to specific acts of his attackers in response to which he acted in self defence to repel same. D

In his submission, the persons who offered the aggression and who were named should have been investigated. As such, the evidence of an eye witness could not displace the necessity for the evidence of the said attackers: evidence obtained upon their investigation through their statement because the plea of self defence was in response to their acts. E

He pointed out that, though the appellant's statement Exhibit B contradicted his evidence at the trial, it did not relieve the Prosecution of the duty of investigating his plea of self defence, He observed that an accused person's defence comprises of his statement and his evidence in Court notwithstanding any attempt to disown or contradict it, *Tsoho v. State* (supra); *State v. Madaki* (supra). F G

In his view, the miscarriage of justice which resulted from the failure to investigate the appellant's defence in Exhibit B was worsened by the fact that the solitary eye witness's statement, at page 6 of the record, clearly, contradicted the evidence of the witness in Court on the point. He urged the Court to resolve this issue in favour of the appellant. H

## RESPONDENT'S SUBMISSION

On his part, the learned DPP, Imo State, C. N. Akowundu, for the respondent, adopted the brief filed on March 28, 2013, although, deemed filed on November 24, 2016. In the said brief, he argued that, in a case of murder under Section 319 (1) of the Criminal Code (*supra*), it is incumbent upon the Prosecution to prove beyond reasonable doubt that; the deceased person has died; that his/her death resulted from the act of the accused person and that the act of the accused person was intentional with knowledge that death or grievous bodily harm was its probable consequence. He cited *Ndukwe v. State* (2009) 37 NSCQR 425, 459-460; *Nwachukwu v. The State* (2002) 3 FWLR (pt. 123) 312, 332; *Onah v. State* (1985) 3 NWLR (pt.12) 236; *Ogba v. State* (1992) 2 NWLR (pt. 222) 164, 198.

It was submitted that the prosecution proved the above ingredients beyond reasonable doubt. On the first ingredient, reference was made to the evidence of PW.1, Emelia Opara, pages 26-27 of the record.

Counsel, also, referred to the evidence of the PW.2, Hyacinth Opara, pages 27-28, particularly, page 28. This witness had stated on oath that the deceased person died on May 2, 1992. He identified the corpse to Dr. Innocent Njemanze who performed autopsy on the body of the deceased person.

Reference was further made to the evidence of the PW.6, Dr. Innocent Njemanze, pages 50-52 of the record. At page 51, this witness stated that the corpse was that of a female, Francisca Opara, who died on 2/5/92 at about 4.00p.m. He submitted that the Prosecution proved the death of the deceased person beyond all reasonable doubt.

Turning to the second ingredient, he referred to the evidence of the PW.3, one Anastasia Opara, pages 30-36 of the record. He submitted that the act of accused person in cutting the deceased with a machete was intentional, with full knowledge that death or grievous bodily harm was its probable consequence, citing Section 316 of the Criminal Code.

In his view, there were two intentions relevant to the appeal,

namely, the intention to kill, Section 316 (1) of the Criminal Code and intention to do grievous bodily harm, Section 316 (2) of the Criminal Code. He canvassed the view that if the act, which caused death, was done with either of these intentions, the offence of murder had been committed, citing *Amayo v. State* (2002) FWLR (pt. 91) 1571, 1575. B

He took the view that the requisite intent to kill or cause grievous bodily harm could be inferred from: the type of weapon used; the nature of wound inflicted on the deceased person; the part of the body where the wound was inflicted, *Bakare v. The State* (1987) 1 NWLR (pt. 53) 579; *Buje v. The State* (1991) 4 NWLR (pt. 185) 287, 300. C

He contended that, from the evidence of the PW.3, an eye witness account, the appellant cut the deceased person on the neck and gave her several machete cuts on other parts of her body, citing the evidence of the PW.6, Dr. Innocent Njemanze, pages 51-52 of the record. *Thereat, the PW.6 averred that on May 21, 1992 "I performed an autopsy on the body of one Francisca Opara, deceased and issued a medical report."* He described the nature of the injury on the body of the deceased person. D E

The learned DPP submitted that the accused person not only had the intention to do grievous bodily harm to the deceased person but the intention to kill her. He maintained that the learned trial Judge was, therefore, right in holding that the Prosecution proved its case beyond reasonable doubt against the accused person, citing *Ndike v. The State* (1994) 8 NWLR (pt 360) 33, 45. F

In his view, having proved the ingredients of the offence of murder against the accused person (now, appellant), the trial Court was duty bound to find him guilty, *Ehot v. The State* (1993) 4 NWLR (pt 290) 663. Citing the evidence of the PW.3, an eye witness, whose evidence was never impugned in the instant case, he urged the Court to resolve this issue against the appellant and in favour of the respondent. G H

#### RESOLUTION OF THE ISSUE

***My Lords, it would seem obvious that, more than other aspects of our corpus juris, the offence of murder***

**under the Criminal Code (culpable homicide punishable with death under the Penal Code) has been the subject of the generous and consistent espousal of this Court in cases too numerous to mention here. Indeed, so frequent has this phenomenon become that I am constrained, in this judgment, to resort to my previous exertions in this regard. Your Lordships must bear with me.**

**In *Tajudeen Iliyasu v. The State* (2015) LPELR - 24403 (SC) 24 -26, G-C, speaking for this Court, I intoned as follows:**

***The three constitutive elements or ingredients of the offence which must be proved in order to secure a conviction under this Section have been, generously, outlined in case law.*** *Maigari v. State* (2013) 6-7 MJSC (pt 11) 109, 125, citing *Ochemeje v. The State* (2009) SCNJ 143; *Daniel v. The State* (1991) 8 NWLR (pt. 443) 715; *Obudu v. State* (1999) 6 NWLR (pt 1980) 433; *Gira v. State* (1996) 4 NWLR (pt 428) 1, 125.

**Under the said Section, the prosecution is obliged to prove; (1) that the deceased died; (2) that his/her death was caused by the accused; (3) that she/he intended to either kill the victim or cause her/him grievous bodily harm, These ingredients have witnessed consistent espousal in many jurisdictions.** For example, by English Courts, *R v. Hopwood* (1913) 8 Cr. App. R. 143; *Hyan v. DPP* (1974) 2 All ER 41; *Woolmington v. DPP* (1935) AC 462; by Nigerian Courts, *Madu v. State* (2012) 15 NWLR (pt 1324) 405, 443, citing *Durwode v. State* (2000) 15 NWLR (pt 691) 467; *Idemudia v. State* (2001) FWLR (pt. 55) 549, 564; (1999) 7 NWLR (pt 610) 202; *Akpan v. State* (2001) FWLR (pt 56) 735; (2000) 12 NWLR (pt 682) 607 and by Courts in other Commonwealth jurisdictions, see, for example, *R. v. Nichols* (1958) QWR 46; *R v Hughes* (1958) 84 CLR 170; *Timbu Kolian v. The Queen* (1968) 42 A. L. J. R.; *R. v. Tralka* (1965) Qd, R. 225, (Queensland, Australia).

