**IDI MUH’D (ALIAS IDUA)**

**V**

**THE STATE**

SUPREME COURT OF NIGERIA

7TH DAY OF APRIL 2017

SC. 578/2014

**LEX (2017) - SC. 578/2014**

OTHER CITATIONS

2PLR/2017/156 (SC)

**BEFORE THEIR LORDSHIP**

WALTER SAMUEL NKANU ONNOGHEN, CJN

MUSA DATTIJO MUHAMMAD, JSC

KUDIRAT M. OLATOKUNBO KEKERE-EKUN, JSC

EJEMBI EKO, JSC

SIDI DAUDA BAGE, JSC (Read the Lead Judgment)

**BETWEEN**

IDI MUH’D (ALIAS IDUA) – Appellant

AND

THE STATE – Respondent

**ORIGINATING COURT**

COURT OF APPEAL, KADUNA JUDICIAL DIVISION

JIGAWA HIGH COURT (Abubakar Sambo Mohammed, J., Presiding)

**REPRESENTATION/LAWYERS**

N. A. DANGIRI with A.M., KARAYE and A.I. LIKKO - for the Appellant.

SANI HUSSENI GARU-GABAS (Attorney-General of Jigawa State), MUSA N. IMAM (DPP), M. MUSTAPHA (DLD), H. ABDULLAHI (DDLD) and MUHAMMAD EL-USMAN (Senior State Counsel) - for the Respondent.

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

CRIMINAL LAW AND PROCEDURE - CONTRADICTIONS IN TESTIMONIES OF WITNESSES:- Nature of that are material

CRIMINAL LAW AND PROCEDURE – HOMICIDE:- Culpable - Offence of - Ingredients of

CRIMINAL LAW AND PROCEDURE – DEFENCES:– Provocation - Meaning of - Nature of defence of

CRIMINAL LAW AND PROCEDURE – DEFENCES:- Provocation - Plea of - What implies

CRIMINAL LAW AND PROCEDURE – DEFENCES:- Provocation - Successful plea of - Conditions precedent to.

CRIMINAL LAW AND PROCEDURE – DEFENCES:– Provocation - Successful plea of – Effect.

CRIMINAL LAW AND PROCEDURE – DEFENCES:- Self defence - When avails accused.

**PRACTICE AND PROCEDURE ISSUES**

COURT:- Nature of as courts of facts and not of fiction.

EVIDENCE:- Contradictions in testimonies of witnesses – Nature of – Whether fundamental.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellant, a Fulani was alleged to have been involved in a fight with the deceased which emanated from the mischief caused on the latter’s land by the Fulanis. The appellant was alleged to have hit the deceased with a stick, cut him with a machete and shot him with a bow and arrow leading to his death. Upon appellant’s arrest, he was arraigned in the High Court of Jigawa State on a one-count charge of culpable homicide punishable with death contrary to section 221(b) of the Penal Code. The appellant raised the defences of provocation, self-defence and alibi. The trial court found the appellant guilty and sentenced him appropriately.

Aggrieved, the appellant appealed to the Court of Appeal where his conviction was affirmed. He further the appellant appealed to the Supreme Court contending that the lower court inappropriately upheld his conviction when the trial court failed to properly consider the defences raised by the appellant.

**DECISION(S) APPEALED AGAINST**

The Court of Appeal entered judgment, affirming the decision of the trial court that convicted and sentenced the Appellant to death for the offence of culpable homicide punishable with death under section 221(b) of the Penal Code. Dissatisfied, the Appellant appealed to the Supreme Court.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

“(i) Whether from the facts and circumstances of this case, the learned justices of the Court of Appeal were right in holding that the defence of provocation is not available to the appellant (Grounds 3, 4 and 5).

(ii) Whether the learned justices of the lower court were right in relying on the contradictory testimonies of the 1st, 2nd and 3rd prosecution witnesses in convicting and sentencing the appellant to death. (Grounds 1, 2 and 6).

(iii) Whether the learned Justices of the lower court were right in convicting and sentencing the appellant to death instead of a terms of imprisonment considering the fact that there was a fight between members of the families of the deceased and the appellant. (Ground 3 and 8).”

*BY RESPONDENT:*

“(i) Whether from the fact and circumstances of this case, the learned justices of the Court of Appeal were right in holding that the defence of provocation is not available to the appellant.

