**SHUAIBU ABDU**

**V.**

**THE STATE**

COURT OF APPEAL

21ST DAY OF FEBRUARY, 2014

[COURT OF APPEAL CITATION ....]

**LEX (2014) – CA/21/02/2014**

OTHER CITATION(S)

2PLR/2014/191 (CA)

**BEFORE THEIR LORDSHIPS**

DALHATU ADAMU, JCA

ITA GEORGE MBABA, JCA

HABEEB A. O. ABIRU, JCA

**BETWEEN**

SHUAIBU ABDU – Appellant

AND

THE STATE – Respondent

**ORIGINATING COURT**

HIGH COURT OF JIGAWA STATE (A. M NAKULLUM J.)

**REPRESENTATION**

N. A. DANGIRI - for Appellant

Y.A.H. RUBA, - Honorable Attorney General of Jigawa State with M. A. LAMIN - for Respondent

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

CRIMINAL LAW AND PROCEDURE- CULPABLE HOMICIDE:- Charge of culpable homicide punishable with death – Whether the same as charge of murder – Three essential ingredients that the prosecution must prove in order to secure conviction – Need for the three ingredients to co-exist – Effect where one of them is either absent or tainted with any doubt

CRIMINAL LAW AND PROCEDURE:- Culpable homicide – Murder - What prosecution must prove - Whether court can draw inferences as to cause of death in the absence of autopsy report – Whether a confessional statement is the best evidence in proof of guilt and can ground conviction - How an accused person can impeach his statement – Defence of provocation

CRIMINAL LAW AND PROCEDURE- MURDER:– Determination of an intention to murder - Requisite criteria

CRIMINAL LAW AND PROCEDURE – DEFENCE - PROVOCATION:- Nature – As a partial defence for murder in cases where the act or omission causing death was provoked by some conduct of the deceased – Effect on a charge of murder – Whether reduces a charge of culpable homicide punishable with death to culpable homicide not punishable with death or manslaughter – Justification for the defence – How determined - Section 222(1) of the Penal Code – Tests to be applied

CRIMINAL LAW AND PROCEDURE - EVIDENCE:- Treatment of evidence – Need for judgment and conclusions of trial court to reflect evidence led in the proceedings – Need for a conviction to meet the required standards and proof of the essential ingredients of the charge of culpable homicide punishable with death beyond reasonable doubt – Duty of trial court to go beyond mere recital of evidence led so as assess and evaluate evidence led before it

CRIMINAL LAW AND PROCEDURE- COURT:- Duty of a trial court in murder trial which carries a death penalty– Need to be seen as not abdicating its responsibility – Need to approach its task of determining the guilt of the Appellant with every sense of responsibility towards seeing that justice must not only be done but must be seen to have been done – Whether a lower Court can pronounce a death penalty without displaying on the record the reason for doing so

CRIMINAL LAW AND PROCEDURE:- Burden of proof of crime - On whom rests - Where the commission of crime by a party is in issue – Standard of proof – Duty of prosecution to prove all the essential ingredients of crime alleged beyond reasonable doubt - Whether burden never shifts - Duty of court to acquit a defendant where prosecution leaves it with any doubt in discharging that burden

CRIMINAL LAW AND PROCEDURE:- Distinction between proof beyond reasonable doubt and proof beyond all iota of doubt – Necessity for a case can be proved beyond reasonable doubt either by direct eye witness account or by circumstantial evidence from which the guilt of a defendant can be inferred or by a free and voluntary confessional statement of guilt which is direct and positive

CRIMINAL LAW AND PROCEDURE:- Confessional Statement – When retracted after being tendered and accepted as evidence – Where uniimpeached – When court would treat subsequent retraction of confessional statement by accused defendant as an afterthought – Whether accused person's confessional statement where voluntary, direct, positive and unequivocal as to the admission of the accused person's guilt is enough to ground the accused person's conviction

CHILDREN AND WOMEN LAW:- *Women and Security/Human Rights* – Murder - Wife-killing – Brutal murder of wife via machete cut on the head – How treated

ETHICS – JUDGE: - Trial court judge – Whether it is essential that all persons who hold the high office of a High Court Judge and the like must always and constantly display learning, understanding and an appreciable level of awareness of their responsibilities in the performance of their duties and obligations – Attitude of appellate court to failure thereto

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - COURT:- Proper steps for an appellate court to take where the lower court has failed to properly evaluate the evidence led by parties at the trial – When the question of credibility of witnesses would not arise - Whether to order a retrial or carry out the evaluation of the evidence available on the records – When the case of the Respondent revolves around unchallenged testimonies of the prosecution witnesses and the confessional statement of the Appellant **-** Whether court can exercise its power of evaluation of evidence

APPEAL:- Formulation of an issue on appeal – Effect when ground of appeal discloses no issue for determination

COURT:- Duties of - Duty to consider all the defences put up by the accused person, express or implied, in capital offences - Duty of appellate court where the lower court has failed to properly evaluate the evidence led by parties at the trial

EVIDENCE:- Who has the burden of proving that any person has committed a crime or a wrongful act – How a case can be proved beyond reasonable doubt

**MAIN JUDGMENT**

HABEEB ADEWALE OLUMUYIWA ABIRU, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the judgment of the High Court of Jigawa State in Suit No JDU/24C/2007 delivered by Honorable Justice A. M Nakullum on the 24th of September, 2008. The Appellant was arraigned before the lower Court on a one count charge of culpable homicide punishable with death under section 221(b) of the Penal Code and he was alleged to have killed his wife called Biba on the 30th day of April, 2007 at Falgore Village in Jahun Local Government Area of Jigawa State by stabbing her with a machete on the head.