Scholars have seldom disagreed with judicial authorities on this question, C. O, Okonkwo, Okonkwo and Naish: Criminal Law

in Nigeria (Second Edition) (Ibadan: Spectrum Books Ltd, 2009) 209 et seq; A.G. Karibi-Whyte, History and Sources of Nigerian Criminal Law (Ibadan; Spectrum Books Ltd, 1988) passim; Archbold's Pleadings: Evidence and Practice in Criminal Cases (Fourth Edition) (London: Sweet and Maxwell, 1979) passim; K. S. Chukkol, The Law of Crimes in Nigeria (Zaria: Ahmadu Bello University Press Ltd, 1988); P. Ocheme, The Nigerian Criminal Law (Kaduna: Liberty Publications Ltd, 2006) 194 et seq. B

I entertain no doubt that the lower Court, rightly, affirmed the trial Court's conclusion that the Prosecution proved the first ingredient, that is, the factuality of the death of the deceased person. This is evident from the testimonies of PW1, Emilia Opara, pages 26 -27 of the record; PW2, Hyacinth Opara, pages 27 -28 of the record and PW6, Dr. Innocent Njemanze, pages 50 -52 of the record. PW2 having identified the corpse of the deceased person to PW6, he (the PW6) performed an autopsy on the said corpse (that is, the body of the deceased person, Francisca Opara). D

As it is often the case with most medical reports, the PW6, Dr. Innocent Njemanze, described the nature of the injury on the body of the deceased person in these medical terms: E

*There was a deep laceration wound cutting across the back of the root of the neck severing muscle, blood vessels and nerves, leaving only the skin holding the neck interiorly. The lacerations had sharp edges. There were deep incisional wounds two in number, each ten centimetres long and two centimetres deep the right periator and the occipital regions of the skull of the head respectively. There were multiple incisional wounds on both upper limbs cutting across the right shoulder, left arm, right elbow joint and right and left palms severing blood vessels muscles and nerves. All the incisional wounds were as a result of multiple wounds from impact with a very sharp object. An example of a sharp object is a machete. (Italics supplied)* F G

With regard to the second ingredient, counsel for the Prosecution referred to the testimony of PW3, Anastasia Opara, pages 30-36 of the record. He submitted that the requisite intent to kill or cause grievous bodily harm could be inferred from: the type of H

weapon used; the nature of wound inflicted on deceased; the part of the body where the wound was inflicted.

This submission is unanswerable. True, indeed, from a con-  
 spectus of the testimonies of PW3 (the eye witness who observed  
 and saw how the appellant, most brutally, employed a machete in  
 cutting the neck of the deceased person) and the above medical  
 report of the PW6, the lower Court was on firm footing in affirming  
 the finding of the trial Court on the Prosecution's proof of the sec-  
 ond and third ingredients set out above, that is, that the appellant  
 caused the death of the deceased person and he intended to kill  
 her or cause her grievous bodily harm.

In the words of the trial Court "*PW3 gave a positive, con-  
 sistent and harmonious evidence of the acts of the accused (per-  
 son) leading up to the death of the deceased (person)*", pages 87  
 88 of the record. The lower Court affirmed this finding: a finding  
 that found firm anchorage on the evidence of PW6. I take the lib-  
 erty to set out the opinion of PW6, once more:

There was a deep laceration wound cutting across the back  
 of the root of the neck severing muscle, blood vessels and nerves,  
 leaving only the skin holding the neck interiorly. The lacerations  
 had sharp edges. There were deep incisional wounds two in  
 number, each ten centimetres long and two centimetres deep the  
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 limbs cutting across the right shoulder, left arm, right elbow joint  
 and right and left palms severing blood vessels muscles and nerves.  
 All the incisional wounds were as a result of multiple wounds from  
 impact with a very sharp object. An example of a sharp object is a  
 machete.

*As this Court held in Iliyasu v. State (supra) at page 34, para-  
 graphs B-F, true indeed, Case Law and scholastic treatises are  
 unanimous on the point that if a dangerous weapon was used (in  
 the instant case, a machete was employed in hacking at the neck  
 of the deceased person), the Courts will infer that death was a  
 probable and not just a likely consequence of the accused person's  
 act, Adamu Garba v. The State (1997) 3 SCNJ 68; Bakuri v. The*

*State* (1965) NMLR 163; *Silas Sule v. The State* (2009) LPELR - 3125 (SC) 24, F-G; *Ejeka v. State* (2003) 7 NWLR (pt. 819) 408; *Garos Bwashi v. State* (1972) 6 SC (Reprint) 55; (1972) LPELR-SC.104/1972; *P. Ocheme. The Nigerian Criminal Law* (Kaduna: Liberty Publications Ltd. 2006) 203; also, *C. O. Okonkwo, Okonkwo and Naish: Criminal Law in Nigeria (Second Edition)* B (supra) 221.”

In effect, having concurrently found that the Prosecution proved the ingredients of the offence charged, the lower Court affirmed the verdict of the trial Court. C

My Lords, as shown above, counsel for the appellant, spirit- edly, tried to fault the above concurrent findings on the ground that the Police, abysmally, failed in discharging the duty of investigat- ing the appellant’s plea of self defence. In his view, this alleged failure was fatal to the Prosecution’s case as it resulted in a mis- carriage of justice, as his defence was neither confirmed nor repu- diated by an investigation. He opined that the said failure amounted to a denial of fair hearing. D

He, further, maintained that the said failure created a doubt E in the prosecution’s case as to whether or not the appellant acted in self defence: a doubt that should have resulted in the acquittal of the accused person (now, appellant). I will return to the implausi- bility of the so-called plea of self defence anon. Before then, I would draw attention to the findings of the trial Court at pages 89 - 90 of F the record, thus: ....*this defence of alibi that he went to the market the date of the incident was raised for the first time in the witness box in Court, it was not ever contained Exhibit B...*

*The best defence and evidence of alibi is one pleaded at the G first opportunity (usually to the Police when making a statement) and not at the time of trial...*

Not done yet, the trial Court, admirably, defenestrated that spurious defence in this unanswerable conclusion which was, H rightly, affirmed by the lower Court;

In the instant case not only was the defence of alibi not raised before the Police with sufficient particulars, even the casual and unsubstantiated manner in which it appeared to have been raised

contained no details that will lend it to belief.

