**SUNDAY UDOFIA**

**V.**

**THE STATE**

IN THE SUPREME COURT OF NIGERIA

7TH DAY OF DECEMBER, 1984

**LEX (1984) – 12 SC 139**

OTHER CITATIONS

2PLR/1984/51 (SC)

(1984) 12 SC 139

# BEFORE THEIR LORDSHIPS

# ADOLPHUS GODWIN KARIBI-WHYTE, JSC

MOHAMMED BELLO, JSC

DAHUNSI OLUGBENI COKER, JSC

# SAIDU KAWU, JSC

CHUKWUDIFU AKUNNE OPUTA, JSC

**REPRESENTATION**

FOLA AKINRINSOLA with AGBAJE, AKINTAN and O. ZAID for the Appellants.

K.A AKANDE, Director of Public Prosecution, Oyo State for the Respondent

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

CRIMINAL LAW AND PROCEDURE:– Murder – Proof – Confession of accused person – Where retracted – Whether can still support conviction – Duty of trial court thereto

CRIMINAL LAW AND PROCEDURE:– Murder trial – Plea of Self-defence – Whether only available if there was reasonable apprehension of death or grievous harm and the accused reasonably believed that the act of killing was necessary for his own protection and not that of an excitable individual killer

CRIMINAL LAW AND PROCEDURE:– Murder trial – Plea of Self-defence – Test - Whether objective and not subjective: that of a reasonable man and the act which resulted in the killing must be the reaction of a reasonable person placed in similar situation

CRIMINAL LAW AND PROCEDURE:– Murder trial - Plea of Self-defence – Distinction between Self-defence and Retaliation – Whether the guiding principles of self-defence are necessity and proportion – Two questions to be posed and answered

CRIMINAL LAW AND PROCEDURE:– Murder trial - Plea of Self-defence – Position of the victim – Where weaker than that of the accused – Whether in such a situation the issue of self-defence does not arise and the defence is not available

CRIMINAL LAW AND PROCEDURE:– Murder trial – Plea of provocation – Ingredients – Whether proof of insult or provocation is not enough – Whether there is need for the retaliation or reaction to bear due proportion to the act which led to the provocation, and for act to have been sudden and in the heat of passion without time to cool down – Presence of malice – Whether negatives plea

CRIMINAL LAW AND PROCEDURE:– Murder trial – Plea of provocation - Self-induced provocation – Whether can qualify as provocation within the definition of s. 318 of the Criminal Code – Whether merely a calculated attempt at retaliation, and not a response to a sudden passion – Three constituent elements which must be complete to found the plea of provocation

CRIMINAL LAW AND PROCEDURE:- Confession of accused person – Where rejected as having not been made voluntarily – Duty of trial court to hold a trial within a trial or voir dire

CRIMINAL LAW AND PROCEDURE:- Murder arising from adultery with spouse – When provocation would be acceptable defence – Whether ocular inspection/eye witness of the act is an essential ingredient – Whether circumstances which induce a desire for revenge, a desire "to punish the deceased for daring to make love overtures to spouse are inconsistent with the legal concept of provocation – Justification

CRIMINAL LAW AND PROCEDURE:- Relevant evidence – Evidence of taboo or ‘abominations’ among a tribe or ethnic group regarding adultery – How treated

CHILDREN AND WOMEN LAW: *Women and Crime –* Wife who colluded with husband to ‘punish’ another man for making sexual advances on her – Death arising therefrom – Whether wife liable for husband’s killing of man – How treated – *Women and Widowhood –* Woman widowed by philandering acts of husband – Valiant efforts of wife to prevent tragic events

CUSTOMARY LAW:- Customary taboos – Relevant of in criminal proceedings – Testimony that amongst the Efiks, it was an abomination to allow a person to go to another man's house and for the man to have sex with the man's wife on the man's own bed – Whether valid ground for finding provocation so as to convert murder to manslaughter

**PRACTICE AND PROCEDURE ISSUES**

APPEAL**:–** Court – Misdirection – meaning of – Distinction from attack of findings of facts

APPEAL:- Findings of fact - Evaluation of evidence and Credibility of witnesses – Whether peculiarly and comfortably within the exclusive competence and domain of the trial court – Attitude of appellate court to invitation to interfere therewith

EVIDENCE:- Peculiar facts of a case – Need for counsel and the court to focus on what the law is in relation to the peculiar facts and circumstances of the case in hand

WORDS AND PHRASES:- “Provocation” – Meaning

**Cases Referred to in Judgment:**

Babalola John v. Zaria Native Aut (1959) N.R.N.LR. 43

Bray v. Ford (1895) A.C. 44 at 49.

Cham Wei Keung v. R. (1967) 2 A.C. 160.

Chan Kau v. R. (1955) AC. 206.

Chidiak v. Laguda (1964) N.M.LR. 133 at 125.

D.P.P. v. Camplia (1978) 67 (Crim. App. R. 14).

Etowa Enang and Ors v. Fidelis Ikor Adu (1981) 11-12 SC 25

Lee Chun Chuen v. R. (1962) 3 W.LR. 146

Leonard Holmes’ case. (1946) 31 Cr. App R. 12 129 and 130.

Mancini v. D.P.P. (1941) 3 All E.R. 272.

Mensah v. The King (1945) 11 WAC.A. 2.