The Appellant pleaded Not Guilty to the charge and the matter proceeded to trial. The Respondent called five witnesses in proof of the charge and the Appellant called no evidence but rested his case on the evidence of the Respondent. At the conclusion of trial, the lower Court found the Appellant guilty as charged and sentenced him to death. The Appellant was dissatisfied with the judgment of the lower Court and sequel to an extension of time granted him by this Court on the 9th of May 2013, he filed a notice of appeal dated the 22nd of April, 2013 on the 15th of May, 2013. The notice of appeal contained eight grounds of appeal.

In arguing the appeal before this Court, Counsel to the Appellant presented and filed a brief of arguments dated the 14th of June, 2013 and it consisted of seventeen pages. In response, Counsel to the Respondent filed a brief of arguments dated the 14th of October, 2013 and it consisted of fifteen pages. At the hearing of the appeal on the 23rd of January, 2014, Counsel to the parties rely on and adopted the arguments contained in their respective briefs of arguments in arguing the appeal.

Counsel to the Appellant formulated two alternate issues for determination in his brief of arguments and these were:

Whether the learned trial Judge was right in convicting and sentencing the Appellant to death without properly evaluating the evidence of the prosecution witnesses but rather based on the appearance of the Appellant.  
  
**Alternatively**

Whether from the facts and circumstances of this case the trial Court was right in convicting and sentencing the Appellant for the offence of culpable homicide.

On his own part, the Honorable Attorney General of Jigawa State, who appeared for the Respondent, formulated only one issue for determination in his brief of arguments and this was:

Whether the learned trial Judge was right in convicting the Appellant having regard to the evidence adduced by the prosecution at the trial?

It is obvious that the alternate issues for determination of the Counsel to the Appellant and the sole issue of the Counsel to the Respondent say the same thing and they question whether the Respondent led credible and cogent evidence to sustain the charge proffered against the Appellant in the lower Court. It must be noted that the Counsel to the Appellant stated that he formulated the two alternate issues for determination from grounds one to five of the notice of appeal. As stated earlier, the notice of appeal contained eight grounds of appeal and the essence of the assertion of the Counsel to the Appellant is that no issues for determination was formulated from grounds six to eight of the notice of appeal. It is settled law that any ground of appeal from which no issue for determination is formulated is deemed abandoned and must be struck out - **Petgas Resources Ltd Vs Mbanefo** (2007) 6 NWLR (Pt 1031) 545 and **Iyoho Vs Effiong** (2007) 11 NWLR (Pt 1044) 31. Grounds six to eight on the notice of appeal of the Appellant are hereby struck out.

In arguing the issue for determination in this appeal, Counsel to the Appellant stated that in view of the nature of the offence with which the Appellant was charged, the lower Court owed a duty to properly consider and evaluate all the evidence led and all defences available to the Appellant before convicting and sentencing him. Counsel stated that there was no eye-witness account of the incident and he proceeded to traverse through and dissect the testimonies of the first and second prosecution witnesses and concluded that while the evidence of the first prosecution witness was replete with inconsistencies and amounted to hearsay, the second prosecution witness stated that she did not witness the incident. Counsel stated that had the lower Court properly evaluated the testimonies of these witnesses along with the testimonies of the third, fourth and fifth prosecution witnesses, it would perhaps have come to a different conclusion and that it was not clear from the records whether the lower Court relied on all or some of the testimonies of the prosecution witnesses before coming to the conclusion that "from the evidence before the court and the accused person's appearance no doubt the accused person had committed the offence of culpable homicide." Counsel said that the lower Court did not state the nature of the "accused person's appearance" that warranted the conviction and that the lower Court ought not to have relied on the evidence of the first and second prosecution witnesses which were riddled with inconsistencies and he referred to the cases of **State Vs Aibangbee** (1988) 3 NWLR (Pt 34) 548 and **Ukwunneyi Vs The State** (1989) 4 NWLR (Pt 113) 131.

Counsel further stated that the Police and the Respondent failed in their mandatory duty to investigate the allegation made by the Appellant in his extra-judicial statement that he was provoked by the deceased and he asserted that it was obligatory for the Police and the Respondent to investigate such allegation, Counsel referred to the case of **Aremu Vs State** (1984) All NLR 314. Counsel stated that the failure to investigate the allegation meant that the statement of the Appellant was unchallenged and that the Appellant thus succeeded in raising the defence of provocation. Counsel stated that there was a duty on the lower Court to consider this defence of provocation raised in the extra-judicial statement of the Appellant and that, in doing so, the lower Court should have taken judicial notice of the notorious fact that verbal words abuse can amount to provocation, and that it did amount to provocation in the instant case taking into consideration the background of the Appellant; he referred to the case of **Lado Vs The State** (1996) 6 SCNJ 1 and made copious references to the lead judgment of Wali, JSC and contributory judgments of Ejiwunmi, JSC and Uwais, JSC. Counsel stated that had the lower Court adverted its mind to the defence of provocation as raised, it would have found a mitigating factor against sentencing the Appellant to death and he also referred to the judgment of Ejiwunmi, JSC in the case of **Shande Vs State** (2005) 12 NWLR (Pt.939) 301.