My Lords, I find no justification for tampering with the above concurrent findings. I will adduce reasons for this later in the course of this judgment. For now, I will deal with the submission of the appellant's counsel with regard to the so-called plea of self defence. With respect, he (the learned counsel for the appellant) would seem to betray his misconception of a well-established principle in Criminal Law. In the apt findings of the trial Court – findings which were affirmed by the lower Court:

*I find that at the time of the attack on the deceased (person) there was neither any provocation offered to the accused (person) by the deceased (person) or any member of her family nor was there any threat or reasonable apprehension of death or grievous bodily harm to the accused (person) to justify the savage attack that ended the life of the deceased (person)... I therefore find no merit whatsoever in the defence of self defence and provocation raised by the defence (page 92 of the record; italics supplied)*

The lower Courts were right in the above conclusion. In *Edoko v State* LPELR -24402 (SC) 62 - 63, this Court found it curious that the appellant (just as the appellant in the instant appeal) set up the defences of self defence and provocation at the same trial. Listen to this Court's adumbration of the rationale for its curiosity:

***Whereas the Criminal Code provides for self defence in Sections 286 and 287, the same Code provides for the defence of provocation in Section 284. Whilst the former (the defence of self defence) is an exculpatory defence because, where it is established, it exonerates the accused person, Uwaekweghinya v. The State (2005) 9 NWLR (pt 930) 227, the latter is, merely, an attenuating or a mitigating defence. Where available, it merely, attenuates; dis-rates or demotes the offence from murder to manslaughter.***

***In effect, the defence of provocation does not exonerate the accused person. It, only, earns him a mitigation of the punishment due for the offence of murder to a***



**sentence for manslaughter.** Uraku v. State (1976) LPELR-SC. 300/1975; (1976) 6 SC 128, Akang v. State (1971) 1 All NLR 47, 49; Musa v. State (2009) LPELR -SC.323/2006; (2009) 15 NWLR (pt 1165) 465; Ada v. State (2008) LPELR-SC.242/2004; (2008) 13 NWLR (pt 1103) 149; (2008) 34 NSCQR 508; Ajunwa v. The State (1988) 1 SC 110; Laoye v. The State (1985) 2 NWLR (pt 10) 832; C. O. Okonkwo, Okonkwo and Naish: 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. B C

**It is, thus, the dissimilarity in the consequences of the availability of these defences that make them, mutually exclusive, that is, that make them inconsistent defences - defences that cannot avail an accused person at the same time.** Ibrahim v. State (1991) LPELR-SC.167/1990; (1991) 4 NWLR (pt 186) 399; (1991) 5 SCNJ 129; see, also, the very incisive, and the most stimulating, article by the cerebral Professor of Law, F. I. Asogwah, *“The Applicability of Some ‘Inconsistent’ Defences in the Nigerian Criminal Code,”* in I. A., Umezulike (ed), Law and Administration of Justice in the Twenty First Century (Enugu: Fourth Dimension Publishing Co. Ltd, 1997) 75-98. (per Nweze, JSC in Edoko v. The State (2015) LPELR -24402 (SC) 62 -63, A- C) D E

**Now, to the question of alibi. As pointed out earlier, the trial Court found at pages 89 -90 of the record, that: this defence of alibi that he went to the market on the date of the incident was raised for the first time in the witness box in Court, it was not ever contained in Exhibit B...** F G

**The best defence and evidence of alibi is one pleaded at the first opportunity (usually to the Police when making a statement) and not at the time of trial...**

**I, entirely, endorse this view which was affirmed by the lower Court. True, indeed, to be entitled to the beneficial effect of the defence of alibi, an accused person must raise it at the earliest opportunity,** Hassan v. The H

State (2001) 6 NWLR (pt 709) 286, 305, which would, preferably, be in his extra-judicial statement. ***This is to offer the Police an opportunity either to confirm or confute its availability to the accused person***, Ibrahim v. The State (1991) 4 NWLR (pt 186) 399; Nwabueze v. The State (1989) 3 NWLR (pt 86);  
 B Ikemson v. The State (1988) 3 NWLR (pt 110) 455.

***What is more, the said defence must be unequivocal as to the particulars of his whereabouts and those present with him***, Onyegbu v. The State (1995) 4 SCNJ 275,  
 C 285-286; Ibrahim v. The State (supra); Balogun v. AG, Ogun State (2002) 6 NWLR (pt 763) 512, 535-536; Eke v. The State (2011) LPELR - 1133 (SC) 16.

***It is only where an accused person, such as the appellant, raised the said defence at the earliest opportunity without any ambiguity that a burden is cast on the Prosecution to investigate it***, Eyisi v. State (2000) 4 NSCQR 60 and to disprove same, Eke v. The State (supra). ***Failure to investigate the defence of alibi raised in such circumstance will lead to an acquittal***, Yanor v. The State (1965)  
 E ANLR (Reprint) 199; Bello v. Police (1956) SCNLR 113; Odu and Anr v. The State (2001) 5 SCNJ 115, 120; (2001) 10 NWLR (pt. 772) 668. ***However, the said defence would be unavailing in a situation, as in this case, where the accused person raised it during the trial***. Hassan v. State (2001) 6 NWLR (pt 709) 305.

***In all, like the lower Courts, I hold that the Prosecution, sufficiently, proved the case as required by law, that is, beyond reasonable doubt***, {Alabi v. The State (1993)  
 G 7 NWLR (pt 307) 511, 523; Nasiru v. State (1999) 1 NWLR (pt 589) 87, 98; Adio v. The State (1986) 2 NWLR (pt 24) 581; Muka v. The State (1976) 9-10 SC 305; Anaekwe v. State (1976) 8 -10 SC 255; Bakare v. The State (1987) 3 SC 1, 32; Aigbadion v. State  
 H (2000) 4 SC (PT 1) 1; Agbo v. State (2006) 6 NWLR (pt. 977) 545.}

***Accordingly, I hereby endorse the concurrent findings of the lower Courts. I find no merit in this appeal.***

***In consequence, I shall enter an order dismissing it as lacking in merit. I, further, affirm the judgment of the lower Court which affirmed the conviction and sentence of the appellant.***

B

### **RHODES-VIVOUR JSC**

I have had the benefit of reading in draft the leading judgment of my learned brother Nweze, JSC. His lordship explained in detail the gruesome murder of Francisca Opara (F) by the appellant. I am in complete agreement with his lordship's reasoning and conclusion.

Section 135 of the Evidence Act states that where the commission of crime is in issue the standard of proof required before a conviction is sustained is proof beyond reasonable doubt.