Olubu v. State 1980 1 N.C.R. 309 at 321.

Onyemaizu’s case (1959) N.M.LR. 93.

Palmer v. R. (1971) 55 Cr. App C. 223.

Pearson’s case (1835) 2 Lewin 216.

Queen v. Obiasa (1962) 1 All N.LR. 651.

R. v. Ajayi Omokoro (1941) 7 W.A.C.A 146.

R. v. Akpakpan (1956) 1 F.S.C. 1 at 2.

R. v. Kanu 14 W.A.C.A. 30.

R. v. Kassi (1939) 5 W.AC.A 154.

R. v. Nwibo (1950) 19 N.LR. 124

R. v. Onabanjo (1936) 3 WAC.A. 43.

Rex v. Holmes 31 CAP 1391.

Sunday Igbani Green v. The Queen 15 W.A.C.A. 73

Woolmington v. D.P.P. (1935 AC 462.

**MAIN JUDGMENT**

OPUTA. J.S.C (READING THE LEADING JUDGMENT)

On the 27th September, 1984. the court heard the appellant’s appeal against the judgment of the Court of Appeal, Ibadan Division, dismissing his appeal against the judgment of Babalakin. J. convicting him of the offence of murder and sentencing him to death. After reading the respective briefs of counsel for the appellant and the respondent, and listening to the oral arguments in elaboration of points made in those briefs, the court decided to dismiss the appeal and give its reasons later. Hereunder are my reasons:

To follow the various points agitated in the appeal before us, it may be necessary to set down rather briefly the facts of this case. The appellant and his wife, Clementina Onwuzurike, were arraigned before and tried by Babalakin, J. sitting in the Ibadan Judicial Division of the Oyo State High Court. The charge was murder. In the trial court, the prosecution’s case was that Clementina Onwuzurike (2nd accused) informed her husband, the 1st accused, now the appellant that the deceased, Raymond Nwachukwu, was making love overtures to her. Apparently displeased, the appellant rushed to the house of the deceased. He was not in but his ’wife, Francisca Nwachukwu, called as the 2nd P.W. was in. This was in the morning (6.30 a.m,) of 26th April 1979. The appellant complained to the 2nd P.W. that her husband, the deceased was "spoiling his family and he will not forgive him". Asked what the matter was, appellant replied "you will know when it happens". Disturbed by this awe-inspiring and foreboding message the 2nd P.W. went to the house of the appellant where she met Clementina Onwuzurike (2nd accused). She told the 2nd P.W. that it was nothing to worry about, that her husband, the deceased came to inquire about the new accommodation they were negotiating. At about 2 p.m. of the same 26th April 1979, the appellant repeated his visit to the house of the deceased, he again met the wife, the 2nd P.W. The appellant then left a message that the deceased, when he returned, should come over to his house so that they will go to see the new room they have secured. The deceased returned from work at about 8.30 p.m. His wife, the 2nd P.W. gave him the message.

He went over to the house of the appellant. Not long after there was shouting. The 2nd P.W., Francisca Nwachukwu and Linus Nwagwu, the cousin of the deceased rushed to the scene of the shouting. It was the house of the appellant.

There they saw the deceased lying half dead in a pool of blood. The police was sent for but the deceased died before the police arrived.

What was the story of the appellant? On the 27th April 1979, a day after the event, when the matter was quite fresh in his mind, the appellant made a statement to the police tendered as exhibit D. That statement is cogent, direct and consistent with the main props of the prosecution’s case - the love overture of the deceased to the wife of the appellant, the visit of appellant to the house of the deceased. In exhibit D the appellant stated that he reported the matter to the police who advised him "to maintain peace." But the appellant apparently was not a man of peace. On that fatal day, he returned from work rather early and to quote the statement exhibit D, "On reaching without the knowledge of anybody. I hid myself under the bed waiting if Raymond will repeat his call to my house this night."

He went and hid under his bed, armed with a matchet. At about 8.30 p.m. the deceased came into the house of the appellant. Here I will reproduce the relevant portion of exhibit D:-

"Immediately I came from under the bed. Raymond seeing me jumped down from the bed and gripped me and we started struggling... I then lay my hand on my cutlass and started cutting towards the direction which inflicted severe matchet cuts all over his body. He ran out from my room and fell outside."

This definitely is a confessional statement if proved to have been made voluntarily by the appellant.

In court, the appellant admitted signing the statement but insisted that he was beaten, kicked, slapped, his pants removed and he was made to sit naked on the floor. He then continued:-

"1st l refused to sign unless I see my wife-He then told me that after I sign he will allow me to see my wife, this make me to sign."

Since the issue here was whether exhibit D was voluntarily made or induced by threats, fear or promise from a person in authority, the learned trial judge did the right thing by conducting a trial of that issue in a mini trial within the main trial and found that exhibit D was the voluntary statement of the appellant made without any threat, inducement or promise held out to him by P.O. No. 50257 Paul Oseniha to whom the statement was made or by anybody in authority. The result is that whether the defence likes it or not exhibit D is evidence to be considered along with all other evidence in this case.