(ii) Whether the learned justices of the Court of Appeal were right in holding that there was no contradiction in the testimonies of the 1st, 2nd and 3rd prosecution witnesses.”

*AS ADOPTED BY COURT:*

[The Court adopted the issues formulated by the Appellant].

**MAIN JUDGMENT**

BAGE JSC (DELIVERING THE LEAD JUDGMENT):

This is an appeal against the decision of the Court of Appeal, Kaduna Judicial Division, delivered on 6 June 2014, in appeal No. CA/K/202/C/2013. The Court of Appeal affirmed the decision of the Jigawa High Court presided by Hon. Justice Abubakar Sambo Mohammed.

The brief facts of this case is aptly captured in the lead judgment of B.A.O. Abiru JCA at pages 136 - 137 of the record of appeal thus:

“...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, along with another person now at large, killed one Hamza Barde on 12 December 2008 at Jumawa Fulani settlement in Sule Tankarkar Local Government Area of Jigawa State by hitting him with a stick on his face, cutting him with a machete on his head, and shooting him with bow and arrow. 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 too called five witnesses in proof of his defence. At the conclusion of trial, the 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 the Court of Appeal on 9 May 2013, he filed a notice of appeal dated 22 April 2013 on the 13 May 2013. The notice of appeal contained twenty-two grounds of appeal.”

The judgment of the trial court convicting and sentencing the appellant to death is at pages 54 - 78 of the record of appeal, while the judgment of the lower court affirming the decision of the trial court is at pages 136 - 155 of the record of appeal. And dissatisfied with the decision of the lower court affirming his conviction and sentence to death for the offence charged, the appellant by a notice of appeal containing eight (8) grounds of appeal dated and filed on 20 June 2014, appealed to this court. The notice of appeal containing eight grounds, is on pages 156 - 159 of the record of appeal. From the said grounds, the appellant formulated the following three (3) issues for the determination of this appeal viz:-

“(i) Whether from the facts and circumstances of this case, the learned justices of the Court of Appeal were right in holding that the defence of provocation is not available to the appellant (Grounds 3, 4 and 5).

(ii) Whether the learned justices of the lower court were right in relying on the contradictory testimonies of the 1st, 2nd and 3rd prosecution witnesses in convicting and sentencing the appellant to death. (Grounds 1, 2 and 6).

(iii) Whether the learned Justices of the lower court were right in convicting and sentencing the appellant to death instead of a terms of imprisonment considering the fact that there was a fight between members of the families of the deceased and the appellant. (Ground 3 and 8).”

On the other hand, learned counsel for the respondent formulated the following two issues for the determination of this appeal to wit:

“(i) Whether from the fact and circumstances of this case, the learned justices of the Court of Appeal were right in holding that the defence of provocation is not available to the appellant.

(ii) Whether the learned justices of the Court of Appeal were right in holding that there was no contradiction in the testimonies of the 1st, 2nd and 3rd prosecution witnesses.”

After a careful perusal of the three issues proposed by the learned counsel for the appellant, vis-a-vis the two issues as proposed by the learned counsel for the respondent, I am satisfied that the three issues proposed by the learned counsel for the appellant are adequate for the purpose of this appeal.

In his written brief and oral submission before this court, learned counsel to the appellant argued issues 1, 2 and 3 together. In arguing the appeal, the learned counsel for the appellant submitted that, there was indeed a fight between the family of the deceased (Hamza Barde) and that of the appellant. PW1 in his testimony in chief said, he was an eye witness of the event leading to the death of the deceased. The PW2 and PW3 also claimed to be eye witnesses to those events leading to the death of the deceased. One common thread going through the evidence of PW1, PW2 and PW3 is that, there was a fight between members of the family of the deceased and the appellant. Those pieces of evidence of PW1, PW2 and PW3 remained unchallenged, and so the two lower courts ought to act on them. He further argued that considering the social background of the accused and the deceased being Hausa farmer and Fulani cattle rearer, both hold their farms and cattle very dear. He cited in support of his submission the dictum of Wali JSC, in Lado v. The State (1996) 6 SCNJ 1 at 6 to the effect that: “It is a notorious fact that a Fulani cattle rearer carries stick with him, wherever he goes. It is with the stick that he controls the cattle.” According to him, the above-quoted evidence of PW1, PW2 and PW3, and of course the finding of fact by the learned trial judge and the learned Justices of the lower court on the evidence quoted above clearly raised the defence of provocation as provided by section 222( 1) of the Penal Code of Jigawa State.

