**ABBAS MUHAMMAD**

**V.**

**THE STATE**

IN THE SUPREME COURT OF NIGERIA

ON THURSDAY, THE 13TH DAY OF APRIL, 2017

SC.141/2013

**LEX (2017) - SC.141/2013**

OTHER CITATIONS

3PLR/2017/6 (SC)

(2017) LPELR-42098(SC)

**BEFORE THEIR LORDSHIPS**

OLUKAYODE ARIWOOLA, J.S.C

CLARA BATA OGUNBIYI, J.S.C

CHIMA CENTUS NWEZE, J.S.C

AMINA ADAMU AUGIE, J.S.C

PAUL ADAMU GALINJE, J.S.C

**BETWEEN**

ABBAS MUHAMMAD - Appellant(s)

AND

THE STATE - Respondent(s)

**REPRESENTATION**

NURENI JIMOH, Esq. For Appellant

AND

SHUAIBU SULE, Esq. For Respondent

**ORIGINATING COURT**

KANO STATE HIGH COURT (Tani Yusuf Hassan, J., Presiding)

COURT OF APPEAL [Coram: Aboki, JCA, Mbaba, JCA, Abiru, JCA]

**ISSUES FROM THE CAUSE(S) OF ACTION** .

CRIMINAL LAW AND PROCEDURE - DEFENCE OF PROVOCATION: Scope of – Ingredients necessary to prove same.- Whether the defence can mitigate the offence of homicide.

CRIMINAL LAW AND PROCEDURE – PROVOCATION:– When raised as a defence – How proved - Whether mere words suffices

CRIMINAL LAW AND PROCEDURE - SELF-DEFENCE:- Nature and scope of - What must be proven to sustain the pleas of self defence.

WORDS AND PHRASES – “WEIGHT OF EVIDENCE” - Meaning of.

**PRACTICE AND PROCEDURE ISSUES**

APPEAL:- Basis for allowing an appeal .

APPEAL - FRESH POINT(S) ON APPEAL:– Raising of - Whether leave of court must be secured to raise same

EVIDENCE – “WEIGHT OF EVIDENCE”:- Meaning of

EVIDENCE - BURDEN OF PROOF - Onus to show circumstances to warrant interference with concurrent findings of the trial court and court of appeal - On whom lies.

EVIDENCE - BURDEN OF PROOF - Standard of proof in criminal cases – Scope of.

EVIDENCE - CAUSE OF DEATH - Circumstances under which medical evidence would be discountenanced. - Circumstances under which cause of death can be inferred.

EVIDENCE - CONFESSIONAL STATEMENT - Meaning and nature of – The appropriate time when an objection to the admissibility of a confessional statement can be raised - Whether retraction of a voluntary confessional statement whittles its relevance and renders it inadmissible – When satisfactorily proved – Effect of.

JUDGMENT AND ORDER - ERROR/MISTAKE IN JUDGMENT - Whether same will result in the setting aside of such a judgment.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The Appellant was charged with the offence of culpable homicide punishable with death, and after a trial in which six witnesses had testified for the Prosecution, the Kano State High Court found him guilty as charged, and convicted and sentenced him to death.

The case against him is that he caused the death of “Nura Muhammad” by stabbing him with a knife on his face and back, knowing that death would be the probable consequence of his act. The Appellant, a football coach, testified in his own defence, and called one other witness. He did not deny that there was a fight between them at the football field, but his side of the story is that he was provoked by the deceased, and acted in self-defence.

DECISION(S) APPEALED AGAINST

The trial Court entered judgment wherein he convicted and sentenced the Accused person/Respondent to death. Being dissatisfied with the judgment of the learned trial judge, the Accused person/Appellant appealed to the Court of Appeal. The conviction and sentence passed was affirmed, hence the appeal by the Defendant/Appellant.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

(i) Whether the learned justices of the Court of Appeal were right, in the circumstances of this case, to affirm the conviction and sentence of the Accused Person (sic)?

(ii) Whether the learned justices of the Court of Appeal were right in holding that the defence of provocation and self- defence will not avail the Appellant?

*BY RESPONDENTS*

[The Respondent adopted the Appellant's issues for Determination[

*AS ADOPTED BY COURT*

[The Court adopted the Issues presented by the Appellant]

DECISION OF THE SUPREME COURT

1. The Appellant and his co-accused were fully aware of the offences they were facing trial on and their defence counsel was also equally aware of the crime(s) which they were facing trial on which he was defending them. This, therefore, knocks the bottom out of the fact that the appellant and his co- conspirator in the crime were misled as to the offences they were both charged with, tried, convicted of and sentenced.

2. Appellant’s counsel’s complaint that the plea of each accused person should have been recorded separately, and that the trial judge should have stated that the charge had been read to each of the accused persons, so as to meet with the wording of the requirements of sections 333. The argument founded on the use of singular person in section 333 is misconceived having regard to the provision of section 41 of the Interpretation Law. Notwithstanding the joint reading and explanation of the charge, there was compliance with section 333 of the Criminal Procedure Law Cap. 37.

3. While I am in entire agreement with the appellant’s counsel that specific recording by the trial court in its record that the charge was read and explained to the accused person is part of the steps of the procedure a trial court should adhere to while arraigning an accused person, it is however my considered view, that failure or omission by the trial court to reflect that in the record, is not fatal to the proceedings once the arraignment as in this instant case, was done in the manner which is apparently and substantially regular.

4. Courts, in handling criminal matters, should have at the bottom of their heart, the aim and desire to always do substantial justice and not to be carried away by sheer technicalities which will ultimately defeat the course of substantial justice. Courts should always aim towards doing or achieving justices.

5. Provisions of section 215 of the Criminal Procedure Act are mandatory. For there to be a valid arraignment the procedure outlined under section 215 must be complied with.

**MAIN JUDGMENT**

AMINA ADAMU AUGIE, J.S.C. (DELIVERING THE LEADING JUDGMENT):

The Appellant was charged with the offence of culpable homicide punishable with death, and after a trial in which six witnesses had testified for the Prosecution, the Kano State High Court found him guilty as charged, and convicted and sentenced him to death.

The case against him is that he caused the death of “Nura Muhammad” by stabbing him with a knife on his face and back, knowing that death would be the probable consequence of his act.

The Appellant, a football coach, testified in his own defence, and called one other witness. He did not deny that there was a fight between them at the football field, but his side of the story is that he was provoked by the deceased, and acted in self-defence.

In his judgment delivered on 5/11/2008, the learned trial Judge, Tani Yusuf Hassan, J. (as he then was) held as follows -

Counsel to the [Appellant] contended that since the deceased approached [him] with a shovel, [he] had a right of self-defence. More so when the deceased used abusing language against [him], which provoked [him].. Neither DW1 [Appellant] and his witness DW2 and PW2 the eye witnesses told the Court the abusive words used by the deceased. It is settled that words alone can constitute provocation. But that depends on the actual words used and their effect or what they mean to a reasonable person having a similar back ground. In this case, the exact insultive or abusive words are neither known nor disclosed. It will not be possible to determine whether the defence of provocation is open or available to [him].

He further stated as follows at page 85 of the Record -

From the evidence adduced before the Court, the [Appellant] cannot be entitled to defence of justification because the Court cannot give [him] the benefit of defence, which was not reflected and supported by evidence, as there is no direct or indirect evidence to show that [he] was provoked by the deceased. I hold that the defence of provocation and self defence is not available to [him]. because [his] allegation that the deceased hit him with the shovel on the head has been controverted by the evidence of PW4, the police investigating officer, who said under cross-examination that he did not see any injury on [him]. Also neither PW2 nor PW3, who were eyewitnesses, told the Court that the deceased injured [him] in fact the evidence of PW2 is that the shovel, which the deceased was holding fell down as they were fighting and [he] brought out a knife stacked (sic) in his pocket and stabbed the deceased at the back. The evidence was collaborated (sic) by (him) in his confessional statement Exhibit A when he said “Islezedre (sic) shovel and hit him on his left leg and hit him on his back two times”. Even if it is true that (he) was wounded by the deceased; the degree of retaliation by the [Appellant] proportionate with the attack by the deceased. In the case at hand, there is no wound by the deceased and abusive words by the deceased has not explained by [him] and even the witnesses either for the prosecution or the Defence.

He challenged the decision of the trial Court at the Court below, wherein he formulated two Issues for Determination: whether the Prosecution proved its case beyond reasonable doubt and the trial Court right to convict and sentence him of the offence; and whether the trial Court properly considered and rightly dismissed the defence of provocation and self-defence, which he had raised.

The Court below [Coram: Aboki, JCA, Mbaba, JCA, Abiru, JCA], in its Judgment delivered on 1/3/2013 resolved the two issues against the Appellant, and affirmed the decision of the trial Court.