In his testimony in court, appellant denied discussing with her that "her husband has spoilt my family twice", denied asking her to tell her husband to come to their (appellant's) house. But on the most crucial issue - the killing of the deceased and the surrounding circumstances, the appellant testified as follows:-

"Immediately I entered my room I saw the deceased struggling with my wife. My wife was crying and the children were crying. The deceased and my wife were on my bed having sex together. Before I open my mouth to speak the deceased jumped down and gripped me by the neck. I struggled, I could not speak- When I saw him on my bed my head was hot. At that time I felt that the man wanted to kill me. Before I entered the house I had a big matchet in my hand. Exhibit A was the matchet I had in my hand. I had this cutlass exhibit A with me because it was the cutlass I took to work that night. When the deceased gripped my neck, the cutlass fell. I then fell on the cutlass, at that time I did not know how my hand got hold of the cutlass. I then saw that the deceased ran out".

This was the appellant's version of the events of that fateful day, 26th April 1979.

The learned trial judge fully considered the prosecution's story and the story of the defence and found:

1. That exhibit D was the voluntary statement of the appellant and that he could even convict on exhibit D alone (but he did not).

2. The learned trial judge believed the evidence of Francisca Nwachukwu, the wife of the deceased called as 2nd P.W. He therefore believed:

(i) that appellant went to the house of the deceased twice on 26/4/79 and on the second occasion he invited the deceased to call on him when he returned from work;

(ii) that the message was given to the deceased who by 8.30 p.m. left for the house of the appellant;

(iii) that 2nd P.W. and Linus Nwagwu 1st P.W. attracted by shouts went over to the house of the appellant (which was nearby) where they saw the deceased lying half dead in a pool of blood with matchet cuts all over his body.

3. The trial judge disbelieved the appellant's story in court and held that "accused's denial of important issue testified to by P.Ws. is an afterthought".

4. The learned trial judge held that the appellant intentionally "invited the deceased to his house on the day of the incident, disregarding police advice to maintain peace" and that 'he intentionally inflicted matchet cut on the deceased with intent either to kill or cause grievous bodily harm". The deceased died of those matchet cut wounds.

Having found as above, the trial court on the facts concluded, rightly in my view, that the appellant committed the offence with which he stands charged - murder.

He then proceeded to consider the various defences available to the appellant on the evidence viz.,

1. Provocation

2. Self-defence

He rejected both and rightly too. He then convicted the appellant who then appealed to the Court of Appeal, Ibadan Division. That court dismissed his appeal. He now appeals to this Court against that dismissal.

It would not have been necessary at all to set out the facts of this case and the findings of the learned trial judge on those facts, as fully as I have done above, except that many of the grounds of appeal filed in the court below and even in this Court, though they allege misdirections, yet still they are indirectly questioning the trial court’s findings of fact. It is unfortunate that even where proper findings have been made, counsel for the appellant argued this appeal as though no such findings were in fact made. Issues of fact, evaluation of evidence, credibility of witnesses - these are peculiarly and comfortably within the exclusive competence and domain of the trial court. An appellate court is bound by the findings of the trial court especially where, as in this case, much depended on which side the trial judge believed before making his findings. Issues of the credibility of witnesses are best left to the judge who saw, heard and believed. An appellate court would not normally descend into the arena (if it is still open -I doubt) of contest to usurp the functions of the trial court except:-

(i) where no finding was made on a relevant and material issue;

(ii) where there is no evidence to support the particular finding complained of;

(iii) where the finding is perverse and not the result of the proper exercise of the judges’ judicial discretion to believe or disbelieve witnesses;

(iv) where the issue is not the evaluation of evidence as much as the proper inference, the deduction to be drawn from accepted facts;

(v) where there has been a misapprehension by the trial court as to what the antecedent presumptions were and where the onus of proof lay. These may seriously affect the weight of the opinion of the trial judge as to the credibility of witnesses and his views on the evidence.

None of these exceptions to the general rule was urged in this appeal.

I shall now consider the grounds as filed and argued. The original ground filed was the omnibus ground dealing with facts. This ground was abandoned and consequently struck out. Leave of court was sought and obtained to file and argue 4 additional grounds. Grounds 1, 3 and 4 of those additional grounds each alleged a misdirection and each gave particulars which either criticised that evaluation of the evidence before him by the learned trial judge or attacked his belief of certain witnesses and his acceptance of their evidence.

At this point, it may be relevant to examine critically what a misdirection is. What then is misdirection? The simple answer is that a misdirection is, generally speaking, an error in law, made by a judge in charging a jury. Every party to a trial by jury (where there is no jury the judge directs himself) has a legal and constitutional right to have the case which he has made either in pursuit or in defence fairly submitted to the consideration of the tribunal. A misdirection occurs where the issues of fact, in the case for the party in pursuit or the party in defence, or the law applicable to these issues raised were not fairly submitted for the consideration of the jury. See Chidiak v. Laguda (1964) NMLR. 133 at p.125 and the English case of Bray v. Ford (1895) AC. 44 at p, 49 (Lord Watson). By and large most misdirections will in the nature of things necessarily involve questions of fact. From the particulars in support of ground 1, 3 and 4 of the additional grounds, it was clear that learned counsel for the appellants cannot achieve the amazing feat of arguing these grounds without referring to the facts. In fact, he could not. He took the court through the entire gamut of the evidence led in the trial court submitting either that the appellant should have been believed or that a particular prosecution witness should not have been believed thus ignoring the judge’s findings on material issues.