Learned counsel submitted further that all the three (3) eye witnesses agreed that the appellant was holding a stick. However, they did not agree as to whether the deceased was hit on the face, head, in the front or from behind. It is not clear from the printed record how the discrepancies which the learned trial judge said exists at page 73 of the printed record was resolved and the lower court did not, with respect, also resolved the conflict.

He further submitted that the lower court did not also consider the defence of provocation. See pages 144 - 145 of the printed record. Also, pages 146, 147 and 148 of the printed record. Rather, the lower court only considered the defence of alibi, and had nothing to do with the defence of provocation as concluded at page 149 of the record of appeal.

Learned counsel submitted further that the defence of provocation can be verbal as it is the case in the present appeal.

Both the trial court, and the lower court ought to have given serious consideration as to why appellant who was not described as insane or abnormal or who has no evidence of any mental incapacity by PW1, PW2, and PW3 who claimed to know him for over twenty years should attack the deceased for no apparent reason. In support of this submission, he relied on the case of Lado v. State, where this court held that provocation can be verbal or physical.

According to him, there is no evidence to prove that the prosecution has discharged the onus placed on it by law to prove the absence of such provocation. The lower courts only considered the defences of alibi and self-defence. This court is referred to the case of Sheidu v. The State (2014) All FWLR (Pt. 750) 1381, (2014) 15 NWLR (Pt. 429) 1, where the defence of provocation was extensively discussed and the conviction and sentence of the appellant were reduced to terms of imprisonment instead of death sentence. He vociferously argued that, “once there is evidence of provocation either from the prosecution or from the defence, the onus is on the prosecution to prove the absence of such provocation.”

Learned counsel further submitted that, the learned trial judge relied on inadmissible evidence having to do with bad character of the accused person, when the accused person has not tendered evidence of his character. The learned trial judge ought to have stopped PW1, PW2 and PW3 from giving evidence of bad character of the accused person. Instead, the learned trial judge at page 77 of the printed record said he believed the evidence of prosecution and rejected that of the defence. All the defences raised by the accused person, the trial court maintained are unsustainable in law. Sections 77 - 87 of the Evidence Act, 2011 deal with evidence of character when relevant. Also sections 68, 69, 72 and 160 of the Evidence Act. See also per Brett JSC in Lawal v. The State (1965-1966) NSCC (Volume 4) Pt. 111 at 113 - 117, he stated that the character evidence of the accused ought not to have been admitted or relied upon by the trial court and accepted by the lower court. And when crucial evidence in a criminal case is over looked or misunderstood by a trial court as in this case, then it is likely to lead to a miscarriage of justice.

This is because the appellate court in considering a complaint by the accused against the judgment reached on that basis by the trial court, may be unable to say what the decision would have been had the trial court given proper consideration to such evidence, see Lado v. The State at page 13. He urged this court to resolve all the three issues in favour of the appellant.

In reply to the submission of the appellant above, the learned counsel for the respondent contended that the appellant in his brief of argument filed before this court, conceded that the deceased, Hazma Turu died as the result of the act of the appellant. The appellant submitted that the three issues he raised were interwoven, as such he argued them together. Learned counsel to the respondent also argued the two issues formulated together as well.

Learned counsel to the respondent submitted that from the testimonies of the three prosecution witnesses PW1, PW2 and PW3, the word “came” featured prominently. This means that the appellant was not at the scene at the material time the deceased was being consoled by Lamido. He was somewhere else and the moment he arrived he struck the deceased. Also the testimony of DW3 indirectly affirmed this fact.

Learned counsel further submitted that, while making submission on the weapon used in killing the deceased, the learned counsel for the appellant contended that there were contradictory testimonies from the prosecution witnesses on the type of weapon used to commit the offence. For contradiction to be of any help or assistance to the appellant, that contradiction must be material and substantial, and it must relate to a material point in the prosecution’s case. See Osetola v. The State (2012) All FWLR (Pt. 649) 1020, (2012) 17 NWLR (Pt. 1329) 251 at 282, paragraphs D - E; Igabele v. State (2006) All FWLR (Pt. 311) 1797, (2006) 5 MJSC 96 at 108, paragraphs A - C.