He filed a Notice of Appeal that contains ten Grounds of Appeal in this Court, and formulated two Issues for Determination in his Brief of Argument prepared by Nureini Jimoh, Esq., and they are

(i) Whether the learned justices of the Court of Appeal were right, in the circumstances of this case, to affirm the conviction and sentence of the Accused Person (sic)?

(ii) Whether the learned justices of the Court of Appeal were right in holding that the defence of provocation and self- defence will not avail the Appellant?

The Respondent adopted the Appellant's issues for Determination in its own Brief of Argument prepared by Shuaibu Sule, Esq.

In arguing issue-(i) the Appellant reproduced the Charge framed against him, which contains cancellations, as follows-

“That you Abbas Mohammed on or about 14/10/2000 at about 8.00 hours at Brigade football Field quarters Kano, within the Kano judicial Division committed an offence of Culpable Homicide with death in that you caused the death of Nura Muhammed by stabbing and hitting him with a knife in different parts of the body namely:- face and back knowing that death would be the probable consequence of your act and you thereby committed an offence of culpable Homicide punishable with death”

He contends that from the natural crossings or cancellation done to the Charge, the Charge was not in respect of the football field squabble/fighting but one at Brigade Quarters, and that it also means it is not about hitting but about stabbing the deceased.

He also argued that Exhibit A. i.e. his Statement to the Police was written in English language and not in the language that he speaks and understands; that there is no illiterate jurat therein and that PW4, who took it down, is an IPO, and not an interpreter.

The Respondent, however, submitted that the points he raised were not canvassed at the lower Courts, and do not arise from the Grounds of Appeal; that since they do not form part of the case argued and decided at the lower Court, the Appellant cannot raise them here for the first time without the requisite leave of Court having been sought and granted, citing Unity Bank V. Bouari [2008) 2 SCNJ 116, and Veepee Ind Ltd V. Cocoa Ind Ltd [sic] (2008) 4 SCNJ 482.

The Appellant argued in his Reply Brief that the references to cancellation and crossings were brought out to show that the said Charge was clearly for causing death by stabbing with a knife at Brigade Quarters, Kano, not hitting with a knife at a football field.

Furthermore, that the emphasis on the Language in Exhibit A, is as to whether it could properly be referred to as a confessional statement, which is why he stated as follows at page 6 of his Brief-

"It is conceded that merely writing the statement in a different Language of the Accused would not affect its admissibility, we submit that it will affect the weight of its evidence and it cannot be the basis of conviction and sentence, as in this case."

Are references to "cancellations and crossing" in the said charge and the language in which Exhibit A was recorded, fresh points? Or are they mere arguments to emphasize points already made?

A fresh point is a matter that was not canvassed at the trial nor in the Court of Appeal, and it is settled law that it is too late to raise such matter here unless new evidence emerged that was not available at trial and no human ingenuity could have foreseen it - See Mohammed V. State (1991) 5 NWLR (Pt. 192) 438 at 453 SC.

See also Akpabio v. State (1994) 7 NWLR (Pt.359) 635 SC, where this Court, per Iguh, JSC, explained the position, as follows -

The question as to exclusion of the statement in issue was neither raised before nor pronounced by the Court below. It was, in fact, neither made a ground of appeal in that Court nor before us. It is well to bear in mind that an appellate Court will not generally allow a fresh point to be taken before it if such a point was not raised and pronounced upon by the Court below unless of course, the question involves substantial points of law and no further evidence needs be adduced to determine the matter and such a course of action is necessary to prevent an obvious miscarriage of justice.

It is also settled that a point raised for the first time in this Court can only be argued with the leave of the Court because this Court as an appellate Court only has jurisdiction to correct the errors of the Court below and to know in what respect it can exercise its supervisory jurisdiction to correct any errors of the Court below - see Director, SSS v. Agbakoba {1999) 3 NWLR (Pt 595) 314 SC.

In this case the issue now is whether the fresh points raised by the Appellant actually involve any substantial points of law.

In his main Brief, he argued that the said cancellations and crossings in the Charge framed against him, was not in respect of the football field squabbling/fighting but one at Brigade Quarters.

This is a laughable argument because there is no question as to the fact that the football field is located at the Brigade Quarters.

The Appellant himself clearly stated as follows in Exhibit A -

On the 14/10/2000, at about 0730hrs at Brigade Qtrs, Kano football field, we are training of ball (sic).

PW1, PW2, PW3 and the Appellant as DW1 testified that they all lived at Brigade Quarters, when and where the incident occurred.

However, the Appellant submitted in his Reply Brief that the reference to the said cancellations and crossings is to stress the importance of the Charge vis-a-vis conviction by the lower Court for hitting with shovel on the left leg and back at the football field.

Apart from being an after-thought, he already complained in his Grounds of Appeal that "the finding that the weapon of attack is a shovel is contrary to the charge and conviction of "stabbing the deceased with a knife"; and "the weapon of attack and/or charge and findings of cause of death is clearly at variance and in doubt."

In this regard, this particular point raised is not a fresh point.

As to Exhibit A, written in English, he conceded that merely writing it in a different language from his own, would not affect its admissibility, however, it would affect the weight of its evidence.

In his Reply Brief, he said that the reference is not to raise a fresh point but to emphasize and stress the point being made clearer.

Is he asking this Court to determine weight of the evidence?

Weight of evidence is the persuasiveness of some evidence in comparison with other evidence – Black’s Law Dictionary 9th Ed.

It is settled that in appeals in criminal cases, an Appeal Court will not allow an appeal merely because the verdict reached by the trial Court is challenged on the grounds of its being contrary to the weight of evidence, and will only do so if it can be shown that the said verdict is unwarranted, unreasonable and cannot be supported having regard to the evidence - see Adi v. R 15 WACA 6 where the West African Court of Appeal (WACA) clearly stated-

The last point- - was that the decision was contrary to the weight of evidence. This is not a proper ground of appeal in criminal cases in which the point is not the preponderance of evidence on one side, which outweighs the evidence on the other side. The proper ground should have been that the “verdict is unwarranted, unreasonable and cannot be supported having regard to the evidence.”

In this case, the Appellant is asking this Court to do the impossible by assessing the weight to be attached to Exhibit A in this Appeal.

Even so, he brought in another argument that he is allowed to rely on “new line of argument on appeal”, citing Ogunbadejo V. Owoyemi (1995) 1 NWLR (Pt.271) 517, wherein this Court held -

I do not accept the argument that because the law was not cited or relied upon in the Court below to support the view of that Court on this issue and no leave has been given here, it cannot be relied upon by this Court, I believe that such line of argument is the product of conclusion between an issue and an argument or an authority in support thereof. I believe the true position of the law is that whereas a party cannot in this Court, without leave, raise an issue which was not canvassed in the Court below such a party can rely upon any new line of argument or new authorities, judicial or statutory to support his argument in an issue, which is properly before the Court

The decision of this Court in Ogunbadejo V. Owoyemi (supra), may appear helpful to the Appellant however, it cannot avail him.

The issue therein was whether the Appellant was right in relying on a Section of a Law not relied upon in the lower Courts but was in support of the argument he proffered there. This Court held that it was not a fresh point because the law cited was in support of his argument on an issue that was properly before the Court.

In this case, the Appellant wants to bring in fresh points that were not raised or argued or even suggested at the lower Courts. He did not seek leave of Court to raise and argue the said points, and the questions raised do not involve substantial points of law. The bottom line is that the fresh points will be discountenanced.

Be that as it may, he also contends that the said Exhibit A is not a confessional statement as labeled by the two lower Courts, and that they failed to resolve the issue of the weapon he used.

He submitted that in Exhibit A, he vividly described how the deceased attacked him, and how he defended himself, therefore, is not a confession but explanation of what happened - Uwaekweghinya V. State (2005) FWLR (Pt. 159) 1911/1930 SC, and Nnamdi Osuagwu V. The State (2013), 1 SCNJ 33/56-57 cited.

The trial Court held as follows on the issue of the said Exhibit A -

The Accused confessional statement that he used shovel to hit the deceased on the leg and twice at the back is an admission that a weapon was used to kill the deceased. This Court accepts the statement of the Accused as free and voluntary because the statement of Accused, Exhibit A, has endorsement of a superior officer on it, where it is reflected that the statement was read to (him) which he admitted correct and made it without duress.

In arriving at the same conclusion, the lower Court also held that –

“In his statement to the Police (Exhibit A), he (Appellant) admitted hitting the deceased on the left leg and twice at the back. He did not specifically disclose what he used to do the hitting after I got hold of the shovel and seized it and hit (sic) him on his left leg again hits (sic) him on his back ...”

It would only be a reasonable conjecture to say that it was the shovel which [he] seized that he used in hitting the deceased, but he did not say so categorically as the sentence of holding and seizure of the shovel appears to have ended, before [he] added:

“.. and hits him on his left leg again hits him on his back two times."

PW2, who watched the fight, saw what the Appellant used in stabbing the deceased (a knife) and the knife was from his pocket!