I shall now consider the grounds as they were argued. Ground 4 was argued first. That ground complained that:

"The honourable Court of Appeal, Ibadan, erred in law and misdirected itself when it affirmed the conviction and sentence for murder, by the trial court, of the appellant in a case of conspiracy to commit a crime with another who was discharged and acquitted".

I need not dwell on this ground since learned counsel for the appellant conceded:

i. That there was no charge of conspiracy in the trial court.

ii. That the appellant was not found guilty of conspiracy by that court.

Following these two concessions, the bottom was knocked off ground 4 and learned counsel for the appellant rightly abandoned ground 4. The ground was then struck out.

Ground 1 was then taken up and argued next. This ground reads:-

"The honourable Court of Appeal erred in law and misdirected itself by accepting that the appellant made a confessional statement, exhibit D".

The particulars of the misdirection are as follows:

(1) Exhibit D was not voluntarily made by the appellant as it was extracted from him and executed by him after he was visited with beatings, inducement, threat and promise by a person in authority, that is, 1st P.W.

(2) Exhibit D was a statement made in defiance of section 28 of the Evidence Act.

(3) Exhibit D is inflicted with death wounds.

(4) Exhibit D is irrelevant to the proceedings.

Whether exhibit D was voluntary as the prosecution alleges or obtained by duress, threat and promises as the defence maintains, is an issue of fact. That was why there was a trial of that issue in the trial within the main trial. At the end, the learned trial judge reviewed the evidence on both sides, believed the prosecution witnesses, disbelieved the defence and found:-

"Finally, I find as a fact and I hold that the prosecution has proved beyond reasonable doubt that the disputed statement was made voluntarily by the first accused person (the present appellant). My answer to the questions (a) above viz. is there evidence of inducement, promise or threat held out to the accused? and (b) did the accused make the statement as a result of (a) above, is in the negative".

Can there be any clearer finding of fact? Neither the court below nor this court can now re-open the issue of the voluntariness or otherwise of appellant’s statement, exhibit D, at least, not on ground 1 as filed. The findings of the trial judge who saw the witnesses, listened to their evidence, watched their demeanour, believed some and disbelieved others are conclusive and binding on an appellate court. Those findings also satisfy the provisions of section 28 of the Evidence Act and make exhibit D most relevant. This ground of appeal fails. There is no need to refer to the cases cited in support of this ground because they are either irrelevant or miscontrued or misconceived or all three.

Ground 2 complained that-

’The honourable Court of Appeal erred in law when it concluded at p. 104 of the record that:-

The plea of self-defence was ....... also rightly rejected’"-

It is not necessary to set out in full the particulars of the alleged misdirection because they do not appear in the judgment of the Court of Appeal. Secondly, those particulars dealt with issues of fact which had nothing to do with the Court of Appeal. Rather the court below quoted a portion of the judgment of the trial court to show that the learned trial judge disbelieved the story of the appellant that "the deceased jumped down from the bed and gripped the appellant’s throat". The court below then considered other findings by the trial judge viz:

i. That the appellant formed a definite intention to punish the deceased whom he then invited to his house.

ii. That the appellant armed himself with a matchet, hid under the bed and lay in wait.

The Court of Appeal then held, and rightly in my view, that in view of the above findings, the defences of provocation and self-defence were rightly rejected by the trial court. I do not see what the complaint of learned counsel for the appellant is all about. Where findings have been made by a trial court and those findings have not been successfully challenged, it is not permissible to close one’s eyes to those findings and argue as though they do not exist. The findings in this case stare one in the face and one has just got to look at them. This ground of appeal is totally devoid of merit and it also fails.

Ground 3 complains that ’The Honourable Court of Appeal erred in law and misdirected itself by upholding the judgment of the trial court that the defence of provocation was not available to the appellant." In arguing this ground, the learned counsel for the appellant relied on his brief where 5 full pages were devoted to state the law on provocation and the authorities that support each proposition. The fact is that in any particular case, the law and legal decisions will have to be applied to and only to the peculiar facts and circumstances proved and accepted by the trial court. What the law is in the abstract may be of considerable academic interest generally, but what should interest counsel and the court is what the law is in relation to the peculiar facts and circumstances of the case in hand. "It is well established law that if a husband discovers his wife in the act of adultery and thereupon kills her, he is guilty of manslaughter only and not of murder." This passage from the judgement of the House of Lords in the case of Leonard Holmes (1946) 31 Cr. App. R 123 at p. 129 and 130 shows how carefully and cautiously the courts tread in stating general principles of law and how necessary it is to relate those principles to the case in hand. Leonard Holmes killed his wife and the House of Lords limited its statement to" a husband killing his wife on a confession of adultery". It did not speculate on the husband killing the co-adulterer. But Baron Park in Pearson’s case (1835) 2 Lewin 216 observed "if a man kills his wife or the adulterer in the act of adultery, it is manslaughter, provided the husband has ocular inspection of the act and only then".

Now what were the facts in this case on which the above principle of law would have been applied by the trial judge?

Learned counsel for the appellant referred the court to the evidence of the appellant himself in court during the trial viz:-

"At the time I entered the house, I did not know it was the deceased who was having sex with my wife. I remember I made a statement to the police about this incident but I never told the police that I had reported (Raymond), deceased before to the police and I was asked to maintain peace. Before that day I never knew that the deceased was having affairs with my wife."