The appellant was charged and found guilty of the offence of murder under Section 319 (1) of the Criminal Code. Section 319 is the punishment Section. It states that any person who commits the offence of murder shall be sentenced to death, while Section 316 of the Criminal Code defines the circumstances when an unlawful killing would amount to murder. To succeed the prosecution must prove beyond reasonable doubt that Francisca Opara F died, and that her death was caused by the appellant. The prosecution must further show that the act of the appellant which resulted in the death of Francisca Opara F is one of the six circumstances listed in Section 316 of the Criminal Code. That is to say-

- (1) If the offender intends to cause the death of 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;
- (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,

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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;

B      (6) If death is caused by willfully stopping the breath of any person for either of such purpose. See Akpan v. State (2001) FWLR (Pt.56) p.735 Mbang v. State (2012) 5-7 SC (Pt. II) p.104 Igri v. State (2012) 5-7 SC (Pt. II) p.59 Chiokwe v. State (2012) 12 SC (Pt. V) p.147.

C      If the act of the appellant that caused the death of the deceased is not one of the six circumstances listed in Section 316 of the Criminal Code, it is no longer Murder.

In Osuagwu v. State (2013) 5 NWLR (Pt. 1347) p.360. I said that:

D      *“Proof beyond reasonable doubt does not mean proof beyond all doubt or all shadow of doubt. It simply means establishing the guilt of the accused person with compelling and conclusive evidence, a degree of compulsion which is consistent with a high degree of probability.”* See also Nwaturuocha v. State (2011) 6 E NWLR (Pt.1242) p.170, Osetola & anor v. State (2012) 6 SC (Pt. iv) p.148 Adewunmi v. State (2016) 1-3 SC (Pt.II) p. 123.

F      Did the respondent prove the charge of murder beyond reasonable doubt? PW.3 an eyewitness saw the appellant run after the deceased and dealt several machete cuts on her. She ran into the compound of George Opara where she met Emelia Opara, P.W.1. She told PW1 what she saw. PW1 ran to the front of the compound and saw Francisca Opara F (deceased) dead, in a pool of her blood.

G      Pw6 Dr. Innocent Njemanze performed autopsy on the deceased and found that there were deep laceration wounds cutting across the back of the neck severing muscle, blood vessels and nerves. He gave the gory details of the state of the corpse and concluded that all the incisional wounds were as a result of multiple wounds from a very sharp object.

H      The evidence of an eyewitness is one of the best evidence available provided the eyewitness is telling the truth. The fact that PW3 was unshaken under cross-examination, and her evidence

was corroborated by PW6 makes her testimony true. Furthermore PW1 saw the deceased dead very soon after she died in the circumstances narrated by PW3.

The appellant is an evil and dangerous man. His attack on the defenceless Francisca Opara (F) (deceased) was ferocious and indiscriminate, absolutely appalling, indescribable, a clearly wicked and despicable act. The act of the appellant which resulted in the death of Francisca Opara (F) falls under (2) or/and (3) of Section 316 of the Criminal Code. This is proof beyond reasonable doubt.

### Alibi

Alibi means elsewhere. That is to say when the offence was committed the accused person was not at the scene of the crime. He was somewhere else.

When an accused person is arrested by the police and investigation commences, the accused person is asked under caution to write a statement. It is at this stage that the accused person raises the defence of Alibi.

He must state the day, time, and address of where he was when the offence was committed. The onus is not on the accused person to establish alibi rather it is on the prosecution to disprove it, but the police has no duty to disprove a worthless alibi.

When the defence of alibi is raised in detail stating exactly where he was on the day and time the offence was committed the police must investigate it properly to see if it is true.

A plea of alibi, if found to be true is a complete defence which absolves the accused person of the charge.

A plea of alibi crumbles if the prosecution adduces sufficient and accepted evidence to fix the accused person at the scene of the crime at the time the offence was committed. See *Osuagwu v. State* (2013) 5 NWLR (Pt.1347) p.360 *Ozaki v. State* (1990) 1 NWLR (Pt. 124) p.92 *Gachi v. State* (1965) NWLR p. 333.

The defence of alibi was not raised by the appellant in his statement to the Police rather it was raised for the first time when he gave evidence in Court, when he said that he went to the market on the date of the incident.

The appellant failed to establish an alibi worth examining.

The appellant's defence of alibi was of no value and it fades into insignificance in the face of compelling, sufficient and accepted eyewitness evidence which was amply corroborated.

B The Supreme Court is slow to set aside concurrent findings of fact of the trial Court and the Court of Appeal but would set aside such findings if found to be perverse, or cannot be supported from the evidence led, and accepted by the Court or if there was miscarriage of justice, or violation of some principle or law or procedure. See *Arowolo v. Olowookere & 2 ors* (2011) 11-12 SC (Pt.II) p.98 *Nguma v. A.G. Imo State* (2014) 2 SC (pt. II) p.1 *Akoma & anor v. Osenwokwu & 2 ors* 2014 5-6 SC (Pt. IV) p. 1 *Anekwe & anor v. Nweke* (2014) 4 SC (Pt. III) p. 65.

D This has been the practice and it is good. The reason being that the trial judge saw, heard and watched the demeanour of the witnesses. He is thus in the best position to make a correct assessment of the witnesses testimony.

E Findings of fact after examination in chief cross examination, and re-examination should be highly regarded and not upset by an Appeal Court, but only when there are exceptional circumstances justifying intervention by an Appeal Court.

F Both Courts below found as a fact that the appellant dealt several machete cuts on Francisca Opara F in a killing frenzy that left her dead. These are concurrent findings of fact by both Courts below which the appellant was unable to satisfy the Courts that the findings are perverse or unreasonable, concurrent findings of fact are in the circumstances true.

G For these brief reasons, as well as those more fully given by my learned brother Nweze, JSC. I would dismiss the appeal.

Appeal dismissed.

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### **MUHAMMAD JSC**

H I had a preview of the leading judgment of my learned brother Nweze JSC just delivered. I agree with his reasoning leading to the conclusion that the appeal being unmeritorious should be dismissed. For the reasons hereinafter articulated purely for empha-

sis and more so the fuller reasons in the leading judgment I also dismiss the appeal.

The appellant was tried and convicted for murder contrary to Section 319(1) of the Criminal Code Cap 30 Vol. II. Laws of the Eastern Nigeria applicable to Imo State. The Imo State High Court's decision convicting him was affirmed by the Court of Appeal, the lower Court. Further dissatisfied, appellant has appealed to this Court raising two issues as having arisen for the determination of his appeal. The more succinct but similar issues formulated by the respondent and on which basis I will determine the appeal read:- C

1. Whether the prosecution proved its case beyond reasonable doubt against the appellant.

2. Whether the statement of the appellant admitted in Court as Exhibit 'B' is not at variance with his testimony in Court and if the answer is in the affirmative what is the legal position? D

In considering these issues, appellant's complaints against the concurrent findings of the two Courts below, I shall be relying on the summary of the facts of the case on which the appeal hinges rendered in the leading judgment. E

My lords, that the appellant's chief complaint is the failure of the two Courts to consider his defence of self-defence pre-supposes that he does not dispute having killed the deceased.