According to PW2, the Appellant had earlier used a long weapon (metal) to fight, but used a knife to stab the deceased when he (deceased) knelt down to pick the shovel which fell from his hand!

That was the evidence the trial Court believed, as well as that of the Appellant in Exhibit A, who admitted hitting the deceased on his leg and at the back, twice. The trial Court then held, thus:

"So whether it is a knife or a shovel that is (sic) used by the accused, the fact still remains that the accused inflicted injuries on the deceased by using a weapon."

Appellant had not appealed against that finding of the trial judge, having not appealed against the admission of Exhibit A as his confessional statement. Appellant cannot therefore complain in this appeal that the trial Court made use of the Appellant's confessional statement, having not appealed against that decision! I do not, therefore think Appellant would be right to argue that the weapon with which he inflicted later injuries on the deceased was not clear, having admitted using lethal weapon, all the same, to inflict the fatal injuries that caused the death of the deceased, the same day he inflicted the injuries on the deceased.

The Appellant submitted that he vehemently appealed against the said findings, and he referred this Court to Ground d. Particular i. of the Grounds of Appeal wherein he complained that "Exhibit A is not a confessional statement of the charge framed against [him]."

The Respondent submitted that Exhibit A was voluntarily made, and the Appellant did not object to its admissibility at trial; that it is a full admission of his guilt and the Prosecution adduced evidence through PW5 connecting his act with the cause of death.

Furthermore, that the two lower Courts found that Exhibit A is a confessional statement, which amounts to concurrent findings of fact, which cannot be disturbed by this Court and since he did not object at the trial, it can be concluded that he made Exhibit A on his own accord, and he cannot therefore, be heard questioning the Exhibit's validity as a confessional Statement or the probative value placed on the said Exhibit A by the two lower Courts.

It also submitted that there is no doubt that the Appellant's evidence as DW1 is a total and complete retraction of Exhibit A, and it is settled that mere retraction of a voluntary confessional statement by an accused person does not render it inadmissible or worthless and untrue in considering his guilt - Egboghonome V. State (1993) 7 NWLR (PL 306) 383; Joseph ldowu V. State (2000) 7 SC (Pt. 11) 50, Dibie V. The State (2007) 3 SCNJ 160 cited.

The position of the law as regards confessional statements is not without its peculiarities. Section 28 of the Evidence Act 2011, says a confession is an admission made by a person charged with a crime, stating or suggesting the inference that he committed it. In my view, the key word there is “inference” which simply means, “A conclusion reached by considering other facts and deducing a logical consequence from them”- Black’s Law Dictionary 9th Ed.

The Appellant is charged with a crime—culpable homicide punishable with death, and he admitted or explained (as he put it) in Exhibit A that the deceased hit him with a shovel. He got hold of the shovel and hit the deceased on his left leg then on his back, and “again on his back two times”. He further stated as follows:-

He ran away, then I asked one Mamud (sic) to go and see the wound inflicted on him, he left and he did not come to me again. By 1515 hrs I asked one Ali, how about the wound? He answered me that he has been treated and discharged, he is at home sleeping. At about 2300hrs I went and asked one Idi that how about the wound? He told me that he is at home and around 0530hrs on 15/10/2000, I was invited by the brother of the deceased to Gwagwarwa Police Station, then I was detained. Then when I was taken to Bompai ClD, I was informed that the boy had died. The shovel I used through (sic) it at the spot.

The Appellant admitted in his statement to the Police (Exhibit A) that he actually hit the deceased with a shovel a number of times, and was later informed that he died from the injuries he inflicted. There was no objection to its admissibility when it was tendered.

This Court has repeatedly stated that the appropriate time to object to the admissibility of a statement said to be a confession is when the statement is sought to be tendered—see Oseni V State (2012) LPELR-7833(SC). Wherein I.T Muhammad JSC observed-

There was no objection to the admissibility of the Appellants confessional statement. It is rather too late to raise such an issue on appeal. “It {is} regrettable that Appellant’s counsel at the trial stage did not object to the admissibility of [this] confessional statement, yet he went on to blame the trial Court in not treating Appellant’s confessional statement with utmost caution. It will appear to be too late in the day to seek to supply a remedy to a dented or a crucified matter, which can hardly be revived... It is too late to seek to retract such confessional statement after its admission without objection from the defence. It is always taken as an afterthought, which Courts are not ready to accommodate.

In this case, the Appellant's grouse is that he appealed against the trial Court's finding that Exhibit A was a confessional statement, contrary to what the lower Court stated that he had not done so.

This line of argument takes him nowhere; the Respondent is right, even if the lower Court had considered the issue, it would make no difference to its decision. He did not object to the admissibility of Exhibit-A at the trial Court. It was too idle to raise the issue at the lower Court, and raising it in this Court is out of the question.

But that is not to say that the Prosecution is left off the hook. It is an ironclad principle that the Prosecution must prove its case beyond reasonable doubt, and this remains so even if the accused admits in his Statement to the Police that he committed the crime: the Prosecution must still prove it beyond reasonable doubt see Adekoya v. State (2012) LPELR-7815 (SC), and Madu V State (2012) LPELR-7867 (SC), where this Court, per Adekeye, JSC, said -

The Prosecution has the burden to prove the guilt of an accused beyond reasonable doubt, regardless of the plea of the accused or where he admitted the commission of the crime in his statement to the Police.

And the Prosecution must so prove each ingredient of the offence - see Chukwu v. State (2012) 12 SCNJ (Pt 1) 208. cited by the Appellant and Respondent, wherein this Court stated as follows -

In a case of culpable homicide or murder, the following conditions must be met for the Prosecution to prove its case beyond reasonable doubt-

i. That the deceased had died

ii. That the death of the deceased was caused by the Accused; and

iii. That the act or omission of the Accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence.

The Appellant admits ingredients i however, it is his contention that ingredient No. ii, was not proved beyond reasonable doubt, as the lower Courts failed to resolve the issue of the weapon used. The trial Court held as follows in relation to the said ingredient -

The contention of defence counsel is that since the deceased was treated and discharged when he was first taken to the hospital, there is an intervening factor as to the cause of death. However, the argument will not hold because the evidence of PW5 the medical doctor, and Exhibit C the medical report, confirmed the cause of death to be intra spinal memiqeal hemorraghe (sic) that is bleeding under the spinal cord resulting from deep cut sustained by the deceased at his middle lower back. Exhibit B2, the photograph of the deceased, also showed the wounds at the back of the deceased. PW2 who is the eyewitness to the incidence, told the Court that as the deceased and the accused were fighting, the Accused, who had a knife stoked (sic) in his pocket, brought out the knife and stabbed the deceased with it at the back. So, whether the Accused (sic) was treated and discharged for the 1st time is immaterial since the cause of death as stated by the Doctor is bleeding under the spinal cord resulting from deep cut sustained by the deceased at the back. And the Accused himself in his confessional statement, Exhibit A, admitted stabbing the deceased at the back. The evidence of PW5 and the medical report, Exhibit C settle the cause of death of the deceased.

The lower Court considered what the Appellant said in Exbibit A *vis-a-vis* his evidence as DW1; the evidence of PW2, PW3, DW2 (his Witness) and Exhibit C (medical report) and held as follows -

I do not therefore think Appellant would be right to argue that the weapon with which he inflicted fatal injuries on the deceased was not clear, having admitted using lethal weapon, all the same, to inflict the fatal injuries that caused the death of the deceased.

The lower Court further stated as follows at 301 of the Record-

That Report of the injuries and the spot of the injuries on the deceased agree, completely with evidence of PW2 and with the statement of the Appellant in Exhibit A that sharp object was used to hit the deceased (knife or shovel) and the point of impact was the leg and back, especially the back.

The Appellant argued that it is only evidence of PW2 that bears out use of knife; that PW3 said under cross-examination that he did not see him stabbing the deceased; that PW2’s evidence was not clear as to whether it was "a long weapon (Barandani metal), shovel or knife, that was used"; that PW4's evidence shows it was a shovel that was recovered; and that the only evidence shows that the deceased was heavily drunk and in the fight, fell on the shovel he seized from PW3, a bricklayer, who was working in the area

As to the said Exhibit C he referred to the evidence of PW5 the Medical Doctor, who wrote the Medical Report, as follows-

The cause of death "intra spinal memingeal hemorrahges (sic)" means bleeding into the spinal cord. The deceased has a cut with sharp object of about 5cm. There is another cut on the middle of the left thigh also caused by sharp object. He also had a stab at the middle lower back and that is the injury at the lower back that caused bleeding to the spinal cord, which eventually caused the death of the deceased.

He pointed to the entry on Exhibit C - "Alleged cause of death - Stab by Cutlass" and the medical terms used of the cause of death, and argued that the lower Court did not specifically find that he stabbed the deceased with any knife; that the cause of the death in Exhibit C is either cutlass or stab; and that Exhibit C never stated that hitting with a shovel or flat element caused the death.