The appellant made a statement to the police a day after the murder, on 27/4/79. This statement the trial court accepted as a voluntary statement of the appellant and as giving the true version of the incidents. Part of that statement ran thus:

"On 25th April 1979, I went to work in the night. When I come back the next day my wife, Clementina told me that one Raymond who has been demanding for sex from her came here yesterday and demanded for sex, I (sic) refused. I then went to his house and I did not see him. I went to the police station Iyaganku, to lodge a complaint about the incident. I was advised to maintain peace. I then went home. About 5.30 p.m. I went to work when I stay to 8.30 p.m. before I returned home to wait for Raymond. If he will repeat his call to my wife in my house.... I hid myself under the bed waiting".

The question that now arises is:- what were the findings of the trial court on the issue of whether or not appellant found the deceased in the very act of adultery with his wife - what Baron Park in Pearson’s case described as "ocular inspection of the act?"

The learned trial judge found:-

1. That the appellant deliberately invited the deceased to his house having formed the settled intention either to kill him or cause him grievous bodily harm (p. 71 of the record, lines 5 to 10 and p. 73 lines 19 and 22).

2. He disbelieved that appellant met the deceased having sex with his wife. At p.75, the learned trial judge found and observed: "I must say that from the evidence before me, the story of the accused meeting the deceased having sex with his wife is improbable. The 2nd accused (appellant’s wife) said she had her pants on".

3. That the 2nd accused (appellant’s wife) collaborated with the appellant to punish the deceased for his overtures to her for sex (p. 77, lines 11-15).

The learned trial judge accepted that overtures were made for sex by deceased to appellant’s wife on 25/4/79, but rejected that there was any sex between them on 26/4/79 and that the appellant witnessed the alleged sex act. The facts and findings in this case cannot support the concept of legal provocation. Circumstances which induce a desire for revenge, a desire "to punish the deceased for daring to make love overtures to his wife", are inconsistent with the legal concept of provocation since the conscious formulation of that desire, the two visits to the house of the deceased; the complaint to the police; the return early from work on the 26/4/79, the laying in wait under the bed with a matchet - all these show that the appellant had ample time to think, reflect, and plan and all these again would negative a sudden temporary loss of self- control which is an essential ingredient of legal provocation. Ground 3 therefore fails.

In the final result, all the four grounds filed and argued have failed and the appeal falls with them and should be dismissed. These are my reasons for dismissing this appeal on the 27th September 1984.

**BELLO, J.S.C**.

On account of information received from his wife that the deceased made sexual advances to her, the appellant invited by false pretences and lured the deceased to his (the appellant's) house where he inflicted multiple cuts with a cutlass on the deceased who died on the spot. We dismissed the appellant's appeal against his conviction of murder on 27th September, 1984 and reserved our reasons to be given today. I had a preview of the lead reasons for the judgment of my learned brother, Oputa J.S.C., and I adopt the reasons so ably stated therein.

**COKER, J.S.C.**

On the 27th September, 1984, after hearing Mr. Akinrinsola, learned counsel for the appellant, and Mr. Akande, Director of Public Prosecution for Oyo State, only on the defences of provocation and self defence, I dismissed the appeal and indicated that the reasons would be given today. I now do so.

The appellant, Sunday Udofia, an Efik from the Cross River State and his wife, an Ibo from Imo State, were jointly charged with the murder of one Raymond Nwachukwu (M) on 26th day of April, 1979 at Ibadan. The facts are not seriously in dispute. The trial was before Babalakin. J. (as he then was) in the High Court of Oyo State, at Ibadan. The prosecution called six witnesses, including one Bassey Asuquo Udoh, who testified that amongst the Efiks, it was an abomination and "against Calabar custom to allow a person to go to another man's house and for the man to have sex with the man's wife on the man's own bed." His evidence is irrelevant, since the trial judge disbelieved the evidence of the appellant that he found the deceased having sex with his wife, the second accused, on the day. The appellant and his wife, both gave evidence at the trial and the appellant called one witness, Amadu Bello, who testified that the appellant, a co-worker at Union Bank of Nigeria, never left his working place during the working hours, between 7.00 a.m. to 6.00 p.m., on 26th April, 1979. At the conclusion of the trial, the 1st accused person was convicted, but his wife, 2nd accused, was discharged and acquitted. 1st accused appealed to the Court of Appeal, which, on the 17th August, 1983, dismissed his appeal.

The facts which the trial judge accepted were that the appellant, in consequence of a report made to him by his wife, the 2nd accused person, that the deceased was worrying her for sex, called at the deceased's house twice on the fateful day. That was on the 26th day of April, 1979. The deceased was absent from home on each of the visits, but the appellant met his wife, P. W .2, on both occasions. Appellant inquired the whereabouts of the deceased, and she informed him that he was still at work.

P . W.2 became curious and worried, she inquired from him what was the matter. Appellant replied that the deceased was "spoiling his family and he would never forgive him." On this second visit, he asked P. W.2 to inform her husband that he (deceased) should visit him on his return home from work that evening in connection with the deceased's request for a vacant room. Meanwhile, P. W.2, still suspicious, immediately went to appellant's house to inquire from appellant's wife, the 2nd accused, what it was all about. The 2nd accused assured her there was no cause to fear. On his return home, P. W.2 conveyed appellant's message to the deceased. Not more than 10 minutes after his (deceased's) departure to see the appellant, 1st and 2nd P. W.s were attracted by shouts emanating from the direction of appellant's house. Both then proceeded there. In appellant's house, they saw the deceased lying in a pool of blood with a big cutlass beside him. He was already dead, with several cuts all over his body. they (1st and 2nd P.W.s) then made a report to the police station at Iyaganku, Ibadan. The pathologist who performed the autopsy, was of the opinion that "the deceased died as a result of multiple injuries to the bodies" (sic), especially to the chest wall, which allowed accumulation of blood and air into the left pleural space and collapse of the left lung. He expressed the opinion that the injuries were consistent with those caused by a sharp instrument. The injuries he saw could not have been self inflicted.