Counsel concluded by saying that the judgment of the lower Court was terse and it did not state the necessary ingredients for the offence of culpable homicide punishable with death and/or which of the ingredients was proved and how the Appellant was linked to the offence. Counsel stated that the judgment of the lower Court did not display a proper evaluation of the evidence led by the Respondent in proof of the charge against the Appellant and it made no mention of the of the extra-judicial statement of the Appellant, but that the lower Court rather relied on the appearance of the accused person in convicting him but did not state the nature of the said appearance.

Counsel submitted that this occasioned a miscarriage of justice and he urged this Court to so hold.

In response, Counsel to the Respondent stated the essential ingredients that must be proved to sustain the charge of culpable homicide punishable with death and that the first ingredient of the death of a human being was proved by the testimonies of the first, second and third prosecution witnesses. On the second ingredient on whether the Appellant was responsible for the death, Counsel stated that the Respondent relied on evidence of the fourth prosecution witness and the confessional statement of the Appellant tendered as Exhibits 1 and 2 wherein the Appellant clearly admitted the act of killing the deceased. Counsel stated that the Respondent was at liberty to prove the guilt of the Appellant either by eye witness evidence, circumstantial evidence or confessional statement and that of these methods, confessional statement was the best and he referred to the cases of **Ojo Vs FRN** (2008) 11 NWLR (Pt 1099) 467, **Emeka Vs State** (2001) 5 MJSC 12 and **Adio Vs State** (1986) 2 NWLR (Pt.24) 581, amongst others. Counsel stated that a confessional statement which is direct, positive and voluntarily made can ground the conviction of an accused person without the need for any corroborative evidence and that in the instant case, the confessional statement of the Appellant met the required conditions and that the lower Court was thus correct in finding the Appellant guilty thereon.

On the defence of provocation, Counsel stated that for the defence to be availing, the act of the accused person must have occur on the spur of the moment and before there was time for passion to cool off and he then proceeded to list the three elements of the defence to be (i) the act of provocation was done in the heat of passion; (ii) the loss of self control was both actual and reasonable, that is that the act was done before there was time to cool off and; (iii) the retaliation is proportionate to the provocation; he referred to the case of **Edoho Vs State** (2010) 14 NWLR (Pt.1214) 651. Counsel referred to the contents of the confessional statement of the Appellant and stated that there was nothing therein to show that he was provoked to do what he did and that all he showed was that he was angry and that anger was not the same as provocation in law. Counsel stated that even assuming that there was provocation, the defence would still not avail the Appellant as the retaliation was not proportionate to the provocation and there was time for the Appellant's temper to have cooled down. Additionally, Counsel stated that the Appellant had a duty to adduce evidence in support of the alleged provocation and that where he fails to do this, the lower Court will be left with only the evidence of the prosecution and that the defence of provocation cannot be at large without supporting evidence. Counsel urged the Court to hold that the Appellant woefully failed to back up his alleged defence of provocation with credible evidence.

The main grouse of the Appellant against the judgment appealed against is that the lower Court failed to evaluate the evidence led by the Respondent at the trial. It is trite that a trial Court has two duties in respect of the evidence led by parties in a trial. The first is to receive into its records all the relevant evidence, and this is called perception. The second is to thereafter weigh the evidence in the context of the surrounding circumstances, and this is evaluation. A finding of fact by a trial Court involves both perception and evaluation - **Guardian Newspapers Ltd Vs Ajeh (2011) 10 NWLR (Pt 1256) 574, Nacenn Nigeria Ltd Vs Bewac Automotive Producers Ltd (2011) 11 NWLR (Pt.1257) 193, Wachukwu Vs Owunwanne (2011) 14 NWLR (Pt.1266) 1.**

It is the primary responsibility of a trial court to hear the parties, watch and observe the demeanour of witnesses called to testify before it, admit or reject documents tendered, ascribe probative value to the evidence and then come up with a decision. Evaluation of evidence entails the assessment of evidence so as to give value and quality to it. It involves a reasoned belief of the evidence of one of the contending parties and disbelief of the other or a reasoned preference of one version to the other. There must be on record how the court arrived at its conclusion of preferring one piece of evidence to the other - **Idakwo Vs Nigerian Army** (2004) 2 NWLR (Pt.857) 249, **Oyekola Vs Ajibade** (2004) 17 NWLR (Pt.902) 356, **Imoh Vs Onanuga** (2013) 15 NWLR (Pt.1376) 139 and **Al-Mustapha Vs State** (2013) 17 NWLR (Pt.1383) 350. Even where only one of the parties lead evidence, the lower Court still has a duty to evaluate the evidence led by that party to see whether it meets the requirements necessary for the party to succeed. This is particularly more so in a criminal trial, as in the instant case, where an accused person is constitutionally presumed innocent until proved guilty and the onus is on the prosecution to establish the guilt of the accused person beyond reasonable doubt, and it is an onus that does not shift.

The entire judgment of the lower Court in the instant case was barely two pages and the learned trial Judge stated the charge against the Appellant and then summarized the evidence of the prosecution witnesses and stated in the final paragraph thus:

"From the evidence before the court and the accused person's appearance no doubt that the accused person had committed the offence of culpable homicide by stabbing his wife and cutting her in various places. So the accused Person is found to be responsible for the death of his wife."