In effect, by this defence, the appellant is affirming that PW1, PW2, PW3 and PW6 are true in their testimonies that the appellant had dealt the deceased fatal blows with his machete and that her death ensued therefrom. Appellants contention is that the law, which both Courts failed to apply to the facts before them, absolved him for killing the deceased in self-defence. F G

This defence, along with the defence of provocation the appellant raises, not only put him at the scene of crime, negating his alibi, it further constitutes an admission that he indeed committed the offence.

The trial Court's devastating findings on these defences, which findings the lower Court justifiably affirmed, belie appellant's assertion that these defences were discountenanced by the two Courts. The trial judge at page 92 of the record of appeal H

firstly held thus:-

*“I find that at the time of the attack on the deceased there was neither any provocation offered to the accused by the deceased or any member of her family nor was there any threat or reasonable apprehension of death or grievous bodily harm to the accused to justify the savage attack that ended the life of the deceased.”*

*I find no merit whatsoever in the defence of self-defence and provocation raised by the defence.*

*Beside, the abandonment of such defences by the accused in the witness box in giving evidence that is inconsistent with them completely knocks off the bottom of those defences. See UMANI v. STATE, Supra at 283.”*

The Court then concluded as follows:-

*“On the totality of the evidence before me, therefore, I accept and believe the evidence led by the prosecution that the accused murdered the deceased, Francisca Opara on the 2nd day of May, 1992 in the circumstances narrated by PW3 in her evidence, I disbelieve the evidence of the accused that he did not murder the deceased, did not know her and did not inflict the machete cuts that ended the life of the deceased, I believe and find that the act of the accused in inflicting those machete cuts on the deceased was intended to cause and did cause the death of the deceased. In the circumstances, I find the accused guilty as charged.”*

Appellant’s further contention is that both Courts should not have relied on Exhibit B, his extra judicial statement, found to be confessional, as same stands contradiction to his oral evidence at trial. This cannot help the appellant either.

It is settled that where an accused person gives evidence that is inconsistent with the earlier statement he made to the police, the Court, if it chooses not to disregard the evidence as being unreliable, should take same with a pinch of the salt.

It needs to be restated here too that the fact that an accused person’s evidence in Court contradicts his extra judicial confessional statement does not deprive the Court from convicting the accused on the basis of the confessional statement alone once the



confession has been found to be voluntary and true. It is only desirable but not mandatory for the trial Court to identify such corroborative evidence outside the confessional statement before convicting the accused. See *Eghoghonome V. The State* (1993) 7 NWLR (Pt 306) 383, *Kim v. State* (1992) 4 NWLR (Pt 233) 17, *Charles Kingsley Joe Isong V. The State* (2016) LPELR-40509 (SC), *Nanmdi Osuagwu V. The State* (2013 LPELR-19823 (SC)).

In the case at hand, evidence abound outside appellant's extra judicial confessional statement in proof of the entire ingredients of the offence he was tried and convicted for. The trial Court's decision which the lower Court affirmed is clearly borne out of the evidence led by the respondent. The appellant cannot succeed in his bid to have the lower Court's affirmation of such a decision having failed in the first place to show any mistake inherent in the concurrent findings of the two Courts and the miscarriage of justice the mistakes occasioned. See *Ahmed v. State* (1999) 7 NWLR (pt 612) 641 and *Mezu V. C & C.B. (Nig) Plc* (2013) 3 NWLR (pt 1340) 188.

For the foregoing and the more detailed reasons outlined in the leading judgment the appeal is hereby dismissed. I abide by the consequential orders contained in the leading judgment

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### **OGUNBIYI JSC**

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I read in draft the lead judgment of my learned brother Nweze, JSC and I agree that the appeal is devoid of any merit and should be dismissed.

The main issue in this appeal is whether or not the prosecution had discharged the onus placed on it by proving the guilt of the appellant beyond reasonable doubt.

The star witness at the trial of the accused was PW3 who is the daughter of the victim. In her evidence, she gave a positive, consistent and harmonious evidence of the acts of the accused which lead to the death of the deceased.

For example PW3 testified that the accused dealt mortal machete cuts on the deceased as he pursued her into the compound of one George Opara where he finally hacked her down

dead. The evidence of PW7 that he saw 13 machete cuts on the body of the deceased also collaborates PW3's evidence.

In addition, the evidence of PW6, who performed the autopsy described in great detail the nature, extent, and type of the injuries he found on the body of the deceased and which is collaborative of the evidence of PW3.

The document Exhibit B was the extra-judicial statement made by the appellant to the police, which was admitted at the trial Court without any objection. Same is totally at variance with the appellant's viva voce evidence in the open Court.

At pages 68 - 69 of the record of appeal, the appellant gave evidence as DW1 wherein he denied knowing the deceased totally or having anything to do with him. He also denied ever making Exhibit B to the police.

In cross reference to the appellant's evidence in Court, is Exhibit B contained at P.11 of the record of appeal, wherein the appellant in his extra-judicial statement had this to say:-

*"I know Francisca Opara since 1974 and we have been good friends. One day in 1982 the late Francisca Opara and the children damaged my car and took me to Court since that time both of us have been in enmity anytime they see me, they will fight me and sent me to Court. Presently I have case with the deceased person at police Nwaorieubi and Magistrate Court Nwaorieubi. All my properties have been stolen by the woman and her children. On the 2nd of May 1992, I was returning from mission near our house.*

*I saw Francisca and her daughter Okwuchi. As Francisca cross my way, she held my cloth and told me I am finished today. As she was still holding and I was going, her daughter Okwuchi picked up stick and hit me and her mother Francisca Opara the deceased also picked stick and hit me. As both of them were beating me, I was crying and one Clifford Ejiogu asked them to beat me. As one of her daughter Chinasa Opara came with knife and I took the knife from her and cut their mother Francisca Opara two times and ran into the bush. I cut her the knife on her hand and neck and ran away."* (Emphasis provided).

It is obvious that the appellant's statement Exhibit B is at variance with his oral testimony in Court at the trial.