The appellant made a voluntary statement confessing that he killed the deceased, Raymond Nwachukwu, with his matchet. In it, he stated the circumstances leading him and his motive for killing the deceased.

Although at the trial he retracted from it, the trial judge after a trial within a trial, came to the conclusion that he voluntarily made it and admitted it in evidence. He then proceeded to examine the content carefully. He expressed the view that in law, he could convict the appellant on his confession alone, relying on R. v. Ajayi Omokoro (1941) 7 W.A.C.A. 146; nevertheless, he warned himself of the need to do so with caution and the need to look for other corroborative evidence outside the confessional statement, in order to test the truth of his confession; R. v. Kanu 14 W.A.C.A. 30. On that basis, he carefully and correctly found, and in his own words:-

"I find corroboration of this voluntary statement in the evidence of P . W.2 when she said that the 1st accused (1) complains to her that the deceased has spoilt his family and he will not forgive him, the 1st accused also told her that she will know when it happens; (2) that the 1st accused came to P. W.2 twice on the day of the incident to request that the deceased should see him when he comes from work; (3) that the deceased went to the house as a result of the invitation to him by the 1st accused person."

Further he said,

"I am reinforced in my belief that the 1st accused person took the steps 1 have enumerated because the 1st accused went further to report the deceased to the police about the alleged persistent demand for sex from his wife (2nd accused) by the said deceased and that the 1st accused was asked to maintain peace. 1 also believe(sic) testified as she has impressed me as a witness of truth. 1 have therefore tested the truth of the confessional statement (exhibit 'D') and 1 find as a fact that the confession is consistent with other facts that have been ascertained and proved. 1 also find that the confessional statement is free and voluntary fully consistent and probable and that the statement has been corroborated by witnesses for the prosecution which showed that the confessions are true. See the case of Queen v. Obiasa (1962) 1 All N.L.R. 651 and the case of Kanu and Anor. v. The Queen 14 W.A.C.A. 30" . The trial judge therefore found the appellant guilty .of murder as charged and sentenced him to death by hanging.

He found the 2nd appellant, his wife, surprisingly, not guilty and discharged and acquitted her. The trial judge, after correctly examining the evidence, found that her confessional statement was made voluntarily and its content true. Yet, by some strange reasoning, said he had doubt about her guilt.

Mr. Akinrinsola, learned counsel for the appellant abandoned ground one, which sought to impugn the conviction of the appellant, on the ground that the 2nd accused having been acquitted on the charge of murder, the appellant too (for the reason of her acquittal alone), should have been acquitted. He was of this view, because the trial judge said "both 1st and 2nd accused persons conspired together to punish the deceased." He lost sight of the fact that the two accused persons were not charged with conspiracy to murder. The clear undisputed fact was that the appellant inflicted multiple cuts on the deceased which resulted in his death. That his wife never inflicted any of those cuts was not in doubt. What the trial judge doubted was whether she ever knew that her husband would use, as he did, the matchet he hid under the bed, even though she knew the deceased was invited into the room for some sort of punishment, the nature of which the trial judge found was not disclosed in evidence.

However, the real crux of this appeal is whether the defence of provocation and self defence were available to the appellant on the evidence before the trial court. Both the trial court and the Court of Appeal held that neither was available, and in my view, their decisions were correct.

The facts amply justified the conviction.

The fact found by the trial judge was that the killing was planned by the appellant and his wife and that on the 26th April, 1979 the deceased person was invited into the room by both the appellant and his wife, and that appellant suddenly emerged from his hiding and violently struck the deceased several matchet blows. The trial court accepted the evidence of 2nd P. W., wife of the deceased, that it was about ten minutes after the deceased left for the appellant's house that she heard loud shouts which attracted her and 1st P. W. to the scene. There, they found Raymond Nwachukwu covered in his own blood, with several cuts all over it. In the circumstance, having regard to the time factor, could the appellant in fact have found deceased on his bed actually having sex with his wife? It is my view that it is improbable. In Babalola John v. Zaria NA (1959) N .R.N .L.R. 43, the husband killed his wife after she showed him the charm given to her by Tanko and, also Tanko's photograph. That was after the accused had refused her permission to go out, probably to see Tanko, whom he suspected, was having illicit sexual relationship with her. The defence of provocation was rejected. In this case in hand, the trial judge found, even if his evidence was true that the appellant had sufficient time to cool down between 9.00 a.m. and 9.00 p.m., when he fatally struck the deceased. Beside, he had been earlier warned by the police that morning to maintain the peace; yet, he persisted to carry on his malicious plan to kill the deceased. The trial judge was therefore right in holding that it was not sufficient that the appellant was insulted or provoked, the retaliation or reaction must bear due proportion to the act which led to the provocation, and his act must have been sudden and in the heat of passion without time to cool down. He found that the force used by inflicting several matchet cuts on the deceased was unreasonable and completely unrelated to the insult. See Sunday Igbani Green v. The Queen 15 W.A.C.A. 73. In R v. Akpakpan (1956) 1 F.S.C. 1 at p. 2. The Federal Supreme Court stated quoting Rex v. Holmes 31 C.A.P. 1391 as regards the defence of provocation, regard must be had to the nature of the act which resulted from provocation, it "depends on the fact that it causes, or may cause a sudden and temporary loss of self control, whereby malice, which is formation of an intention to kill or to inflict grievous bodily harm, is negatived."