The judgment did not show that lower Court subjected the evidence of the prosecution witnesses to any assessment. It did not show how the lower Court came to the conclusion that the evidence led by the Respondent met the required standards and proved the essential ingredients of the charge of culpable homicide punishable with death beyond reasonable doubt. It did not display the basis for the conclusion of the lower Court that "from the evidence before the court and the accused person's appearance no doubt that the accused person had committed the offence". It has been stated times and times again that the mere recital of evidence led is not the same as assessment and evaluation of such evidence.

In a criminal trial, the question always is whether there is evidence of such quality on every material ingredient of an offence that it ought to be believed and as such, a trial Court is obligated to scrupulously examine, analyze and weigh every item of evidence to assess the substantiality of the testimony and statements proffered or made - **Ibrahim Vs State** (1991) 4 NWLR (Pt 186) 399, **Alake Vs State** (1992) 9 NWLR (Pt 265) 260, **State Vs Onyeukwu** (2004) 14 NWLR (Pt 893) 340 and **Bello Vs State** (2007) 10 NWLR (Pt.1043) 564.

The lower Court in the case completely abdicated its responsibility and did not approach its task of determining the guilt of the Appellant with any sense of duty. This attitude of the lower Court is very worrying and must be disturbing to anyone with a fair understanding of the concept of justice; that justice must not only be done but must be seen to have been done. This is particularly more so when it is considered that the offence with which the Appellant was charged carries the death penalty, the highest punishment ever, and the lower Court pronounced this penalty on the Appellant without displaying on the record the reason for doing so. The learned trial Judge did not know show that he knew what he was doing. It is essential that all persons who hold the high office of a High Court Judge and the like must always and constantly display learning, understanding and an appreciable level of awareness of their responsibilities in the performance of their duties and obligations. It is the only way that such a person can show that he is deserving of being entrusted with the office and the responsibilities that go with it.

This was a clear case of no assessment of evidence by the lower Court.

It is settled law that the proper steps for an appellate court to take where the lower court has failed to properly evaluate the evidence led by parties at the trial is either to order a retrial or carry out the evaluation of the evidence available on the records if the question of credibility of witnesses would not arise - **Orianwo Vs Okene** (2002) 14 NWLR (Pt.786) 156, **Wachukwu Vs Owunwanne** supra, **Ovunwo Vs Woko** (2011) 17 NWLR (Pt 1277) 522. Where the credibility of a witness is not in point, a court sitting on appeal can evaluate such evidence. Where the conclusion is arrived at without any real controversy, such as in the case of documentary evidence, or where there is oral evidence which involves merely an admission by the adversary, or there is an unchallenged piece of evidence, an appellate court should consider itself to be in as good a position as the trial court, in so far as the evaluation of such evidence is concerned - **Ebba Vs Ogodo** (1984) 1 SCNLR 372, **Ogundepo Vs Olumesan** (2011) 18 NWLR (Pt 1278) 54. The case of the Respondent, in the instant case revolved around unchallenged testimonies of the prosecution witnesses and the confessional statement of the Appellant. This is a matter in which this Court can exercise its power of evaluation of evidence.

It is settled that the burden of proving that any person has committed a crime or a wrongful act rests on the person who asserts it and this is, more often than not, the prosecution. Where the commission of crime by a party is in issue in any proceedings be it civil or criminal, it must be proved beyond reasonable doubt. In discharging the burden, all the essential ingredients of the crime alleged must be proved beyond reasonable doubt. The burden never shifts. Therefore, if in a criminal trial, on the whole of the evidence before it, the court is left in a state of doubt, the prosecution would have failed to discharge the burden of proof which the law lays upon it and the defendant will be entitled to an acquittal. It must, however, be stated that proof beyond reasonable doubt is "not proof to the hilt" and is thus not synonymous with proof beyond all iota of doubt. It simply means establishing the guilt of the defendant with compelling and conclusive evidence to a degree of compulsion which is consistent with a high degree of probability. Thus, if the evidence is so strong against a mar: as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case will be said to have been proved beyond reasonable doubt - **Sabi Vs State** (2011) 14 NWLR (Pt 1268) 421, **Iwunze Vs Federal Republic of Nigeria** (2013) 1 NWLR (Pt.1324) 119, **Njoku Vs State** (2013) 2 NWLR (Pt 1339) 548, **Osuagwu Vs State** (2013) 5 NWLR (Pt.1347) 360, **Ajayi Vs State** (2013) 9 NWLR (Pt 1360) 589.

A charge of culpable homicide punishable with death is the same as a charge of murder and it has been held in a plethora of cases that the essential ingredients that the prosecution must prove in order to secure a conviction are (i) that the deceased died; (ii) that the death of the deceased resulted from the act of the defendant; and (iii) that the defendant caused the death of the deceased intentionally or with knowledge that death or grievous bodily harm was its probable consequence - see, for example, **Sule Vs State** (2009) 19 NWLR (Pt 1169) 33, **Nkebisi Vs State** (2010) 5 NWLR (Pt.1188) 471, **Mbang Vs State** (2010) 7 NWLR (Pt 1194) 431, **Usman Vs State** (2011) 3 NWLR (Pt.1233) 1, **Uluebeka Vs State** (2011) 4 NWLR (Pt.1237) 358, **Ilodigwe Vs State** (2012) 18 NWLR (Pt 1331) 1. The Prosecution must meet the above ingredients through credible evidence. The three ingredients must co-exist and where one of them is either absent or tainted with any doubt, then the charge is said not to be proved - Sabi Vs State supra.