Learned counsel submitted further that in this appeal, the prosecution witnesses 1, 2 and 3 were eye witnesses to the incident and they gave cogent testimonies and maintained so under cross-examination. All the material evidence in the prosecution’s case linked the appellant with the death of the deceased. According to him, it is glaringly clear from the medical record that the cause of death of the deceased arose from the wounds from arrows; axe and injury to the bowels, and in the diagnosis card it was stated very clear that there was axe cut on the face. The defence of provocation cannot avail the appellant in the circumstances of this case. Learned counsel to the respondent relied on Kaza v. The State (2008) 12 QCCR 146; Shalla v. The State (2007) 18 NWLR (Pt. 1066) 240 at 272 - 273, (2008) All FWLR (Pt. 397) 25; Yaro v. State (2007) 18 NWLR (Pt. 1066) 215 at 233, (2008) All FWLR (Pt. 397) 1 in support of this proposition. He further submitted that this finding of fact was made by the Court of Appealat page 144 of the printed record. See also, the cases of Ekpeyong v. The State (1993) 5 NWLR (Pt. 295) 513; Annabi v. The State (2008) 13 NWLR (Pt. 1103) 179. The character issue also did not avail the appellant. See Lawal v. The State (1966) 1 All NLR 107. He urged this court to resolve all the two issues in favour of the respondent.

To establish its case beyond reasonable doubt, the prosecution called PW1, PW2 and PW3. All the three witnesses were eye witnesses when the appellant was alleged to have committed the offence charged.

The appellant was charged on one count charge. It read:-

“That you Idi Muhammad alias Idau ‘M’ and another now at large on or about 12 December 2008 at about 1510 hrs at Jumawa Fulani settlement, Sule Tankarkar Local Government Area within the Jigawa Judicial Division committed culpable homicide, when you caused the death of one Hamza Barde, the deceased by hitting him with a stick on his face cutting him with a machete on his head and shooting him with bow and arrow and thereby committed an offence punishable under section 221(b) of the Penal Code Cap. 107, Law of Jigawa State, 1998.”

The law is settled under our jurisprudence that to succeed in a trial of an accused person for an offence of culpable homicide, the prosecution must prove beyond reasonable doubt that:-

“(1) That the accused killed the deceased person;

(2) That the death of the deceased was a result of the voluntary act of the accused; and,

(3) That the killing was unlawful.”

In proof of the charge of culpable homicide against the appellant, the prosecution called three eye witnesses:-

1. Tasi’u Usman of Tagwayen Fage Village in Garki Local Government of Jigawa State. He stated that on that fateful day, there was a fight between them and the Fulanis of Jumawa as a result of the mischief committed in their farm land by the said Fulanis. He further state, that one Fulani man by the name, Lamido Usman came and asked them to stop fighting and resolve the dispute amicably, but to their surprise the accused person came through behind Lamido Usman and hit the deceased Hamza Barde with a stick on his face and cut him with a machete on his head. (PW1).

The 2nd prosecution witness one Shuaibu Musa of Tagwayen Fage Village, Garki Local Government of Jigawa State, stated that, on that fateful day while fighting with Fulanis of Jumawa, he saw the time when the accused person cut the deceased with a machete on his head.

The 3rd prosecution witness, Murtala Ubali of Tagwayen Fage Village, Garki Local Government Area of Jigawa State, also stated that, on that fateful day while fighting with Fulanis of Jumawa, he saw the time when accused person cut the deceased with a machete on his head.

The 4th and 5th prosecution witnesses, Corporal SaniGarba State CID Jigawa State who stated that, he was part of the Police Officers that investigated the case, recorded the statement of the accused person and Dr. Abubina Babalola of the Gumel General Hospital of Jigawa State who stated that he carried out post-mortem examination on the corpse of the deceased and to further state his finding there.”