He further argued that the Police through PW4 never said that they recovered any knife at all but shovel; that the deceased did not die immediately after the fight, and there was no evidence of anybody, who followed him from the fight till his eventual death therefore, the lacuna and doubt ought to be resolved in his favour

The Respondent, however, submitted that it is settled that this Court will not disturb concurrent findings of fact of the lower Courts, unless there is some miscarriage of justice or a violation of some principles of law and procedure, citing Omoregie V. State (2008) 12 SC (Pt. III) 80, Ben V The State {2006) 7 SCNJ 215.

The issue here is whether the death of the deceased was caused by the Appellant, and his contention is that there was no evidence to establish the actual weapon that he used in causing the death.

Let me quickly say that this issue is easily resolved because his argument cannot stand against the decision of this Court in Ali V. State (2015) LPELR-24711 (SC), wherein, Ogunbiyi, JSC, observed-

The Appellant is very particular about the actual instrument used in striking the deceased i.e. to say, the exact specification as to whether it was an axe or cutlass/matchet that was used. What is of relevant significance is the fact that the deceased was struck with a heavy weapon (axe) in the middle of the head, which got broken and caused his instant death. It is well taken that the Prosecution has proved beyond reasonable doubt that the Accused used the weapon on the deceased and caused his death. The Medical Doctor, PW4, in his Report did confirm and corroborate the use of weapon on the deceased's head. The question whether the instrument used was an axe or matchet did not in the least matter. What is relevant is that the instrument was heavy and lethal. It was also applied very forcefully and caused instant death. PW1's evidence on the use of heavy object on the head was corroborated, therefore, by PW4, the Medical Doctor. In the course of the examination of the corpse; he found a big cut wound on the deceased's skull and also a culminated fracture of the skull. The Appellant expects PW4 to state the specific instrument used and inflicted the big cut wound on deceased's skull, which caused the eventual death. As rightly submitted on behalf of the Respondent, the said witness is not under any obligation to state the kind of instrument used on the deceased. This is more so when PW4 was not at the scene of incident. It was sufficient that his testimony and findings are corroborative of PW1 the star witness.

As Ogunbiyi, JSC, pointed out in Ali V. State (supra), this Court held in Ben V. State (supra), (2006) 16 NWLR (Pt. 1006) 582 that medical evidence is not essential in establishing this issue where the deceased was attacked with lethal weapon and died instantly.

In that case, Ben V. State (supra), Akintan, JSC, stated as follows -

In cases, where a man was attacked with lethal weapon, and he died on the spot, cause of death can properly be inferred that the wound inflicted caused the death. Put in another form, where the cause of death is obvious, medical evidence ceases to be of any practical or legal necessity in homicide cases. Such a situation arises where death is instantaneous or nearly so.

Katsina-Alu, JSC [as he then was], further observed as follows -

The Appellant struck the deceased on the head - - He fell down unconscious, never regained consciousness until he died a few hours later in hospital. Medical evidence was not necessary to determine the cause of death in the circumstances of this case. It could properly be inferred that the wound inflicted caused the death of the deceased.

In this case, the deceased came after the Appellant with a shovel. The Appellant admitted in Exhibit A that he got hold of the shovel and hit the deceased a number of times on the left leg and back. After the deceased ran away, he asked "one Mamud", to go and see the wound he inflicted on him. When Mamud did not come back, he asked "one Ali" first and then "one Idi" - "how about the wound".

In his evidence in Court as DW1 the Appellant stated as follows-

While we were fighting both of us felt (sic) down on the shovel and that is how Nura got injured at his back. I then asked my boys to take him to the Chemist. From the Chemist, he was taken home. The following day in the evening when I went to his house to see how he was feeling, I was told that he was taken to Murtala Muhammad Hospital. The following day I was told that he is dead.

A confession is an admission by an accused stating or suggesting the inference that he committed the crime, and I did say earlier, inference means a conclusion reached by considering other facts, and deducing a logical consequence from them. In this case, it is clear from what the Appellant narrated in Exhibit A and as DW1, about the use of the shovel and subsequent death of the deceased, that he did, in fact, admit that he caused the death of the deceased.

Even if his argument that he never so admitted, holds water, the Prosecution adduced more than enough evidence to support the findings of the two lower Courts that he used a lethal weapon, and the lethal weapon he used on the deceased, led to his death.

PW1 confirmed his evidence as DW1 that the deceased was first taken to a chemist, then to the Hospital, where he later died.

PW2 gave a detailed account of the unfortunate incident that led to the death of the deceased on that fateful day. He testified that -

The deceased Nura called me and I asked him to come, but he refused and asked me come to where he is. Then the [Appellant] asked why I should go to the deceased. Since he is the one calling me, he should come to me so I did not go to the deceased; I came back and sat down with [Appellant] and Mamuda. The deceased came where we were sitting with a shovel of one Mallam Nura, which they are working with. When he came (sic) he stood in front of [Appellant] and started to abuse him. [Appellant] got up to fight the deceased but we intervened. The [Appellant] said it’s none of our business, so he went and got a long weapon (Barandami metal) and approaching the deceased where they were fighting themselves in the field. As they were fighting the shovel of the deceased felt down and as he knelt down to pick it, [Appellant] stabbed deceased with a knife at the back. [Appellant] had a knife stocked (sic) in his pocket. [Appellant] ran away and the deceased also left for a nearby uncompleted building and lied (sic) down there. Some people came and picked him and took him (deceased) to the Chemist."

DW2. an eyewitness called by the Appellant, testified as follows -

We were watching football when we head somebody throwing abuses. It was Nura [deceased] that was abusing [Appellant]. The [Appellant] and deceased started to fight, but they were separated. The deceased took a shovel of one Mallam Nuhu [PW3] and approached us, some of us ran away and Nura the deceased and [Appellant] started to quarrel. Later we saw blood coming out of the head of deceased. We pleaded with the [Appellant] to take the deceased to the hospital, which he did.

But far weightier than all the above oral testimonies is Exhibit C, Medical Report, prepared by PW5 which tallies with the injuries, the Appellant admitted that he inflicted on the deceased that day.

The Appellant stated in Exhibit A that he hit the deceased "on the back and again on his back two times". PW5 explained that it was the injury at his lower back, which caused bleeding to his spinal cord that eventually caused the death of the deceased.

The lower Court is right; the Appellant cannot argue that the weapon he used on the deceased is not clear. He used a weapon, and whether it was a shovel or a knife, the weapon proved lethal; the deceased died the next day as a result of the injuries received.

In such circumstances, the position of the law is that the cause of death can properly be inferred that the injuries caused the death.

In other words, where cause of death is obvious, it is not a vital component of proof to have medical evidence to establish it. See Ali v. State [supra], Ben V. State {supra}. More importantly, the medical doctor is not obliged to specify the instrument used.

In this case, the Appellant admitted he used a lethal weapon to wound the deceased, which caused his death, and that is that.

It is not over yet. The Prosecution must also prove that the act that caused the death of the deceased was intentional with the knowledge that death or grievous bodily harm was its probable consequences. On this score, the Appellant cited Garba v. State (2000) 4 SC 157/163, Chukwu v. State (2012) 12 SCNJ (Pt. 1) 208, and argued that it is the deceased that attacked him with a shovel, and in his “fight and struggle for safety”, the deceased, who was drunk and weak, fell on the shovel. He then asked the question - "lf there was any fight, can the act of struggling be the necessary mens rea intention to kill the deceased? And he answered - No.

He urged this Court to set aside the lower Court's decisions on mens rea, the intent to kill or cause grievous bodily harm, and in particular, the following finding of the lower Court at page 303.

Appellant cannot therefore be taken seriously, when he claims he did not intend to cause the death of the deceased, or cause grievous bodily harm, when he inflicted such injuries on him with the lethal weapon, hitting the deceased at the thigh and twice at the lower middle back, where the Spinal Cord is located, and he did that while the deceased was kneeling down, apparent sign of surrender.

His contention is that the lower Court's finding is not borne out of evidence on the record but based on sentiments and conjecture.

He submitted, citing Mbang v. State (2012) 6 SCNJ (Pt. 11) 395, and lgri v. State (2012) SCNJ (Pt.11) 365 that the onus is on the Prosecution to prove its case beyond reasonable doubt based on all the ingredients, which must co-exist and having failed to prove this ingredient, his conviction and sentence should be set aside.

The Respondent insists that there are concurrent findings of fact by the lower Courts that he caused the death of the deceased, and knew that death would be the probable consequence of his stabbing the deceased with a knife at his back, and since he failed to show any special circumstance or miscarriage of justice arising from their concurrent findings that the Prosecution proved all the ingredients of the offence beyond reasonable doubt, this Court should not interfere with the said concurrent findings of fact, which are, in its own assessment, credible and unimpeachable.

The Appellant has a point but I will also say it is not enough to torpedo the lower Court's judgment out of the water. Yes, there is no evidence to support its statement that he hit the deceased – “while deceased was kneeling down, apparent sign of surrender.”