I am satisfied that the defence of provocation on the facts as found by the trial judge was not established by the appellant. I agree with him, and the view taken by the Court of Appeal.

The defence of self defence was also examined meticulously by the trial judge and, similarly, rejected. The appellant in his evidence said the deceased gripped his neck during the scuffle. The trial judge did not believe that was reason for killing him. But he came to the decision that even if the deceased held him by the throat, that was not sufficient to justify inflicting such brutal and savage attack on the deceased, who was not armed; he was not satisfied that the force used by the deceased would reasonably put the appellant in real fear or threat to his life. In Onyeamaizu's case (1959) N.M.L.R. 93, the trial judge held that the self defence was only available if there was reasonable apprehension of death or grievous harm and the accused reasonably believed that the act of killing was necessary for his own protection and not that of an excitable individual killer. The test is objective and not subjective. It is that of a reasonable man and the act which resulted in the killing must be the reaction of a reasonable person placed in similar situation. See Palmer v. R. (1971) 55 Cr. App. R.223. In this case, there was no credible evidence that the life of the appellant was in danger or that he wielded his matchet in order to save himself, on reasonable belief, from imminent death. In fact, he never admitted in court that he used the matchet at all. This was what he said:

"When the deceased gripped my neck the cutlass fell, I then fell on the cutlass, at that time I did not know how my hands got hold of the cutlass. I then saw that the deceased ran out."

In his statement to the police (exhibit D), contrary to his evidence in court, he stated:-

"Immediately I came from under the bed, Raymond seeing me jumped from the bed and gripped me and we started to struggle in the darkness

… I then lay my hand on my cutlass and started cutting towards the direction which inflicted several matchet cuts all over his body."

It is clear from his testimony that he was already holding the matchet before the deceased gripped his neck, if at all.

From the finding of the trial judge, the appellant had conceived the intention to kill and snared the deceased to his house. The question of self defence was therefore an afterthought. The defence on the facts did not arise; it was purely a speculative defence.

These are my reasons for dismissing the appeal on the 27th September, 1984.

**KARIBI-WHYTE, J.S.C**.

This appeal was argued on the 27th September, 1984. Mr. Akinrinsola, learned counsel for the appellant, and Mr. Akande, Director of Public Prosecutions, Oyo State representing the respondents, relied on their briefs and oral arguments in elaboration. Mr. Akinrinsola with the leave of this Court filed four additional grounds of appeal. In his oral argument before us counsel for the appellant abandoned the original ground of appeal, and also ground 4 of the additional grounds of appeal, after the Court drew his attention to the fact that the accused persons were not charged with the offence of conspiracy and that that ground of appeal was not based on the judgment. These grounds were accordingly struck out. Counsel for the appellant then argued the surviving three grounds of appeal. Counsel for the respondent replied. After reading the briefs filed by counsel, and listening to the oral arguments advanced in elaboration, I was satisfied that this appeal be dismissed and the judgment of the Court of Appeal affirming the judgment of the High Court, Ibadan, convicting the appellant for murder affirmed. I indicated that I will give my reasons for so doing today. This I now do below.

The main points of law of any substance argued in this appeal are the questions whether the defences of provocation and self-defence are avail- able to the appellant on the evidence and whether these defences were considered by the learned trial judge. Also whether the Court of Appeal was right in dismissing the appeal. It is pertinent at this stage to observe, even if this observation will be clearer from the reasons to be given in this judgment, that this appeal is concerned essentially with the question of findings of fact made by the trial judge. Ignoring the prolixity of the formulation by counsel for the appellant of the questions to be determined in this appeal, the formulation by the respondent's counsel of the same questions brings clearly into focus the issues involved. The issues for determination are-

1. Whether the statement of the appellant was made voluntarily and whether the learned trial judge had evidence to so find.

2. Whether the defences of provocation and self-defence rejected by the learned trial judge were rightly rejected.

3. On the whole whether there is sufficient evidence to convict the appellant.

It is necessary to have a brief summary of the facts in this appeal to enable a clear appreciation of the issues involved and the defences urged on the Court by the appellant. Appellant, Sunday Udofia, was charged together with his wife Clementina Onwuzuruike that on the 27th April, 1979, they murdered Raymond Nwachukwu and thereby committed an offence contrary to section 254 (2) and punishable under section 257 (1) of the Criminal Code Cap. 28, Volume 1 Laws of Western Region of Nigeria 1959. In support of the charge, the prosecution called six witnesses. The accused persons gave sworn evidence on their own behalf denying the charge. 1st accused, now the appellant, called one witness, whose testimony was completely useless and did not go to any issue. At the conclusion of the trial, the learned trial judge discharged and acquitted the second accused and convicted the 1st accused. The 1st accused is the appellant before us.