From the evidence generally, the appellant in the instant appeal was sufficiently linked to the cause of death of the deceased. The trial court was perfectly right in holding that a prima facie case was established against the appellant. The evidence against the appellant is direct and not circumstantial. PW1, PW2 and PW3 were eye witnesses in whose presence the dastardly act was committed. Throughout, the defence put forward by the appellant, from the trial court, to the Court of Appeal, and in this court, nowhere had the appellant put up a denial that he had not committed the offence for which he is charged. The appellant put up some hangers, in the form of defences, which by their very nature are mitigators and not necessarily to exculpate him from the offence which he committed. For example, the appellant put up the defences of provocation, self-defence, and alibi. Let us pause to consider the defence of provocation, whether it can avail the appellant in the circumstances of this case. The simple fact of the case is that, there was a fight between the tribe of the appellant (Fulani) and the tribe of the deceased (Hausa). The controversy surrounds a mischief caused to the farm of the deceased and others. The Lamido who is the Chief of the Fulani settlement was in the process of consoling the deceased and others, the appellant was then absent, but just came around and struck the deceased with a machete. The word “came” had appeared three times in the testimonies of the three prosecution witnesses. This means that the appellant was not at the scene of crime at the material time the consolation begun. He was somewhere else, and the moment he arrived, he struck the deceased. The lower court at page 145 of the printed record after considering the defence of provocation as raised by the appellant held as follows:-

“The defence of provocation is provided 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 power 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 feeling had an adequate cause.”

Having the feeling of an adequate cause, in the circumstance of the present appeal, the appellant from the facts, was not even present when the issue of the mischief was being discussed.

Can the appellant use provocation as a hanger then? This court in Kaza v. The State, has laid down the requisite conditions to be satisfied before the defence of provocation could avail the appellant. Perhaps we may need to look at certain conditions set out by this Court under the Penal Code, for the defence of provocation to avail the appellant. See Kaza v. The State (2008) 12 QCCR 146. The conditions are as follows:-

“(i) The act of provocation must be grave and sudden;

(ii) The accused must have lost self-control, actual and reasonable;

(iii) The mode of retaliation must bear reasonable relationship to the provocation.”

See also Akpan v. The State (1994) 4 SCNJ 140; Oladipupo v. The State (1993) 6 SCNJ 233; Ihuebeka v. The State (2000) 2 SCNQR 186 Vol. 2. I cannot see how, the appellant, who was physically absent, during the initial session of consolation between Lamido, the leader of the appellant and the deceased person and others; that any or all the three conditions for defence of provocation as spelt out by this court, in Kaza v. The State can avail the appellant. Perhaps again, this court was more elaborate when it defined the term provocation to denote some acts or series of acts (or utterance) done or said by the deceased to the accused person which would cause any reasonable person and which actually caused in the said accused person, a sudden and temporary loss of self-control, rendering him (i.e. the accused) so subject to passion as to make him for a moment not a master of his mind.

In the instant appeal, even the appellant has not shown in defence, a pre-interaction with the deceased person before the said attack. Eye witnesses testimony said “just came.” The point is well marshaled when this court held in Yaro v. The State (2007) 18 NWLR (Pt. 1066) 215 at 233, (2008) All FWLR (Pt. 397) 1 that:- “The defence of provocation is like any other defence as such, it cannot be seen to be on a shaky foundation or hang in the air without any supporting evidence.”

And without any supporting evidence, in the instant appeal, the defence of provocation cannot avail the present appellant. I earlier on alluded to some other defences raised by the appellant to include self-defence, alibi, and contradictions, in the testimonies of the prosecution witnesses. For the defence of self-defence, to avail the appellant, the evidence he presents, must disclose that the act committed by him is a last resort to either escape death or a grievous bodily harm from the aggression of the deceased person. See Uwaekweghinya v. The State (2005) All FWLR (Pt. 259) 1911, (2005) NCC 374 at 384 paragraphs B, C and D. This court held as follows:-

“But the defence of self-defence in my view is different. Before the defence is available, it must be shown by the person relying upon it that he reasonably believe that there was no other way of saving himself from death or grievous bodily harm other than by using such force as he did and that he tried to disengage from the event which led to the application of such force or in the instant case the use of cutlass. See Umana v. The State (1972) 4 SC 164; Bassey v. The Queen (1963)1 All NLR 285.

For an accused person to avail himself of the defence of self-defence, he must show by evidence that he took reasonable steps to disengage from the fight or make some physical withdrawal. But the issue of disengagement depends on the peculiar circumstances of each case.”