Evidently, the lower Court lifted what PW2 said at page 8 of the Record that while they were fighting, the shovel fell down and as the deceased "knelt down to pick it" the Appellant stabbed him.

PW2 testified in Hausa through an interpreter and I believe I can take judicial notice of the fact that a lot is lost during translations.

A Court deals with cold hard facts, and nothing but the facts. In this case, the Appellant and deceased had gotten into a fight. During the fight or struggle, as the Appellant called it, the shovel fell from the deceased's hands, and it was when the deceased was trying to pick up the shovel that the Appellant hit him at the back. There is absolutely nothing on record to suggest or imply that the deceased knelt down in "surrender" as the lower Court inferred.

This is an embellishment that is unbecoming in a Judgment. But it is not every error or wrong inference made by a Court that will lead to the reversal of its Judgment. An Appellant must show that the error or wrong inference, as in this case, has occasioned a miscarriage of justice and/or substantially affected its decision - see Ajuwon V. Akanni & Ors (1993) 9 NWLR (Pt. 316) 182 SC.

In other words, an error that has not occasioned miscarriage of justice is immaterial and may not affect the result of a decision. This is because an appellate Court only has to decide whether the decision of a lower Court was right; not whether its reasons were - A.G., Ekiti State V. Adewumi (2002) 2 NWLR (Pt. 751) 474 SC.

In this case, it is clear from the said passage that the lower Court observed that the Appellant cannot be taken seriously when he claimed he did not intend to cause death or grievous bodily harm to the deceased, when he had hit him with a lethal weapon "at the thigh and twice at the lower middle back where the spinal cord is located", and it merely added the comment "and he did that while the deceased was kneeling down, apparent sign of surrender."

The observation and comment were made after the finding of fact that he hit the deceased with a lethal weapon at the back.

The lower Court merely expressed an opinion that the Appellant cannot be taken seriously in view of the fact that was established.

In the circumstances, it cannot be inferred that the comment or embellishment, as I called it, substantially affected its decision. The Appellant's complaint on this score is therefore, immaterial.

Be that as it may, the question whether the said act was done intentionally with the knowledge that death was a likely outcome, dovetails into Issue 2 - whether the lower Court was right to hold that defences of provocation and self-defence will not avail him, which target the same principles, and they will be taken together.

The Court below held as follows, on the defence of provocation -

“The evidence in this case negative(d) any claim to provocation as Appellant saw a fight coming, and prepared for it! He actively started it, when he attacked the deceased, whom he himself said was seriously drunk. Even when his friends intervened, to stop the fight, [he] resisted, saying it was none of their business! Right from when the drunk Nura (deceased) called PW2 and Appellant advised PW2 not to go to the deceased, it is apparent he was spoiling for a fight with the deceased, and so when the deceased approached them with the shovel in hand, and abused [him], Appellant saw opportunity to act having an excuse to fight the deceased! He took undue advantage of the drunken state of the deceased, whom he even testified as being weak! While others ran from the drunk, he looked for a long metal to fight him and, even when the shovel held by the deceased fell down, suggesting he was over powered and he was not capable of posing any immediate danger to [him] or to anyone, [he] decided to take advantage of his kneeling down (to pick the shovel) to stab him to death!”

Defence of provocation cannot avail such a man, who acted in such a cruel and unusual manner, even if the words of abuse were stated and adjudged provocation - - Every sane and reasonable person is expected to take pity on a drunken person, and to seek or try to help him in the stead of stupor, rather than harm him, or increase his self-inflicted troubles, [he] rather elected to destroy the drunk. I think he was callous. It is correct, to say that the trial Judge considered the defence of self-defence jointly with that of provocation. See page 84 where she observed…. The learned trial Judge thereafter went on to consider the provocation aspect in detail, and then held. The learned trial judge erred in failing to give the defence of self-defence proper treatment, separately, from the consideration she made on the defence of provocation.

As to the defence of self-defence, the Court below held as follows -

The Respondent's Counsel had argued that the defence of self-defence cannot avail the Appellant, going by the evidence before the trial Court. As earlier held in this judgment, Appellant cannot be free from blame or fault in bringing about the encounter, He was the one that instigated the drunken man (deceased) to turn against him (Appellant) with abuses, and at that point, Appellant started the fight, even upon knowing that the deceased was drunk and so not responsible for his action! Considering this point the learned trial judge observed, on page 86 of the Record, as follows:

“lf it is true, the deceased was drunk at the time it is commonly (sic) knowledge that any person who is drunk is not in his senses. That is why the more reason that Accused should have ignored the deceased and the incidence would have been avoided. This Accused failed to do because he intended to kill the deceased."

There could not have been any impending peril to the life of Appellant or of any bodily harm, whether real or apparent, as to create any honest belief of an existing danger or necessity in the circumstance that a drunk holding a shovel, stood (may be staggering) abusing Appellant, who was in company or his Friends or boys as he called them). Appellant said the deceased was "seriously drunk" and "he was weak" and that was shown, when the shovel (the deceased) held fell down, and he had to kneel down in order to pick it! Appellant decided to take advantage of such a weak and vulnerable man, by stabbing him as he knelt down!

There is evidence that some of the other friends of Appellant, who saw the state of the deceased, ran from him, when he approached them with the shovel. The Appellant did not consider that option, to escape or retreat. He rather initiated the attack! Also there was no necessity for taking life, at all. If anything, Appellant had a moral duty to help and protect the drunken man from harm. He can, (sic) therefore, claim any right of acting in self-defence in the circumstances, as the same cannot avail him in the situation.

The Appellant complained that the trial Court only considered the defence of provocation and the Court below found that the trial Court failed to give the defence of self-defence proper treatment", but went on to consider and dismiss the defence of self-defence.

As to provocation, he cited Section 222(1) of the Penal Code, Edoho V. State (2010) 4 SCNJ 100, Gambo Musa v. State (2009) 7 SCNJ 329, and argued that the Prosecution and trial Court held on to the fact that the exact words of provocation are unknown, and the lower Court went further to hold that his conduct was cruel, which is not correct, because he clearly stated in Exhibit A that -

“I heard an abuse from one Nura saying no useless person can disturb us, he kept on abusing but he did not mention anybody’s name and one Yakubu was near me than he want to go and urinate and Nura called him to come, so that he will beat him, but l told Yakubu to come to me let him not go to him and as Yakubu come to me and sit down, then Nurah called my name and abused me and at that place they are some people building house, then Nuru went to them and took a shovel and come to me. I stand up, and he hits me on my head and wounded me again he hits me on my hands then I got hold of the shovel and seized it and hits him on his left leg.”

Furthermore, that the exact words and the exact circumstances of provocation are replete in the record; particularly the evidence of PW2 and PW3. He also referred to his evidence in Court as PW1-

“I was standing with my friend Mahmuda when we heard abusive words. It was Nura the deceased that was using abusive language we did not answer. He then faced me and started abusing me. I asked him why he was abusing me. Then one Yakubu Umar (PW2) held him and pushed him at that time Nura the deceased was drunk. He later went and brought shovel and we heard people shouting. He was approaching him with the shovel and saying that he will kill me people started running and Nura the deceased hit me with shovel on my head when he wanted to hit me the 2nd time I held him and we started to fight.”

And his response under cross-examination, wherein he added-

“When Nura was abusing me, it was PW2 that intervened. It is true PW2 is a good person, who does not want trouble. Yes, by Yakubu (PW2)’s intervention he does not want (sic) either the deceased or myself to be harmed. When he approached me with the shovel before I realized he was (sic) hit me. The deceased was drunk in compression (sic) and he was huge. When the deceased was abusing me, he was seriously drunk.”

He argued that in view of the above evidence, it is difficult to hold, as the two lower Courts did, that the exact words were unknown; and conclude, as the Court below did, that the circumstances was improper for provocation. He says that there was a sudden fight in the heat of passion and absence of premeditation, there was loss of self control both actual and reasonable, and the retaliation was proportionate to the provocation. He further submitted that -

“The Accused never took undue advantage or acted in a cruel, callous or unusual manner at all. It is inconceivable that aside from the abuse, only few mortals will have the calmness after been [sic] hit on the head with a shovel!!!”

On self-defence, he cited Omoregie v. State (2008) 18 NWLR (Pt. 1119) 464 and Sule v. State (2009) 6 SCNJ 65, on the ingredients, and submitted that even as the trial Court did not consider same, the Court below that did, failed to consider it fairly and properly; and what the Court below did throughout its Judgment was not considering the defence, but the drunken state of the deceased.

He insisted that he was free from fault in bringing about the encounter; that he is a coach and was in the football field with his team when the deceased, heavily drunk came to insult and abuse him as a useless person, and went on to snatch a shovel, which is a weapon likely to take life or cause probable grievous bodily, and hit him suddenly on the head; that there was no sense of escape or retreat from an intruder; that the defence was proved; and the Court below did not consider the defence of self defence for him, but conjecture, sentiments and emotional support for the deceased.