On the first ingredient of the offence, the first, second, third and fifth prosecution witnesses gave unchallenged evidence that the deceased, the wife of the Appellant, died. The first prosecution witness stated that she found the deceased dead in the deceased's room while the second prosecution witness testified that he saw the covered dead body of the deceased. The third prosecution witness, a police man attached to the Police Academy in Kano, stated that on the 30th of April, 2007, the second prosecution witness came to report that the accused person attacked his wife with a machete and cut her on the head and arm and that the woman had died and that he rushed to the scene of the incident and he found the corpse of the woman and he conveyed the corpse to the Jahun Hospital. The fifth prosecution witness, a Senior Medical Officer with Jahun Hospital, confirmed that the corpse of the deceased was indeed brought in on the 30th of April, 2007 for medical examination. The Respondent led clear and cogent evidence to prove the first ingredient of the offence of culpable homicide punishable with death.

On the second ingredient of the offence of whether it was the act of the Appellant that caused the death, the law is that to establish this ingredient beyond reasonable doubt, the Respondent must establish the cause of death unequivocally and then there must be cogent evidence linking the cause of death to the act of the Appellant - Udosen Vs State (2007) 4 NWLR (Pt.1023) 125, Oche Vs State (2007) 5 NWLR (Pt 1027) 214 and Ekpoisong Vs State (2009) 1 NWLR (Pt.1122) 354. This point was made by the Supreme Court in Oforlete Vs State (2000) 12 NWLR (Pt. 631) 415 thus:

"In every case where it is alleged that death has resulted from the act of a person, a causal link between the death and the act must be established and proved in a criminal proceeding, beyond reasonable doubt. The first and logical step in the process of such proof is to prove the cause of death. Where there is no certainty as to the cause of death, the enquiry should not proceed no further. Where the cause of death is ascertained, the next step in the enquiry is to link that cause of death with the act or omission of the person alleged to have caused it. These are factual questions to be answered by a consideration of the evidence"

The first prosecution witness testified that the Appellant was his junior son and that the Appellant and the deceased stayed with her and that on the day of the incident she went to the well to fetch water and that she then took food to the room of the deceased and found her dead. The second prosecution witness stated that he and the Appellant with the deceased lived in separate houses in the same compound and that he was not aware of any quarrel between the Appellant and the deceased and that on the day of the incident, he went to the bush and returned around 7pm to find the deceased dead. The third prosecution witness, the police man, stated that when he got to the scene of the incident and recovered the corpse of the deceased, she had a cut on her head and on the left arm. The fifth prosecution witness, the medical doctor who examined the corpse of the deceased, stated that he noticed deep multiple lacerations on the scalp of the deceased damaging the brain tissue and also a laceration on the arm and that the laceration on the scalp was very strong and must have been inflicted by someone and that, apart from the abdomen, he did not examine other parts of the body the deceased as there was no cause for it.

The Respondent did not tender an autopsy report. The law is that in the absence of autopsy report or where an autopsy report is inconclusive, a Court has the duty to examine the evidence before it and draw necessary inferences as to the cause of death - Essien Vs State (1984) 3 SC 14, Adekunle Vs State (1989) 5 NWLR (Pt.123) 505 and Aiguoreghian Vs State (2004) 3 NWLR (Pt.860) 367. Where there is evidence that a deceased person was hale and hearty before the occurrence of an offending act and death is instantaneous or nearly so and there is no break in the chain of events from the time of the act that caused injury to the deceased to the time of the death, the death of the deceased will be attributed to that act, even without medical evidence of the cause of death-Essien Vs State supra, Azu Vs State (1993) 6 NWLR (Pt.299) 303, Aiguoreghian Vs State supra, Akpa Vs State (2008) 14 NWLR (Pt 1106) 72.

Thus, in Ben Vs State (2006) 16 NWLR (Pt 1006) 582, where the deceased was struck on the head with a stick and he fell down unconscious and never regained consciousness until he was pronounced dead some hours later in the hospital, the Supreme Court held that the trial Court rightly found that the cause of death was the lethal blow to the head without a need for medical evidence. The rationale for this position, which is founded on sound logic and common sense, is that since that act is the most proximate event to the death of the deceased, it should be regarded as the deciding factor even where it may be taken as merely contributory to the death of the deceased - Jeremiah vs State (2012) 14 NWLR (Pt.1320) 248.

The evidence of the first and second prosecution witnesses suggest that the deceased was hale and hearty before the machete cuts to her scalp and arm and that the death occurred within a short space of time and the evidence of the fifth prosecution witness was to the effect that it was the multiple deep lacerations on the scalp of the deceased damaging the brain tissue that caused the death of the deceased. This Court finds that the Respondent thus led cogent evidence on the cause of death of the deceased.