The peculiar circumstance of the instant appeal, there is no iota of evidence, in the record before this court to show the necessity for a resort to self-defence by the appellant. I agree, entirely with the lower court on pages 147-148 of the printed record, when it said:-

“I have found that the accused person at the material time he struck down the deceased, it was not in the midst of the fighting. His victim was not reported to be armed or engaged in the fighting at the material time he was struck down. Evidence has revealed that the deceased victim was aggrieved and somehow he was expressing his anger over the mischief committed inside their farmlands. The deceased was at the instance, engaged in conversation with the accused person’s village head (Lamido) who was consoling him when the accused person came from behind and struck down the deceased with an axe and a stick without the deceased posing any threat or proportionate danger armed with weapons against the accused person.”

The lower court continued on the same page to state:-

“These findings were not challenged or contested by the counsel to the appellant in his brief of arguments. It is settled law that where a finding of fact made by a trial court is not contested or challenged on appeal, it remains unassailable and is binding on the parties -Amale v. Sokoto Local Government (2012) All FWLR (Pt. 618) 833, (2012) 5 NWLR (Pt. 1292) 181; SCC (Nig.) Ltd v. Anya (2012) 9 NWLR (Pt. 1342) 503; Nwaogu v. Atuma (2013) All FWLR (Pt. 669) 1022, (2013) 11 NWLR (Pt. 1364) 117.”

From the above, self-defence cannot be available to the appellant. The situation also covers adequately the defence of alibi raised by the appellant. This is a situation where appellant has not shown he was physically in some other place, other than the scene of the crime when it was committed.

In fact, there was no exchange of words of any kind between the deceased and the appellant when he arrived at the scene, before the deceased was “attack.” The defence of alibi cannot be available to the appellant.

The last hanger of defence left for the appellant are those minor discrepancies in PW1, PW2 and PW3 evidence whether it was an axe or machete that was used to strike down the deceased by the appellant. In an answer to this question, the lower court at page 149 of the record, stated as follows:-

“Though I have found minor discrepancy in PW1, PW2 and PW3 evidence as regards to whether it was an axe or machete that was used to strike down the deceased by the accused person, such discrepancy in my view is not material to affect the veracity of their evidence. It is common knowledge that axe and machete are referred to as one and the same subject by some people.

In view of exhibit A (the medical report or post-mortem report on the deceased body), it was an axe wound found on the deceased body.”

Reading through the judgment of the lower court, the lower court did resolve the differences in the testimonies of the witnesses on the nature of weapon of attack. This court will not tamper with this resolution which remains unassailable. It is only to add that, the law is that, contradictions of minor details which do not affect the substance of the issue to be decided are irrelevant.

The relevant contradictions must be shown to amount to a substantial disparagement of what was said, making it unsafe to rely on either. See John Agbo v. The State (2005) 2 NCC 158 at 161, (2006) All FWLR (Pt. 309) 1380; Ayo Gabriel v. The State (1989) 5 NWLR (Pt. 122) 457, 468 - 469, (1989) 12 SCNJ 33 at 42.

Having established that, all the defences put up by the appellant, have collapsed, this satisfies the fact that; the prosecution has proved its case beyond reasonable doubt against the appellant. The evidence before the court is overwhelming. The prosecution produced three (3) living eye witnesses in whose presence the murder was committed.

The prosecution produced the weapon used for the commission of the offence. The prosecution produced the medical report which confirmed the cause of death of the deceased person, to be the use of that weapon which caused such a severe injury; that led to the loss of life of the deceased person.

Before concluding, let me cite with admiration what the late eminent jurist Eso JSC, (as he then was) stated in the case of The State v. Aibangbe 2 LC page 550 at 569, on courts being court of facts and law and not of fiction.

“For be it noted, a court of law is a court of facts and law and not a court of fiction. Fiction belongs to Alice in Wonderland. Facts belong to the court where the judge almost visibly, sees in his mind, a scale - hence, it is called an imaginary scale. He feeds facts into either scale, depending on which side gives the evidence in a criminal case, until the prosecution weighs right down the judge does not convict. In a civil case, the judge measures the delicacy of the tilting scale at the time he assesses the evidence, the tilt may be slight yet he gives judgment for the side to whom it is tilts. If there is no evidence fed into one of the scales, then it is for whom the bell tolls? It tolls for the empty scale, for eminently, the slightly fed scale wins against the empty scale.”