The Respondent submitted that what the lower Court found was that the trial Court "erred in failing to give the defence of self-defence proper treatment, separately from the consideration she made on the defence of provocation"; that failure to give separate consideration is not one and the same thing as failure to consider, and the trial Court extensively and painstakingly considered both and that the Court below, having ruled as it did, proceeded to evaluate the evidence adduced, and then came to the conclusion that the said defence of self-defence cannot avail the Appellant.

On provocation, it submitted, citing Edoho V. State (supra), (2010) 14 NWLR (Pt. 1214) 551; that the said defence cannot be at large without supporting evidence; that Appellant did not adduce any evidence, which is credible enough to support his allegation; and this Court held in Edoho V. State (supra), and Uwagboe V. State (2008) 4 SC 67, that for provocation to constitute a defence, it must consist of three elements, which must co-exist, namely:-

(a) The act of provocation was 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 is proportionate to the provocation.

Furthermore, that the two lower Courts concluded that he did not adduce evidence of the actual insultive words used against him, and there is nowhere in Exhibit A and evidence as DW1 that he showed the insultive words uttered against him by the deceased; and he must prove that the act relied on by him was provocative citing Uwagboe V. State (supra), Kaza V. State (2008) 2 SCNJ 373.

As to self-defence, it cited Omoregie V. State (supra) and Musa V. State [supra], where this Court held that the defence can only avail an accused when the following ingredients are proved -

(a) Accused must be free from fault in bringing about the encounter;

(b) There must be present an impending peril to life or of great bodily harm either real or so apparent as to create honest belief of an existing necessity;

(c) There must be no safe or reasonable mode of escape by retreat,

(d) There must have been a necessity for taking life----

It argued that the Prosecution showed that it was the Appellant, who with malice aforethought sought for a confrontation with the deceased; that PW2's evidence attests to the fact that instead of avoiding the encounter, the Appellant with premeditation left the field to look for a long [Barandani metal] with which he returned to fight with the deceased, who, in his own words, was drunk.

Furthermore, that it is clear from the testimony of DW2 that there was a safe and reasonable mode of retreat for the Appellant but he chose to stay and fight with a drunk, and the question is-

lf the DW2 and others took the reasonable decision of retreating from the deceased, why did the Appellant stay?

In its view, the Appellant saw an opportunity of taking advantage of a drunk and weak person which he did with dire consequences.

It also argued that when the shovel held by the deceased fell down, there was no impending peril to him; and that as DW1- he alluded to the fact that deceased was 'seriously drunk and weak' therefore, there could not have been any impending peril to him, but he willfully proceeded to stab the deceased fatally on his back, even when there was no necessity to take life in such a situation.

The same evidence - different inferences; what says the law? First, there is a thin line between the defences since, as Oputa, JSC, noted in Nwede V. State (1985) 3 NWLR (Pt. 13) 444, the defences are basically conclusions drawn from surrounding circumstances and a party, who relies on them, must introduce evidence of those surrounding circumstances leading to a conclusion that he was provoked and/or fought back in self-defence; or else, a trial judge is justified in drawing other conclusions it can reasonably draw from the totality of evidence led. He further observed as follows -

After a quarrel, it is natural to expect one of two things - reconciliation or revenge. Either the parties will shake hands and become "friends" again or one party may like "to pay the other party back". Which one it is, will depend on the totality of the evidence.

The defences may be similar in that regard, nonetheless, there are also substantive and significant differences in effect - see Laoye v. State (1985) 10 SC 177, wherein

Karibi-whyte, SC, stated that -

“Whereas provocation merely reduces the offence of murder to manslaughter and merely is a justification for killing. Self defence excludes criminal responsibility entirely. The facts constituting provocation need not amount to assault likely to result in death or grievous bodily harm, whereas that is the only condition requisite for the defence of self-defence. It will be correct to state that where the fact established have gone beyond mere provocation based on words or conduct and have threatened the life of or grievous bodily harm to the accused, the proper defence available to the accused is self-defence.”

In this case, the Appellant's grouse is that the lower Courts did not properly consider the said two defences of provocation and self-defence, which he says, were rooted on firm ground in his favour.

When does a defence of provocation succeed in a charge of culpable homicide punishable with death? Section 222(1) of the Penal Code that is applicable in Kano State provides as follows -

“Culpable homicide is not punishable with the death if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.”

Evidently, a plea of provocation does not exculpate the accused, but is only a mitigating factor when it comes to the sentencing. For the defence to avail the accused, the burden is on him to establish that the act of provocation was "grave and sudden"; that he must have been deprived of the power of self-control; and the extent of retaliation is proportionate to the provocation offered- See Galadima V. The State (2012) LPELR-15530(SC).

It is also settled that words can constitute provocation but this depends on the actual words used, and what they mean to a reasonable person having a similar background with the accused- see Akalezi V. State (1993) 2 NWLR (Pt 273) 1 SC wherein this Court, per Wali, JSC, stated as follows on this particular point -

“For words to suffice, certain basic ingredients must be satisfied. The words - must be such as to incense a reasonable man of such an accused person's standing and education in life to anger of such a nature as to lead him to passion or loss of self-control, and the accused person must not have had the time to cool down before he did the act with fatal results, which led to the charge.”

So, the definition of provocation must be considered in the light of particular facts and circumstances of the case, which includes the station in life of the accused, and the society in which he lives - see Lado v. The State [1999] NWLR (Pt. 619) 369 SC.

The words themselves must be known - see Shalla V. State (2007) 18 NWLR (Pt. 1066) 240 SC, wherein the Appellant and five others slaughtered the deceased with a knife because he was said to have made remarks insulting to Prophet Mohammed [S.A.W].

He was tried, convicted and sentenced to death by the Kebbi State High Court for culpable homicide punishable with death, and his appeal to the Court below was dismissed. In dismissing his further appeal to this Court, per Onu, JSC, observed as follows-

Words alone can constitute provocation depending on the actual words used and their effect or what they mean to a reasonable person having a similar background with the Appellant, and in the case at hand, where the exact insultive words are neither known nor disclosed and moreover not even heard from the mouth of the deceased, it will not be possible to determine whether the defence of provocation is open or available to [him].

In his own Judgment in Shalla's Case, I T. Muhammad, JSC, said -

Not only are the exact words used by the deceased unknown, no one testified as to the facts that he heard the deceased utter those words, not even the Appellant, who now intends to take advantage of provocation in the circumstances

A similar scenario played out in Kaza V. State {supra), where the deceased was also slaughtered for allegedly doing the same thing - insulting Prophet Mohammed (S.A.W). In dismissing the Appeal this Court, per Chukwuma-Eneh, JSC, reiterated the same point -

“The only evidence the Appellant and his co-confederates have against the deceased is the unproven rumor that [they] overheard, that is, hearsay allegation that the deceased had insulted Prophet Mohammed (S.A.W). It is noteworthy that what constitutes the content of the insult so far has remained a mirage to the Courts below and so also this has disabled the Respondent to refute it. Even then it is not open to the Courts below to speculate on the words of the abusive insult.”

In this case, the Appellant is a football coach, and the question is - what did the deceased actually say that provoked the Appellant so much that he stabbed the deceased in front of his football team?

The test is whether a reasonable man in the street or status of the accused would have been provoked to commit the offence - See Kaza V. State (supra), Shalla V. State (supra), and Owhoruke v. COP (2015) LPELR-24820 (SC), where Rhodes-Vivour, JSC, said -

“There is no set standard of retaliation expected from a reasonable man; it all depends on the Appellant's station in life. A reasonable man is a reasonable man of the accused person's standing in life and to a large extent, his cultural background.”

I set out the Appellant's evidence as he had laid it out in his Brief. He merely stated in Exhibit A that he had heard the deceased say ''no useless person can disturb us" without mentioning any names, and it was only after he asked PW2 not to go to the deceased that the deceased called out his name and abused him. He conceded that PW2 did not state the exact words used by the deceased and there is nowhere in his evidence in chief and cross-examination that he explicitly stated the exact words that the deceased used.

In Kaza V. State (supra), this Court relied on the very apt observation of the Lord Chancellor, Viscount Simon, in the case of Mancini v. Director of Public Prosecution 28 C.A.R. 55 at 74 that -

“In applying the test, it is of particular importance to take into account the instrument with which the homicide was affected, for to retort, in the heat of passion induced by provocation, by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.”

In this case, it is an established fact that the Appellant retaliated by stabbing the deceased a number of times with a lethal weapon. But there is nothing on record of what the deceased actually said that caused the Appellant, a football coach, to lose his self-control. In the absence of the actual abusive words used by the deceased, the Lower Court was standing on firm ground when it concluded that the defence of provocation was not open to the Appellant.