This takes us to the second limb of the second requirement in a charge of culpable homicide punishable with death - whether the Respondent proved beyond reasonable doubt that it was the act of the Appellant that led to the cause of death of the deceased. It is settled law that a case can be proved beyond reasonable doubt either by direct eye witness account or by circumstantial evidence from which the guilt of a defendant can be inferred or by a free and voluntary confessional statement of guilt which is direct and positive - **Emeka Vs State** (2001) 14 NWLR (Pt.734) 666, **Nigerian Navy Vs Lambert** (2007) 18 NWLR (Pt 1066) 300, **Mbang Vs State** (2010) 7 NWLR (Pt.1194) 431, **Ahmed Vs Nigerian Army** (2011) 1 NWLR (Pt 1227) 89, **Dele Vs State** (2011) 1 NWLR (Pt.1229) 508**, Ilodigwe Vs State** (2012) 18 NWLR (Pt.1331) 1.

It is obvious from the records of appeal that the Respondent relied on the confession of the Appellant and the English and Hausa versions of the confessional statement were tendered and admitted in evidence as Exhibits 1 and 2 respectively. In the said confessional statement, the Appellant stated that the deceased was his wife and that they were living together as husband and wife and he continued thus:

"...But about one month ago, her attitude towards me changed completely. Up to the extent that she was no longer respecting me. And at anytime I talk to her, she will be growing annoyed and continue eyeing me disrespectively (sic) and refusing to do anything I ordered (sic) her to do. Though I did not reported (sic) her to anybody. On Monday 30/4/07 at about 0700hrs after I pray i.e "sallah" and came back and met her still sleeping ... I came in for the second time and woke her that she should get up and engage herself with some works and if she don't have anything to do, she should wash my clothes but she answered that she will not wash it. I insulted her father and she retaliated, after that I was annoyed and slapped her, she attempted to revenge but she did not do so. I was very angry with her, I then brought out a machete in the room and cut her on her chicks (sic) and jaws for the first time. The second time she was trying to blocked (sic) the machete with her hand and I cut her the second time. . . I left her in the blood rushing out of her body and dropped the machete inside the room and run into the bush behind the village . . ."

The records of appeal show that when the two versions of statement were being tendered, Counsel to the Appellant objected to the admissibility of the statements on the ground that there was no signature and no thumbprint of the accused person on the English version of the statement and it only contained the signature of a police officer. The lower Court admitted the two versions of the statement despite the objection. The basis of the objection of Counsel to the Appellant is really unclear; he neither stated that the Appellant did not make the statement or that the statement was made under duress. The fourth prosecution witness who tendered the two versions of the statements testified thus:

"I was detailed to take the statement of the accused person ... I then administer and word of caution to the accused person. I read it over in Hausa to him and he agreed to it and I made him to thump print it and he thump print it. So I read the statement in Hausa language and he thump print it. The statement is a onfessional statement. After I read it over to him he thumb print and I signed it. Later I translate the statement into English version. Later I took the accused person with the statement to the Senior Police Officer. Then I read the statement to the accused person and then he endorsed it..."

This witness was not cross-examined on this testimony. It was not the case of the Appellant that the English version of the statement did not reflect the correct interpretation of the Hausa statement. The law is that, in such circumstances, the testimony of the witness will be believed and any subsequent retraction of the confessional statement by the accused defendant is to be treated as an afterthought - **Oforlete Vs State** (2000) 12 NWLR (Pt 681) 415**, Iwunze Vs Federal Republic of Nigeria** (2013) 1 NWLR (Pt 1334) 119**, Chukwu vs State** (2013) 4 NWLR (Pt 1343) 1**, Egwumi Vs State** (2013) All FWLR (Pt.678) 824.

The Appellant did not testify at the trial and he did not thus clarify the basis of the objection of his Counsel to the tendering of the statement. It is settled law that during trial, an accused person who desires to impeach his statement is duty bound to establish that his earlier confessional statement cannot be true by showing any of the following (i) that he did not in fact make any such statement as presented; or (ii) that he was not correctly recorded; or (iii) that he was unsettled in mind at the time he made the statement; or (iv) that he was induced to make the statement - **Hassan Vs State** (2001) 15 NWLR (Pt 735) 184, **Kazeem Vs State** (2009) WRN 43 and **Osetola Vs State** (2012) 17 NWLR (Pt.1329) 251. The Appellant did not impeach the confessional statement in any way.

It is settled law that where an accused person's confessional statement is voluntary, direct, positive and unequivocal as to the admission of the accused person's guilt, the statement is enough to ground the accused person's conviction - Lasisi Vs State (2013) 9 NWLR (Pt 1358) 74. The Appellant, in the instant case, admitted in his confessional statement that he inflicted the injuries found on the scalp and arm of the deceased with a machete. The Appellant admitted that he caused the death of the deceased. The Respondent led cogent evidence to establish the second ingredient of the charge against the Appellant.

The third requirement of the offence of culpable homicide punishable with death is - whether the Appellant caused the death of the deceased intentionally or with knowledge that death or grievous bodily harm was its probable consequence. This is what is known as "specific intention" necessary for sustaining a murder charge. It is the law that a person intends the natural consequences of his action and if there was an intention to cause grievous bodily harm and death results, then the defendant must be held culpable for the offence of murder - **Nwokearu Vs State** (2010) 15 NWLR (Pt.1215) 1, **Njoku Vs State** (2013) 2 NWLR (Pt.1339) 548.