In the present case, the prosecution gave evidence which weighs right down the court. The prosecution in essence has proved its case beyond reasonable doubt against the appellant. All the three (3) issues in this appeal are resolved against the appellant.

This appeal is unmeritorious, and it is hereby dismissed. The judgment of the Court of Appeal, Kaduna Judicial Divisions, delivered on 6 June 2014 in appeal No. CA/K/202/C/2013, is hereby affirmed by this Court. The conviction and sentence to death for the offence of culpable homicide by the appellant is hereby affirmed.

**ONNOGHEN CJN:**

I have had the benefit of reading in draft, the lead judgment of my learned brother, Sidi Bage JSC just delivered.

I agree with his reasoning and conclusion that the appeal is devoid of merit and should consequently be dismissed. I therefore order accordingly and affirm the judgment of the lower court. Appeal dismissed.

**MUHAMMAD JSC:**

Having read in draft, the lead judgment of my learned brother, Bage JSC, just delivered, I agree with his lordship that the appeal lacks merit. I imbibe the reasoning leading to the conclusion in the lead judgment as mine in dismissing the appeal. I abide by the consequential orders made in the lead judgment.

**KEKERE-EKUN JSC:**

I have had the benefit of reading in draft, the judgment of my learned brother, Sidi Dauda Bage JSC just delivered. I agree with the reasoning and conclusion that the appeal is devoid of merit and should be dismissed. I make a few comments in support of the judgment. In doing so, I adopt the summary of the facts leading to this appeal as set out in the lead judgment.

The appeal is a further appeal against the appellant’s conviction and death sentence for the offence of culpable homicide punishable with death by the High Court of Jigawa State after an unsuccessful appeal to the Court of Appeal, Kaduna Division which was dismissed on 6 June 2014.

It is the appellant’s contention that in the circumstances of this case the defence of provocation ought to have been found in his favour. Learned counsel for the appellant relying on the authority of Lado v. The State (1996) 6 SCNJ 1 at 6, submitted that provocation can be both physical and verbal and that in the absence of evidence of insanity or mental incapacity on the part of the appellant, explaining why he would have attacked the deceased for no apparent reason, the lower court ought to have held that the prosecution failed to discharge the onus of satisfying the court that he was not entitled to the defence.

Learned counsel for the respondent argued that the facts in Lado’s case are distinguishable from the facts of this case and that the appellant failed to prove the alleged provocation by the deceased that warranted the taking of his life, particularly, as the evidence shows that the appellant hit the deceased from behind. It is an established principle of law that in a case of a culpable homicide, the trial court and even the appellate courts have a duty to consider all defences available to the accused person whether directly raised by the defence or not, provided there are sufficient facts on the record capable of being considered as adequate proof of such defences. See Ojo v. The State (1973) 11 SC (Reprint) 199. In other words, the court cannot discharge this duty where the defences are not supported by the evidence on record. See: Annabi v. The State (2008) 13 NWLR (Pt. 1103) 179; Namsoh v. The State (1993) 5 NWLR (Pt. 292) 129 at 143, paragraphs A - B; Maiyaki v. The State (2008) All FWLR (Pt. 419) 500, (2008) 15 NWLR (Pt. 1109) 173.

Section 221(1) of the Penal Code of Jigawa State provides:

“221(1) Culpable homicide is not punishable with 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.”

(Italics mine for emphasis)

The elements which must be present to sustain a defence of provocation and which must co-exist are as follows:

(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 tempers to cool; and

(c) The retaliation was proportionate to the provocation.

Where the defence of provocation is established it has the effect of whittling down the punishment stipulated for culpable homicide punishable with death to culpable homicide not punishable with death. See Edoho v. The State (2010) All FWLR (Pt. 530) 1262, (2010) 14 NWLR (Pt. 1214) 651; Ajunwa v. The State (1988) 4 NWLR (Pt. 89) 380. It is not sufficient merely to show that the accused was provoked into losing self-control, it must be shown that the provocation was such as would, in the circumstances have led a reasonable man to lose his self-control.