The Appellant also put up a defence of self-defence, which is the use of force to protect oneself, one's family or property from a real or threatened attack - see Black's Law Dictionary, 8th Ed. It is recognized that a citizen has the right to defend his person, family and property against unwarranted aggression, trespass or threat. Section 33 (2) of the 1999 Constitution (as amended) provides -

“A person shall not be regarded as having been deprived of his life in contravention of this Section, if he dies as a result of the use, to such and in such circumstances as are permitted by law, of such force as is reasonably necessary-

a. For the defense of any person from unlawful violence or for the defence of property.”

The guiding principles are necessity and proportion - the force must have been necessary and it must have been reasonable - see Black's Law Dictionary, 8th Ed-; and Adeyeye v. State (2013) 11 NWLR (Pt. 1364) 47, wherein Ogunbiyi, JSC, observed as follows:

“The two questions, which ought to be posed, and therefore, answered before the trial Court, were:-

(1) on the evidence, was the defence of self-defence necessary

(2) Was the injury inflicted proportionate to the threat offered, or was it excessive? if however, the threat altered is disproportionate with the force used in repelling it, and the necessity of the occasion did not demand such self-defense, then the defense cannot avail the Accused. See R v. Onyeamaizu (1958) NRNLR 93.”

That said; the actual limits within which Section 33(2)(a) of the Constitution operates are set out in the Criminal and Penal Codes. The relevant provisions of the Penal Code are as follows:

“Section 59 -

Nothing is an offence which is done in the lawful exercise of the right of private defence

Section 60 -

Every person has a right, subject to the restrictions hereinafter contained, to defend -

(a) His own body and the body of any other person against any offence affecting the human body.

Section 62 -

The right of private defence in no case extends to inflicting of more harm than it is necessary to inflict for the purpose of defence.

Section 63 -

There is no right of private defence in case in which there is time to have recourse to the protection of the public authorities.

Section 65 -

The right to private defence of the body restrictions mentioned in Sections 62 and 63, to the voluntary causing of death only when the act to be repelled is of any of the following descriptions, namely:

(a) An attack which causes reasonable apprehension of death or grievous hurt.”

Section 222 of the Penal Code [on when culpable homicide is NOT punishable with death], provides as follows in Sub-section (2) -

“Culpable homicide is not punishable with death if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the powers given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.”

S.S. Richardson explained in Notes on the Penal Code Law that -

“This Sub-section was necessary because a person exercising his right of private defence is not usually in a situation in which he has time to weigh up the niceties of his legal position. Since the law permits the killing of a person in self-defence in specified circumstances -and the causing of harm short of death in other cases, there are many occasions when an act falls on the wrong side of what is really an arbitrary line of distinction. In the application of this sub-section, it is essential that the person causing hurt in the bonafide exercise of the right of private defence should act without any intention of doing more harm than is necessary for the purpose of such defence. The onus of proving private defence is on the accused. Where the accused sets up the principle of self-defense, the question to consider is whether the accused had any reasonable apprehension that he would be hurt and particularly in a case where he has caused death, whether he was under any reasonable apprehension of grievous hurt or death to himself. It is the apprehension that is the important point not the actual injuries suffered by him.”

See also Kwaghshir V. The State (1995) 3 NWLR (Pt.386) 651 SC, wherein this Court held that four cardinal conditions must exist before taking of life of a person is justified - Accused must be free from fault in bringing about the encounter; there must be present an impending peril to life or of great bodily harm either real or so apparent as to create honest belief of an existing necessity; there must be no safe or reasonable mode of escape by retreat; and there must have been a necessity for taking the life of the person.

In Kwaghshir's Case (supra), this Court relied on the Indian case of Kosavalu Naidu (1930) MWN 502, wherein it was held that a person cannot avail himself of the plea of self-defence when he was himself the aggressor and willfully brought on himself without real excuse, the necessity for the killing of the deceased.

In this case, the lower Court held that the Appellant cannot be free from blame or fault in bringing about the encounter since he had instigated the deceased to turn against him with abuses.

But this is not true. It is clear that it was the deceased that initiated the 'encounter' that eventually led to his death that day.

The Appellant did not start the fight, as the lower Court said; it was the deceased that came after the Appellant with the shovel. But the question is whether the Appellant's action after the shovel fell down from the hands of the deceased qualifies as self-defence.

In Owhoruke V. COP [supra], the deceased snatched a bottle of drink from the Appellant and broke it. He then threatened the Appellant with the broken bottle. The Appellant confessed that he later overpowered the deceased; seized the broken bottle from the deceased, and then used it to stab the deceased in the neck.

The issue was whether the Appellant was in apprehension of death or grievous bodily harm at the time. This Court held that -

The Appellant was no longer in apprehension of death or grievous bodily harm since he stabbed the deceased after he had overpowered him and retrieved the broken bottle from him. At the time of stabbing, the Appellant was no longer in apprehension of death but rather an unjustified aggressor that retaliated in a disproportionate manner. The killing was intentional. It is lawful If the nature of the assault on the Appellant is such as to cause reasonable apprehension of death or grievous harm for him to use such force on the deceased as is necessary to defend himself, but this does not arise since the danger had passed after the Appellant overpowered the deceased, retrieved the broken bottle from him and stabbed him on the neck with it. The stabbing was clearly unnecessary. The killing was intentional. The defence of self-defence fails.

The situation in this case is similar; the Appellant may not have initiated the encounter, but he became an "unjustified aggressor", when he got hold of the shovel, and instead of backing away from the deceased, proceeded to hit him on the back a number of times. It is injuries received thereby that caused the deceased's death.

The provision of Section 62 of the Penal Code is very explicit; self-defence must be proportional to the harm that is intended to be prevented, otherwise, the use of the right will not be justified.

Section 63 of the Penal Code also says that there is no right of private defence in cases in which there is time to have recourse to the protection of public authorities. In this case, the encounter took place at the Brigade Quarters, which is presumably occupied by Soldiers, being an Army Base. DW2, the Appellant's witness, testified that the deceased approached them with the said shovel and some of them ran away, but the Appellant stayed on to fight, and they later saw blood coming out of the head of the deceased.

In other words, the Appellant did not call out for assistance, but stayed there to take on the deceased, who, he said, was drunk. He complained that the lower Court did not consider his defence, but focused its attention on the drunken state of the deceased.

In so arguing, the Appellant lost sight of the fact that under cross-examination he insisted the deceased was drunk. He said -

When he approached me with the shovel before I realized he was hit me (sic). The deceased was drunk. When the deceased was abusing me, he was seriously drunk. I wouldn't know because he was seriously drunk, he was weak.

As I said earlier, the defences of provocation and self-defence are, basically conclusions drawn from the surrounding circumstances, and in this case, the lower Courts accepted the Appellant's words for it that the deceased was seriously drunk, as he had indicated. The Appellant cannot, therefore, complain that the lower Courts used that piece of evidence in arriving at its decision in this case.

Finally, Section 65 of the Penal Code makes it very clear that a person exercising the right to private defence, which is the same thing as self-defence, must show that by the nature of the attack, he was under reasonable apprehension of death or grievous hurt.

As S. S. Richardson explained in Notes on the Penal Code Law, it is the apprehension itself that is the important thing; not actual injuries that he may have suffered at the hands of the attacker.

So, the Appellant's insistence that the deceased hit him with the shovel on the head, which the trial Court found was unproved, is of no consequence in the determination of the issue at hand.

Was the Appellant in apprehension of death or grievous hurt when he took the shovel from the deceased, and turned attacker?

I think not. The evidence of PW2 makes that so very certain. He said the deceased came with the shovel and started to abuse the Appellant, and the Appellant got up to fight. They intervened, but the Appellant said it was none of their business. He got a long weapon and approached the deceased when they were fighting & the shovel fell down. The deceased knelt down to pick the shovel, and the Appellant stabbed the deceased with a knife at the back.

Defence counsel cross-examined PW2 but did not challenge his account of the incident as narrated above. It is the Appellant, who admitted under cross-examination by Prosecuting counsel, that when the deceased was abusing him, PW2 had intervened.

PW2 intervened, and it must be taken that he did not listen, because at the end of the day, the deceased died from injuries that he received when the Appellant stabbed him on the leg and back.

In the circumstances of this case, can the Appellant be said to be in apprehension of death or grievous hurt when he took the shovel from the deceased and proceeded to stab him in his back?

The answer is, obviously, in the negative, and it goes without saying that the Appellant failed to discharge the burden placed on him to establish the appropriate circumstances in which the said defence of self-defence, and provocation also, would benefit him.

The end result is that the lower Court was right to conclude, from surrounding circumstances of this case that the defences of provocation and self-defence he put up cannot avail the Appellant.

The Appeal fails and is, therefore, dismissed. The judgment of the Court below upholding the trial Court's decision is affirmed.

**OLUKAYODE ARIWOOLA, J.S.C.:** I had the privilege of reading in draft the leading judgment just delivered by my learned brother, Amina Augie, JSC. His Lordship dealt meticulously with all the issues in the appeal and I agree entirely with the reasoning therein and the conclusion arrived thereat, that the appeal lacks merit and ought to be dismissed. The appeal is therefore dismissed by me.