At page 134 of the record and while considering the inconsistency rule, this is what the lower Court had to say:-

*“The above exposition of the inconsistency rule by the learned trial judge may be incomplete in the circumstances of the case but his finding of the unreliability of the accused testimony in Court remains valid because of the legal truism that a plea of alibi is contradictory and inconsistent with a plea of self defence.”* <sup>B</sup>

In further consideration, their Lordships continued also and said:-

*“The inconsistency rule, is that where an accused viva voce evidence at the trial Court and his extra-judicial statement are contradictory or inconsistent, the trial Court should disregard or reject both as unreliable and rely only on the evidence of the Prosecution. However, the rule does not apply to confessional statements made by accused persons. It only applies to other extra-judicial statements of witnesses outside of confessional statements. Habibu Musa V. The State (2012) 3 NWLR (pt. 1286) 59 at 96-98.”* <sup>D</sup>

For all intents and purposes, the inconsistency rule does not apply to the situation at hand. Be that as it may, when regard is had also to the evidence of PW3 whose testimony was found as positive and consistent, same is a corroboration of Exhibit B, the confessional statement made by the appellant himself. <sup>E</sup>

The appellant in his defence raised issues of alibi and self defence. I seek to say quickly that the two defences are very much contradictory and thus bringing the appellant again into the same situation of inconsistency as he was when he gave evidence in Court which contradicted his extra-judicial statement to the police. <sup>F</sup>

While defence of alibi exonerates the accused totally from being present at the scene of the crime, self defence, though, it also exonerates completely from culpability, it however connotes that the accused was at the scene of crime and in fact was responsible for the act which he alleges was necessitated as a reason for his exercise of self defence. <sup>G</sup>

On the question of alibi therefore, the trial Court said:-

*“In the instant case not only was the defence of alibi not*

*raised before the police with sufficient particulars, even the casual and unsubstantiated manner in which it appeared to have been raised contained no details that will lend it to belief. Besides, the suggestion made to PW3 in cross-examination that the accused inflicted the machete cuts on the accused in self defence completely destroys that of alibi even if it were to exist (which it does not)."*

The appellant was clearly identified by an eye witness PW3 and thus the defence of alibi raised is logically demolished. See Henyo Ntom & Anor. V. The State (1968) NMLR 86 at 87, Micheal Hausa V. The State (1994) 6 NWLR (Pt. 350) 281 and Patrick Njovens V. The State (1973) 5 SC 17.

The judgment of the two lower Courts are concurrent and there is no reason adduced by the appellant for this Court to interfere therewith. In other words, the judgment of the lower Court affirming the trial Court has not been found to be perverse. My learned brother Nweze, JSC has dealt comprehensively and adequately with all the issues raise in the appeal.

With the few words of mine and particularly relying on the lead judgment, I also dismiss the appeal as lacking in merit. I further abide by all the orders made therein the lead judgment.

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### **SANUSI JSC**

I had the advantage of reading before now, the judgment prepared and read by my learned brother Chima Centus Nweze, JSC. I am in entire agreement with the reasons and conclusion of my noble lord that this appeal is wanting in merit and deserves to be dismissed. While dismissing it, I also have few comments to make in support of the said judgment.

This appeal is against the judgment of the Court of Appeal, Owerri division (the lower Court) delivered on 9th of November, 2012 which affirmed the judgment of High Court of Imo State, Iho Ikeduru Judicial division (the trial Court) which convicted and sentenced the appellant to murder for causing the death of his victim one Fransisca Opara (f) by cutting her with a machete.

#### **FACTS OF THE CASE**

On 2nd May 1992, while PW3 was with a bicycle repairer,

she heard voice of the deceased calling on her. As she rushed and met the deceased, she saw the appellant with a machete which he used in cutting the deceased on the neck. The deceased ran for her dear life but the appellant/accused pursued her and continued to deal machete cuts on her. The PW3 testified that she followed them until both of them got to the compound of one Emeka Opara (PW1), where the deceased eventually gave up. B

The appellant was later arrested by the police and he volunteered a confessional statement. He was later arraigned before the trial Court on a charge of murder. C

During the trial, the prosecution called seven witnesses while the accused person, now appellant, testified for his defence. In the end, the learned trial judge found the appellant guilty of murder, convicted and sentenced him to death. Disenchanted with his conviction and sentence, the appellant appealed to the Court of Appeal (the Court below) which dismissed his appeal and affirmed the conviction and sentence passed on him by the trial Court. Further aggrieved by the dismissal of his appeal by the Court below, the appellant appealed to this Court vide a notice of appeal filed on 6th December 2012 containing two grounds of appeal. D E

Briefs of arguments were filed and exchanged by the parties. In the appellant's Brief of Argument settled by one Chief Henry Akunebu, two issues for determination were proposed which read, thus:-

1. Whether the Court below is right in applying the inconsistency rule as resulting in making the Appellant viva-voce evidence and cautioned statement as both unreliable and therefore held the viva-voce evidence of the Appellant as having totally contradicted Exhibit B qua cautioned statement of the Appellant. F G

2. Is the Court below right in holding that there was no legal duty on the police to investigate the Appellant's plea of self defence and particulars therein furnished for reasons of the existence of eye witness account, denial of the cautioned statement by the Appellant and that the viva-voce evidence, totally contradicted the cautioned statement,. H

In his reaction, the learned counsel for the Respondent upon being served with Appellant's brief, also filed its own Brief of argu-

ment wherein, it also raised dual issues for the determination as set out below:-

(a) Whether the Prosecution proved its case beyond reasonable doubt against the appellant

B (b) Whether the statement of the appellant admitted in Court as Exhibit 'B' is not at variance with his testimony in Court and if the answer is in the affirmative, what is the legal position    Looking at the two sets of issues raised by the parties as reproduced above, the issues raise in the respondent's brief appear to me to be C more elegantly couched, and are simple and straight to the core points calling for determination in this appeal. The issues raised in the appellant's brief of argument besides being verbose, are also semantical and they appear to be rather too technical. To my mind, D the issues raised by the appellant have also been adequately subsumed by the issues proposed by the respondent, hence I choose to be guided by them in determining this appeal. I will take the 2 issues together.

SUMMARY OF SUBMISSION BY COUNSEL

E APPELLANT'S COUNSEL

The learned counsel to the Appellant submitted that the fact that the appellant gave a different version of evidence which contradicts his earlier statement to the police, does not make both accounts unreliable. He argued that the approach by the lower F Court with respect to the inconsistency rule relating to the case of the appellant was perverse and a total misconception of inconsistency rule in criminal cases.