See Annabi v. The State (2008) 13 NWLR (Pt. 1103) 179. In Lado v. The State (1999) 9 NWLR (Pt. 619) 369 at 380, paragraph F, it was held that it must be shown that there was instant provocation negativing the possibility of deliberation or choice of alternatives. In that case, taking into consideration factors such as the primitive nature of the community where the offence occurred and the premium placed on farm ownership, this court held that the sight of cattle destroying his crops followed by the threat of violence with a stick, constituted such grave and sudden provocation as to deprive the appellant of self-control and caused him to react in the manner that he did. The facts of Lado’s case are poles apart from the facts of this case.

The uncontroverted evidence of PW1, PW2 and PW3 was that there was no exchange at all between the appellant and the deceased. In fact, the appellant arrived at the scene after being informed by his wife that there was a fight going on in the village between the Hausas and the Fulanis. Indeed, the evidence of these three witnesses was that it was while the village head, Lamido, was consoling the deceased regarding damage allegedly done to the farms of the community by the appellant and trying to resolve the matter amicably, that he suddenly appeared from behind and struck the deceased with a matchete, which led to his death.

I am in full agreement with the lower court that there was no iota of evidence on the record of provocation of the appellant by the deceased. I also agree that the alleged inconsistencies in the evidence of PW1, PW2 and PW3 as to whether the weapon used was a matchete or an axe was not material as the medical report indicated that the death of the deceased was as a result of an injury inflicted by an axe and other injuries inflicted with arrows. Both axe and matchete are lethal weapons when used other than for their intended purpose. Moreover, there was sufficient evidence before the court to leave it in no doubt as to the guilt of the appellant.

For these and the more exhaustive reasons stated in the lead judgment, I find this appeal to be devoid of merit. I accordingly dismiss it and affirm the judgment of the lower court.

**EKO JSC:**

On 6 June 2014, the Court of Appeal, Kaduna Division, in the appeal No. CA/K/202/C/2013, affirmed the conviction and sentence handed down on the appellant by the Jigawa State High court for the offence of culpable homicide punishable with death.

The appellant has further appealed in this court for the review of the decision of the Court of Appeal. I had the privilege of reading in draft, the judgment just delivered in this appeal by my learned brother, Sidi Dauda Bage JSC. It represents my views in the appeal. I intend only to add a few comments of mine for purposes of emphasis.

An issue was raised as to whether the Court of Appeal, the court below, was right in holding that the defence of provocation was not available to the appellant. The appellant, from the records, did not explicitly raise the defence of provocation himself.

However, because of the death sentence imposed, all defences that may avail the convict may have to be considered.

A plea of provocation:

In the instant case, there was no specific plea of provocation as a defence, nor could the defence be inferred from the evidence of the prosecution.

The evidence of PW1, PW2 and PW3, which the two courts believed, had fixed the appellant to the scene of crime. These are concurrent findings of fact which are not perverse. The appellant had a duty to establish his alibi. The evidence of DW1 was largely hearsay. This much was admitted by the DW1. The DW3 admitted that he was informed by the appellant’s wife that there was a fight at the appellant’s hamlet and that the appellant, on hearing of the fight, left for the hamlet. Meaning, at the time of the fight the appellant was not present in the hamlet, even if that much could be believed. The DW4 was with the appellant up to 2.30pm on the fateful day. The appellant heard of the fight after Friday prayers and at that point parted ways with the DW4. The alleged homicide took place after the appellant had left the DW4. The evidence of DW4 is not useful for alibi or provocation. Simultaneously, pleading alibi and provocation as defences tantamounts, in my view, to approbating and reprobating at the same time on one issue.

There was no evidence that the deceased and the appellant were at the scene of the earlier fight and or participated therein. The indubitable fact is to the effect that the appellant was not present at that fight. If in fact the fight had taken place earlier, then the conduct or act of the appellant to which the PWs 1 – 3 testified was an act of unnecessary revenge or retaliation, which thus negatives provocation or self-defence. This is even as he, Lamido had intervened and was making peace when the appellant struck the deceased. The appellant, therefore, cannot complain that the court below held that provocation was not available to him.

I cannot fault the decision of the court below which affirmed the conviction and sentence of the appellant for the offence of culpable homicide punishable with death. The appeal lacking in substance is hereby dismissed. The decision of the Court of Appeal in the appeal No. CA/K/202/C/2013 delivered on 6 June 2014 is hereby affirmed.

Appeal dismissed