Accordingly, the judgment of the Court below which affirmed the conviction and sentence of the appellant by the trial Court, is hereby affirmed.

Appeal dismissed.

**CLARA BATA OGUNBIYI, J.S.C.:** I read in draft the lead judgment just delivered by my learned brother Augie, JSC.

I agree that the appeal is devoid of any merit and should be dismissed.

The two lower Courts are concurrent in their decisions and the onus lies on the appellant to give very good reason why this Court should interfere with the findings of fact arrived at by the two lower Courts. It is not a matter of course. See Ben v. The State (2006) 7 SCNJ 216 at 223.

It is on record that at the time the deceased was dispossessed of the weapon which was in his hand, the appellant was in control and master over the situation and the deceased was placed at his mercy.

In other words, the deceased who was apparently drunk wielded a shovel which eventually fell down and it was when he bent down to pick the weapon, that the appellant stabbed him at the back with a knife and ran away from the scene. The deceased died eventually.

The medical report showed that the deceased died of a bleeding into the spinal cord. (Pw3), the pathologist found that the deceased had a cut with a sharp object at the middle of the lower back and that this was the injury that caused the bleeding into the deceased's spinal cord.

Exhibit 'A' was the appellant's confessional statement.

Pw2 was an eye witness and at page 8 of the record of appeal, he said:-

"The accused stabbed the deceased with a knife at the back. The accused had a knife stocked in his pocket. The accused then ran away."

The appellant did not deny the admissibility of Exhibit 'A' at the trial. He said positively that he made Exhibit 'A' and he did state that he hit the deceased at the back an injured hm.

The appellant retracted his statement in Court at page 30 of the record. The law is trite that mere retraction of a voluntary confessional statement by the accused person does not render it inadmissible or worthless. See Egboghonome v. State (1993) 7 NWLR (Pt. 306) 383 and Joseph Idowu v. State (2000) 7 SC (Pt. 11) 50, also Dibie v. The State (2007) 3 SCNJ 160 at 171.

My learned brother Augie, JSC has resolved all the issues raised in this appeal comprehensively. With the few words of mine therefore and relying particularly on the lead judgment, which i adopt as mine, I also dismiss this appeal as lacking in dire merit.

The judgment of the lower Court which affirmed that of the trial High Court Kano State is also affirmed by me.

**CHIMA CENTUS NWEZE, J.S.C.:** I had the advantage of reading the draft of the leading judgment which my Lord, Augie, JSC, just delivered now. l, entirely, agree that, being unmeritorious, this appeal ought to be dismissed.

Just as the leading judgment has shown, a clearly evident cause of death, as in the instant case, obviates the need for any medical evidence to establish the first ingredient of the offence of culpable homicide punishable with death, that is, that the deceased person died, Maigari v. State [2013] 6-7 MJSC (PT. 11) 109, 125; Ochemeje v. The State [2008] SCNJ 143; Daniel v. The State [1991] 8 NWLR (PT. 443) 715; Obudu v. State [1999] 6 NWLR (PT. 198) 433; Gira v. State [1996] 4 NWLR (pt. 428) 1, 125; R. V. Hopwood (1913) 8 Cr. App. R. 143; Hyam v. DPP [1974] 2 All ER 41; Woolmington v. DPP [1935] AC 462.

Others cases include, Madu v. State [2012] 15 NWLR (PT. 1324) 405, 443; Durwode v. State [2000] 15 NWLR (PT. 691) 467; Idemudia v. State [2001] FWLR (PT. 55) 549, [1999] 7 NWLR (PT. 610) 202; AKPAN V. STATE [2001] FWLR (PT. 56) 735; [2000] 12 NWLR (PT 682) 607; 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.

Thus, in situations, as exemplified in the instant case, where the cause of death is obvious, medical evidence ceases to be of any practical or legal necessity in homicide cases. Such a situation arises where death was instantaneous or nearly so, Ben v. The State (2006) LPELR - 770 (SC) 12 - 13; Bakuri v. The State (1965) NMLR 163, 164; Uyo v. Attorney - General of Bendel State [1986] 1 NWLR (PT. 17) 418; Onwumere v. The State [1991] 4 NWLR (PT. 186) 428; Nwachukwu v. The State [2002] 12 NWLR (PT. 782) 543; Oforlete v. The State (2000) LPELR- 2270 (SC); Ogbu v. The State (1992) LPELR - 2270 (SC); Ogbu v. The State (1992) LPELR - 2292 (SC) 18; B-C.

It is for these, and the more detailed reasons in the leading judgment that I, too, hold that this appeal, ought to be, and is hereby, dismissed. I, too, affirm the concurrent judgments of the lower Courts. Appeal dismissed.

**PAUL ADAMU GALINJE, J.S.C.:** I have had the privilege of reading in draft the judgment just delivered by my learned brother AMINA AUGIE JSC and I entirely agree with the reasoning contained therein and the conclusion arrived thereat. The facts of the case have been ably set out in the lead judgment and need no further reproduction. The appellant admitted at the trial that he killed the deceased but attempted to justify his act on provocation and self defence. To succeed in proof of the defence of provocation, a person accused must prove the following ingredients, to wit:-

1. Sudden fight between the appellant and the deceased, which was continuous with no time for passion to cool down.

2. That in the course of that fight the accused was deprived of his self-control.

3. That the provocative acts came from the deceased.

4. That the force used by the accused in repelling the provocation was not disproportionate in the given circumstance.

The provocation must be grave and sudden and must be such as to take away from the accused the power of self-control.

See Chukwu v State (1992) 23 NSCC (Pt. 1) 44 at 53, (1992) 1 NWLR (Pt.217) 255 at 270; Ekpenyong v State (1993) 5 NWLR (Pt. 295) 513 at 521 - 522.

At the trial Court, PW2, one Yakubu Umar, who is an eye witness to the commission of the offence testified as follow:-

"The deceased Nura called me and I asked him to come but he refused and asked me to come to me where he is. Then Abbas the accused said why should l go to the deceased since he is the one calling me he should come to me. So I did not go to the deceased I came back and sat down with Abbas and Mamuda. The deceased came were (sic where) we were sitting with a shovel of one Mallam Nura, which they are working with. When he come (sic) he stood in front of the accused and started to abuse him. The accused got up to fight the deceased but we intervened. The accused said its none of our business. So he went and got a long weapon (Barandami metal) and approached the deceased were (sic. where) they were fighting themselves in the field. As they were fighting the shovel of the deceased fell down and as he knelt down to pick it the accused stabbed the deceased with a knife at the back."

For the defence of provocation to succeed, it must be shown that death was caused:-

"(a) In the heat of passion,

(b) By grave and sudden provocation as to deprive the accused of self-control.

(c) Before there is time for passion to cool."

These three requirement must co-exist before the defence could be made out. See Section 222(1) of the Kano State Penal Code. Chukwu v. State (supra).

In the instant case, the extra judicial statement of the appellant, the evidence of PW2 which I have partly reproduced in this judgment and the appellant's evidence in chief all state that the deceased abused the appellant. The exact words uttered by the deceased were not supplied.

Words can cause provocation, but that would depend on the actual words used and what these words mean to a reasonable person in the class of the appellant. See Akalezi v. State (1993) 2 NWLR (PT 273) 1.

Where the words relied upon in proof of the defence of provocation are unknown, the Court will find it difficult to reach a decision that there was provocation so grave enough to have pushed the Appellant to commit the act complained of. See Shalla v. State (2007) 18 NWLR (Pt. 1066) 240.

Evidence before the trial Court clearly shows that the appellant stabbed the deceased while the latter had his back to the appellant as he bent down to collect the shovel he had dropped. At this point the force used against the deceased, that is stabbing him with a knife was certainly not Proportional to whatever provocation that must have arisen in the circumstance. I therefore do not think the defence of Provocation was available to the Appellant. The Court of Appeal was therefore right when it held that the defence of provocation did not avail the Appellant.

I am also of the firm view that the Court of Appeal was right when it held that the defence of private or self defence would not avail the Appellant. For the defence of private defence to avail an accused person, he must show that his life was so much endangered by the act of the deceased so much so that the only option that was open to him to save his life was to kill the decease. In the instant case, the Appellant had time to go and fetch the weapon (Barandami metal) with which he deployed in killing the deceased, and much more, the shovel which the deceased was carrying had dropped to the ground at the time the Appellant attacked him. Clearly the deceased was not armed at the time he was stabbed. In the circumstance, the defence of private defence was not available to the Appellant.

Indeed my learned brother AUGIE JSC has commendably resolved all the issues submitted for determination in this appeal. Any further comment by me will only amount to repetition. For the reasons my lord has articulated in the lead judgment which I adopt as mine in addition to the few words I have set out herein, this appeal shall be and it is hereby dismissed by me as well.