In order to determine whether a defendant really had an intention to murder, the law has set down some criteria, some of which are (i) the nature of the weapon used; here, the law builds its tent not just on any weapon but on a lethal weapon, that is a weapon which is deadly or death-dealing; (ii) the part of the body which was brutalized by the lethal weapon; and (iii) the extent of proximity of the victim with the lethal weapon used by the accused - **Iden Vs State** (1994) 8 NWLR (Pt 365) 719. Thus, in **Ejeka Vs State** (2003) 7 NWLR (Pt 819) 408, where the appellant stabbed the deceased with a jack knife at a fragile part of the body such as the heart, the Supreme Court held that this clearly explained that the appellant's intention was to cause grievous injury to the deceased. In the instant case, it is beyond contest that the act of the Appellant in inflicting deep multiple machete cuts on the scalp of the deceased showed a clear intention to cause the death of the deceased or to cause the deceased grievous bodily harm. The Respondent thus proved the third ingredient of the offence.

Counsel to the Appellant argued copiously in his brief of arguments that the contents of the confessional statement of the Appellant disclosed the defence of provocation. It is trite law that in all cases attracting capital punishment, it is incumbent on the court to consider all the defences put up by the accused person, express or implied, in the evidence before the court. No matter the level of the defences whether they are full of figments of imagination, fanciful, replete with porous lies or even doubtful, the court must not be wary to give them due consideration. Thus, if from the totality of evidence, a particular defence avails an accused person in a criminal matter, he should be given the benefit of that defence notwithstanding the fact that he did not specifically raise it. However, the court is only under an obligation or duty to consider such defences open to an accused person as disclosed or supported by the evidence on the printed record. A court of law will not presume or speculate on the existence of facts not placed before it - Ani Vs State (2003) 11 NWLR (Pt 830) 142, **Yaro Vs State** (2007) 18 NWLR (Pt 1066) 215, **Shalla vs State** (2007) 18 NWLR (Pt.1066) 240, **Edoho Vs State** (2010) 14 NWLR (Pt.1214) 651.

Now, provocation is a partial defence for murder in cases where the act or omission causing death was provoked by some conduct of the deceased. It reduces a charge of murder to manslaughter, i.e. charge of culpable homicide punishable with death to culpable homicide not punishable with death, and the idea behind the defence is basically the recognition of human frailty and the tendency to overreact. Provocation means some act or series of acts done by the deceased to the accused which would cause in a reasonable man, and did cause in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.

Under our criminal jurisprudence, provocation which is not at large and which will reduce what would otherwise amount to murder to manslaughter, is a legal concept which is made up of a number of elements which must co-exist within a reasonable time. They are: (a) the act of provocation was done in the heat of passion; (b) the loss of self-control, both actual and reasonable, occurred before there was time for cooling down; and (c) the retaliation is proportionate to the provocation. In other words, where a person who unlawfully kills another, does the act which causes death in the heat of passion caused by grave and sudden provocation and before there is time for passion to cool down and the act causing death is proportionate to the provocation, he is guilty of manslaughter - Uraku Vs State (1976) 6 SC 195, **Nwede Vs State** (1985) 3 NWLR (Pt 13) 444, **Ahmed Vs State** (1999) 7 NWLR (Pt.612) 641, **Shalla Vs State supra, Edoho Vs State** supra.

The defence of provocation is provided for under section 222(1) of the Penal Code and to constitute a defence under the section, provocation must be grave and sudden as to deprive the accused of the pourer of self-control. It must be established not only that the act was done under the influence of some feeling which took away from the person doing it all control over his action, but that that feeling had an adequate cause. It must be understood that not all provocation will reduce the crime of murder to manslaughter. The test to be applied is that of the effect of provocation on a reasonable man so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the tests in the defence of provocation, it is of particular importance to (a) consider whether sufficient interval has elapsed since the provocation to allow a reasonable man time to cool; and (b) take into account the instrument with which the homicide was effected, 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 knife, and the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter - **Musa Vs State** (2007) 11 NWLR (Pt 1045) 202, **Shalla Vs State** supra.

Counsel to the Appellant has urged this Court to infer the defence of provocation from the portion of the confessional statement of the Appellant which read thus:

"... I came in for the second time and woke her that she should get up and engage herself with some works and if she don't have anything to do, she should wash my clothes but she answered that she will not wash it. I insulted her father and she retaliated, after that I was annoyed and slapped her, she attempted to revenge but she did not do so. I was very angry with her, I then brought out a machete in the room and cut her on her chicks (sic) and jaws for the first time. The second time she was trying to blocked (sic) the machete with her hand and I cut her the second time..."

In other words, that it was the belligerent attitude of the deceased that provoked the Appellant into acting as he did. But, firstly, what the Appellant said was that he was angry at the action of the deceased and the Courts have held that mere anger does not by itself qualify as provocation in law - **Onya Vs State** (2006) 11 NWLR (Pt 991) 267 and **Edoho Vs State** supra. Secondly, assuming that it is possible that, given the fact that the deceased is the wife of the Appellant, her belligerent attitude might constitute provocation depending on its effect or what it means to a reasonable person having a similar background with the Appellant, the Appellant did not testify before the lower Court and gave no evidence as to his background and as to how such belligerent attitude of a wife is construed in his circumstances. This Court cannot thus determine whether the defence of provocation was open or available to him - **Ahmed Vs State** (1999) 7 NWLR (Pt.612) 641, **Shalla Vs State** supra.