He cited the case of Tsoho v. The State (1986) 4 NWLR G (pt.36) pages 710-712, where it was held that when an accused gives a previous statement completely different from his testimony it will be neglected. It was held further in that case, that the Court should not base its verdict on it because it is not applicable to the evidence of an accused but rather restricted to the evidence of a H witness in criminal cases. He faulted the lower Court's failure to rely on Tsoho's case (supra) He contended that the findings of the lower Court was based on a wrong application of law having regard to the principle in Tsoho's case (supra) which has resulted in

miscarriage of justice. He submitted further, that the defence of an accused person comprises his cautionary statement and his evidence at the trial, notwithstanding his attempt to disown it. He referred to the case of MADAKI V. STATE (1990) 3 NWLR (pt. 429) pg. 171 at 174. He finally submitted on this issue, that non-consideration by the lower Court is of necessity to investigate the plea of the appellant in his cautionary statement based on inconsistency rule, is perverse. He urged this Court to resolve this issue in favour of the appellant. B

On Issue no.2 which deals with the holding of the Court below that there was legal duty on the police to investigate the plea of self defence and the particulars furnished. C

Here the learned counsel to the appellant narrated the story of the Appellant that on 2/5/1992 while he was returning home, he was attacked by the deceased alongside four others with a knife which were contained in appellant's statement Exhibit "B". He argued that the plea of self defence was made at the earliest opportunity to the police and the onus to disprove it rests on the police. He submitted that failure of the police to investigate the appellant's plea of self defence amounts to denial of fair hearing which resulted in a miscarriage of justice to him. He referred to UDO V. STATE (2005) NWLR pt.928 p.521 and SHANDE v. STATE (pt.937) p.301 ratio 5 where it was held that failure of the police to investigate or disprove such evidence is a failure to perform a vital duty which will likely result in Miscarriage of justice. He argued that notwithstanding the evidence of PW3 the purported eye witness, the police still had a legal duty to thoroughly investigate the appellant's plea of self defence. He also stated that to hold that the evidence of eye witness is sufficient without investigating the defence of self defence of the appellant amounts to a denial of the appellant's right to fair hearing. He submitted that the contradiction in the evidence of the appellant does not relieve the police from investigating the defence of self defence contained in Exhibit "B". D  
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He then urged the Court to also resolve this issue in favour of the appellant/accused person and allow this appeal.

ON ISSUE No.1

*“Whether the prosecution proved its case beyond reasonable doubt”*

In arguing this issue, the learned counsel for the respondent referred to the evidence of PW1, PW2 and most importantly, the evidence of PW3 at pages 30-36 of the record that he saw the Appellant emerging from a track armed with machete and he cut the deceased on the neck and that the deceased started running and the appellant pursuing her inflicting machete cuts on her body. He submitted that the act of the accused in cutting the deceased with machete was intentional and done with full knowledge that death or grievous bodily harm was the probable consequence. Learned counsel submitted that the prosecution proved its case beyond reasonable doubt. He referred to the case of ESHOT v. STATE (1993) 4 NWLR (pt. 290) p.663 (paragraphs 3-8) where was held thus:-

*“Once the trial Court is satisfied beyond reasonable doubt that on the evidence offered by the prosecution, the accused and no one else committed the offence charged, the Court is entitled to enter a finding of guilty against the accused persons. This is especially so, where the prosecution evidence emanated from eye witness whose credibility was not impugned successfully.”*

He urged the Court to resolve this issue in favour of the respondent.

ISSUE No.2

*“Whether the statement of the appellant admitted in Court as Exhibit ‘B’ is not at variance with his testimony in Court.*

He referred to evidence of the appellant at page 68 that he did not know and kill the deceased and that he had never seen the deceased nor made any statement to the police, let alone admitting to PW7 that he killed the deceased. He also referred to Exhibit B at page 2 of the record paragraphs 12-30 where he stated that he knows Francisca Opara, the deceased and that they had being friends since 1974.

*He then urged the Court to hold that Exhibit ‘B’ is at variance with his testimony. He submitted that the position of law*



*with regard to inconsistency rule, is that where an accused evidence at the trial contradicts his extra judicial statement. The trial Court should reject both as unreliable and rely on the evidence of the prosecution. He referred to the judgment of the lower Court at pages 234 of the record, where it held thus:-*

*However the rules does not apply to confessional statement made by the accused person.*

*It only applies to other extra judicial statement of witnesses outside of the confession”*

He submitted that the above is a true representation of judicial decisions with regard to inconsistency rule. He argued that the trial judge not only considered the inconsistency rule, but he also still went ahead to consider the plea of alibi and self defence raised by the appellant. He referred to pages 89-90 (the finding of the trial Court) which was accepted by the Court below at page 136 of the record. He also referred to page 92 where the trial Court considered the defence of self defence and provocation and held that they cannot avail the Appellant. He submitted that the findings of two lower Courts are not perverse. He referred to the evidence of PW7 at pages 54-56 of the record and submitted that the police did not investigate the defence of self defence raised by the appellant. He submitted further, that having not challenged the issue of proper investigation of the case at the trial Court, he cannot definitely complain at this Court. He mentioned that the decided authority heavily relied upon by the Appellant has been overruled by the case of *EGBOHONOME v. STATE* (1993) 7 NWLR (pt.306) 383 and submitted that reliance placed on it is misconceived.

He urged the Court to resolve this issue in favour of the respondent and dismiss this appeal.

It is well settled law, that in criminal cases, the burden of proof of the offence or offences is squarely on the prosecution and the standard of proof is beyond reasonable doubt. See *Asariyu v. The State* (1987) 4 NWLR (pt. 67) 709; *Paul Ameh v. State* (1987) 6-7 SC 27 at 36. *Okpulor v. State* (1990) 7 NWLR (pt. 164) 581 at 593; *Oduneye v. The State* (2001) 1 SCNJ 25.

In a murder case the prosecution is expected to prove be-

yond reasonable doubt the underlisted elements, in order to obtain conviction. The elements are:-

- (a) That it was by the act of the accused
- (b) That the act or acts were done with the intention of causing

death,

- B (c) That the accused knew that death would be the probable consequence of his act or acts. See *Omini v. State* (1999) 9 SC Onah v. State (1995) 3 NWLR (pt.12) 36.

C It is pertinent to stress here, that all the above mentioned ingredients must co-exist and once any of them was not proved or is missing or faulted with even the slightest doubt, then the charge is short of being proved.

D Now from the facts borne out by the record, evidence abound from the testimony of PW6 Dr. Innocent Njemanze, that the victim died following laceration wound cutting across the back of the roof of the neck severing muscles. There were also other wounds in her shoulders, palms and PW6 also opined that the wounds were caused by the use of sharp object. With regard to the second and E third elements from PW3's (who was an eye witness) testimony one can safely infer that the appellant really intended to kill and in fact did kill the helpless lady his victim, by dealing blows on her body even after she fled for her dear life but was pursued by him. There is nothing that could be a clear display of his intent to kill her F and not only to cause her bodily injuries which led to her death.