Again, there is nothing to suggest that the Appellant acted on the spur of the moment and in the heat of passion before there was time for temper to cool. It was not his case that he was already holding the machete with which he attacked the deceased at the time of the alleged provocation, but it was his case that he went to get the machete thereafter. Additionally, the concluding part of the confessional statement of the Appellant read thus: **"... before this incident occurred I told (warned) her on several occasions that she should go away to her parents house because I was tired with her attitude but she keep on insisting that she is pregnant she will not go anywhere"** and this suggest that the action of the Appellant was premeditated. Further, the degree of retaliation cannot be said to be proportionate to the alleged act of provocation. The infliction of deep multiple lacerations on the scalp of the deceased, which damaged her brain tissue, and on the arm shows that the Appellant attacked the deceased with the machete viciously and that he cut her several times. This cannot qualify as the reaction of a reasonable man acting in the heat of passion to the belligerent attitude of his wife.

As stated earlier, the Appellant did not testify at the trial, but rather rested his case on the evidence of the Respondent. The defence of provocation, like all other defences cannot hang in the air without supporting evidence nor can it be built on scanty foundations. In order to establish it, it is the duty of an accused person to adduce credible or positive evidence to support the alleged provocation. Where the accused person fails to adduce evidence in support of his defence, as in the present case, the court has to rely on the evidence adduced by the prosecution - **Yaro Vs State** supra. The defence of provocation was not available to the Appellant on the evidence led before the lower Court.

In conclusion, the findings of this Court support the conclusion reached by the lower Court. This appeal is thus lacking in merit and it is hereby dismissed. The judgment of the High Court of Jigawa State in Suit No. JDU//24C/2007 delivered by Honorable Justice A. M Nakullum on the 24th of September, 2008 convicting the Appellant for the offence of culpable homicide punishable with death and the sentence passed therein are hereby affirmed. These shall be the orders of this Court.

**DALHATU ADAMU, J.C.A.:**

I have had the privilege of going through the draft of the lead judgment of my learned brother **H.A.O. Abiru JCA** in this appeal. I agree with his reasons and conclusion that the appeal is lacking in merit and should be dismissed. I accordingly hereby dismiss it. The conviction and sentence of the appellant by the trial court are thereby affirmed by me.

**ITA G. MBABA, J.C.A.:**

I have had the privilege of reading the lead judgment, just delivered by my learned brother, **H.A.O. ABIRU JCA,** and I agree, completely, with his reasoning and conclusion that the appeal is devoid of merit.

I think it is rather strange for Appellant, who failed to testify at the trial Court and only rested on the case of the prosecution, to raise, on appeal a defence of provocation which was never an issue before the trial Court and which was never considered in the judgment appealed against and could not have been contemplated in the judgment. Such a defence is lame and an afterthought, which cannot be available to the Appellant, especially as he did not file any application before this Court to raise it as a fresh issue for consideration.

We have stated, several times, and it is trite principle of law that an issue on appeal can only be formulated from a ground of appeal which flowed from the judgment appealed against and not from the wishful thinking of Appellant. See the case of **SHETTIMA VS. GONI (2011) 18 NWLR (Pt.1297) 413 at 440; OSSAI VS. FRN (2013) 13 WRN 87; UNILORIN VS. OLAWEPO (2012) 52 WRN 42; OSENI VS. BAJULU (2010) ALL FWLR (Pt. 511) 813**.

The law is also trite that a confessional statement remains the best evidence in proof of guilt and can, alone, lie conviction, being evidence against self, and amounting to a Surrender to the law. It is moreso, where the confessional statement is adjudged positive and direct, and freely made by the Accused person. See the case of **YUSUF VS. THE STATE (2012) LPELR 7878 (CA) OMOJUH VS. FRN (2008) ALL FWLR (Pt. 415); SALAHUDEEN VS. THE STATE (2013) LPELR CA/K/1/C/2012; AKPA VS. STATE (2009) 39 WRN 27; (2008) 14 NWLR (Pt.1105) 72 BLESSING VS. FRN (2013) 12 WRN 36**.

In this Appeal, the Appellant never really contested the voluntariness of his confessional statement (Exhibits 1 and 2) at the trial, and the free flow of the account of his squabbles with his wife, his anger and the resultant furious attack on her with machete, leaves no doubt that his act resulted in the death of his wife. He said:

**"... I insulted her father and she retaliated, after that I was annoyed and slapped her, I then brought out a machete in the room and cut her on her chicks (sic) and jaws for the first time.  
The second time she was trying to blocked (sic) the machete with her hand and I cut her the second time ... I left her in the blood rushing out of her body and dropped the machete inside the room and ran into the bush..."**

Of course, when the fire of anger seized him, he dealt the matchet cuts on his wife and watched blood (life) gushing out of her body and he did nothing to stop the flow! It then dawned on him he had fatally wounded his wife and so he ran away into the bush and abandoned her to die.

That is the usual story of a fallen man, as he plays a pawn in the hands of fate. At the heat of passion of anger and hate, he turns his strength and might against his pal to brutalize and hurt, even a fragile tendril that gives him pleasure, and which he was meant to protect and keep!

Appellant cannot escape the consequences of his evil act. I too dismiss the appeal, and affirm the judgment of the Lower Court on his guilt.

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