Her evidence also corroborated the medical report issued by PW6 and also his testimony at the trial Court especially regarding places the deceased was cut with sharp object used in attacking her by the appellant, namely a machete which is indeed a lethal weapon. Again, considering the vital places in the deceased person's body which were cut or hit with the machete, one can easily infer that the appellant had really intended the natural consequences of his act or acts which was certainly to kill the deceased person. H

I shall now consider the defences raised by the appellant at the trial, but before doing so, my lords permit to reiterate that the appellant made a voluntary cautionary statement to the police at

the earliest stage of his arrest, owning up the commission of the offence which was tendered at the trial and admitted in evidence as Exhibit B. I will first of all consider the defence of Alibi raised by the appellant. On pages 89-90 of the record, the trial Court found that the accused person now appellant raised Alibi defence when he stated, inter alia, that he went to the market on the date of the incidence. This defence as found by the trial Court, was raised for the first time when the accused/appellant was testifying for his defence and NOT in his statement to the police i.e. Exh B. The word Alibi is a Latin word meaning “*elsewhere*” where an accused person raises it, he wants the Court to believe that he was not physically at the scene of the crime, hence it was not possible for the Court to find him guilty by placing him in a location of the crime, since he was somewhere else at the time the offence was allegedly committed.

However, for the defence of Alibi to avail an accused person, the law requires that he must raise such defence at the earliest opportunity to enable the police investigate it and therefore he must offer evidence. See *Salam v. The State* (1988) 3 NWLR 670; *State v. Peter Eze* (1976) SC 125 at 129/130; *State v. Francis Odili* (1977) 4 SC 1 at 5-6.

Also in order to take advantage of the defence of Alibi the accused must give a detailed particularization of his whereabouts on the crucial day and time of the offence which should also include the specific places he was, the people in whose company he was and what had transpired on the said day and at the said time and place or places. Once these comprehensive information are furnished to the police at the earliest stage then the police are duty bound to investigate and ascertain the veracity of such information. See *Udoebre v. The State* (2001) 6 SCNJ 66. Furthermore, these information must be furnished to the police preferable in the accused person’s cautionary statement for the police to investigate.

However, where an accused person decides to raise the defence of Alibi while testifying for his defence in the Court (as done by the appellant in this instant appeal), it could be regarded that

he deliberately wanted to deny the prosecution its right and duty to investigate the defence. See *Gachi v. The State* (1965) NMLR 333; *Udoebre v The State* (2001) 6 SCNJ 66-67.

Moreover, where an alibi defence is vague, nebulous and misleading and is also devoid of material facts worthy of or impossible to be investigated by the police, in such circumstance the trial Court can rightly discard it, rather than to engage on wild goose chase all in the name of investigation. In that case, the Court would have nothing before it to consider as alibi defence. In the result, all I am saying is that once alibi defence was not raised timeously, or no particulars of where the accused was on the material date and time was furnished or that it was vague or a mere camouflage, then it does not qualify as a valid defence worthy of being investigated. As I said supra, the appellant's defence of alibi raised fell short of particulars and was also not raised timeously. It was therefore rightly rejected by the trial Court and the Court below was equally right in affirming the finding of the trial Court in that regard.

This brings me to the issues of self-defence raised by the accused/appellant at his trial. The learned trial judge, at page 97 of the record, found as below:-

*"I find that the time of the attack on the deceased person there was neither any provocation offered to the accused person by the deceased person or any member of her family nor was there any threat or reasonable apprehension of death or grievous bodily harm to the accused person ... I therefore find no merit whatsoever in the defence of self defence and provocation raised by the defence ..."*

The Court below, rightly in my view, affirmed or endorsed the above finding of the trial Court. In the first place, the defence of provocation when raised by an accused person presupposes and amounts to an admission by the accused that the death of the deceased was as a result of the act of the accused/appellant. See *Edoha v. State* (2010) 42 NSCQR (pt. 1) 477/478.

As regards the defence of self-defence, it is trite law, that the defence of self-defence can only avail an accused person if he

proves that he was a victim of attack which causes him reasonable apprehension of death or grievous harm and even then, the accused is only allowed by law to use such reasonable force to defend himself or repel the attack to defend himself from the danger and he is entitled to it even though such force may cause death or grievous harm. B

However, if the act of self defence is committed after all the danger or threat from the assailant is past and by way of vengeance, then the defence will not avail the accused. See *R v. Dummemi* (1955) 15 WACA 75; *Uwagboe v. The State* (2008) 4 C SCNJ 471-472. C

In this instant case, here was a man who without any attack or threat of assault from either the helpless and unarmed lady (the deceased) or from any member of her family who attacked her with lethal and sharp weapon i.e. matchet by dealing several matchet cuts on her all over her body and even when she took to her heels he pursued her and continued cutting her with this matchet until she later died. In the circumstance, I do not see any apprehension of death or grievous harm for the appellant to use his matchet to attack the helpless deceased victim. It is my view, that the defence is not feasible as it is inconceivable for him to raise defence of self defence in the absence of any apprehension of deadly attack on him by the deceased. D E

The two lower Courts are therefore right in rejecting such defence. F

The last point that I should comment on is the question posed by the learned appellant's counsel in his issue no. 1 in his brief of argument on the question of contradiction between Exhibit B, the cautionary statement of the accused/appellant and his testimony in Court when testifying for his defence. This Court in the case of *Wasari Umani v. The State* (1988) 1 NWLR (pt.70) 274 or (1988) All NLR 148 or (1988) 2 SC 88 or (1988) LPELR 3357 (SC) had this to say per Nnamani JSC (of blessed memory) at page 14. G H

In the recent case of *Oladejo v. State* (1987) 3 NWLR (pt. 61) 364 at 427 this Court dealt with this matter in greater detail.

There, I said as follows:-

*“Contrary to the conclusion of the learned trial judge, the law is rather that where a witness (here an accused person makes a statement which is inconsistent with his testimony, such testimony is to be treated as unreliable while the statement is not regarded as evidence upon which a Court can act” See pages 427-428. This Court also went further to say thus:-*

*“While I agree that the learned trial judge was clearly under a duty to consider all possible defences available to the defence even if they were not raised by the defence, I can see nothing suffered by the appellant by his failure to consider those defence (provocation and self defence. There was nothing to sustain them .... ”*

I think from the above dictum of the learned jurist, the question posed by the appellant in his first issue is well explained and therefore require no further adumbration or expatiation. Apropos of my discourse above, I have no hesitation in resolving the two issues raised in the respondent’s brief of argument in favour of the respondent against the appellant. As a corollary therefore, the issues raised by the appellant are resolved against him since they border on the same points even though they were differently couched from the way the respondent’s issues for determination were framed. As I said earlier, the latter’s issues had adequately subsumed the former’s issues for determination.

On the whole, for these reasons/comments and the fuller and more detailed reasons ably and adequately given in the lead judgment of my learned brother Chima Centus Nweze, JSC, which I entirely agree with and adopt as mine, I also see no merit in this appeal. It is also my judgment that this appeal lacks merit and is accordingly dismissed by me. I affirm the judgment of the Court below which had earlier affirmed the conviction and sentence passed on the appellant by the trial Court.

H