The facts of the case are that Raymond Nwachuku, the deceased, his wife Francisca, Sunday U dofia, the appellant, and his wife Clementina Onwuzurike the two families lived within the same area, and only about 100 metres apart. Appellant worked during the day as a gardener, at the Union Bank, and at night as a guard with the S.C.O.A. His working hours covered almost twenty hours of the twenty-four hours of the day. The evidence of the prosecution witnesses was that at about 6.30 a.m. of 26th April, 1979 appellant went to the house of the deceased and made a complaint to his wife that the deceased had spoilt his family twice and threatened the wife of the deceased, P. W.2, that he will not forgive him if the deceased did it a third time. P. W.2 wanted to know from appellant what the matter was but he declined to disclose to her. P. W.2 then went to 2nd accused Clementina, the wife of the appellant, to know what the matter complained of was Clementina told P. W.2 that she knew nothing to be amiss. She only knew that deceased demanded from her the key of the house deceased wanted to move into, and that she told him that the key was with her husband, the appellant. P. W.2 said that on that same day, i.e. the 26th April, 1979, appellant came to their house two times to ask for her husband, the deceased. The second time was about 3 p.m. when appellant asked P. W.2 to tell the deceased to see him when he returned from work. When the deceased returned from work at about 8.30 p.m. P. W.2 gave him the message from the appellant. The deceased immediately left for appellant's residence. The next P. W.2 heard was shouting of people coming from the direction of appellant's house. She went to see what was happening, and went immediately to tell P. W.1, a cousin of the deceased, and Chief Mess Officer of Femi Johnson's Flat Reservation, Ibadan. This was at about 9 p.m. Both P. W.1 and P. W.2, together, went to the residence of the appellant, and found the deceased with matchet cuts all over the body lying on the floor. P. W.1 then made a report to the police. The deceased was removed to the hospital where he died shortly after. On the 18th April, 1979 appellant had invited P . W. 3 to his (appellant's) house to complain that the 2nd accused was having a boyfriend, and that he intended sending her to her brother in Lagos. The second accused complained to P. W.3 that appellant would not let her post a letter she had written to her parents. She did not disclose the contents of the letter.

The statements to the police made on the 27th April, 1979 the next day after the incident by both appellant, exhibit D, and the second accused, exhibit E, would seem to amount to a voluntary confession of both to the murder by the appellant or knowledge of circumstances leading to the murder of the deceased on the part of the second accused. The sum of appellant's statement was that the second accused told him on the 26th April that the deceased had been demanding to have sexual intercourse with her and that she had refused. Appellant said he had for that reason gone to the house of the deceased but did not find him. He then went to lodge a complaint at the Iyaganku police station where he was advised to maintain peace. The same day 26th April, 1979, appellant said that he, without the knowledge of the second accused, hid under their bed with his matchet to wait for the deceased, in case he would come, so that he would confirm his suspicion about the relationship between the deceased second accused. He left his place of work at about 8.30 p.m. for his house for this purpose. His suspicion was proved right. Shortly after he hid under the bed, the deceased knocked at the door, second accused opened the door for him on his identifying himself. The deceased entered the room and sexual intercourse commenced almost immediately on the matrimonial bed. Appellant then emerged from under the bed. The deceased on seeing the appellant jumped off the second accused from the bed and gripped the appellant. The second accused opened the door and ran outside, shouting for help. None came. Appellant then inflicted several matchet cuts all over the body of the deceased, who ran through the door of the room and fell outside. Appellant seeing the deceased in a pool of blood ran to Iyaganku police station to make a report of the incident. This was the version of the appellant. Although appellant endeavoured to exclude his wife in this shameful and cruel murder, her evidence clearly shows that the affair was an arrangement by appellant and herself.

During the trial appellant rejected exhibit D as having not been made voluntarily. With respect of exhibit D, the learned trial judge adopted the proper procedure where there is the allegation that a confession was not voluntary, and conducted a trial to determine the voluntariness or not of the confession; called a trial within a trial or in the norman French voir dire. The learned trial judge considered the allegations by the appellant that he was threatened and punished and that inducement was held out to him that he would be allowed to see his wife only if he made the statement. After hearing evidence on these issues, the learned trial judge believed the evidence of the prosecution witnesses who denied that there was threat, punishment or inducement, before the statement was made.

He found that the statement was made voluntarily by the appellant. The statement was not made as a result of any inducement, promise or threat held out to the appellant. In his fact finding role as a trial of fact, only the learned judge is entitled to decide whether there was any inducement, threat or punishment with respect to the making of the confession See Cham Wei Keung v. R (1967) 2 A.C. 160. Where the judge rules on its admissibility after his finding of fact, this is the end of the matter-See R v. Onabanjo (1936) 3 WACA. 43; R v. Kassi (1939) 5 WACA.154. Having ruled that the confession is voluntary, it is now left for the judge to determine its probative effect. This the learned trial judge did with admirable clarity. A voluntary confession by itself without any other evidence is sufficient to support a conviction. The trial judge however found corroboration. Referring at p. 69 (of the record of proceedings) to the contents of the voluntary statement, he found corroboration in the evidence of P. W.2 and what she said appellant told her, and her evidence that the deceased went to the residence of appellant, and concluded as follows-,at p. 70

"I have therefore tested the truth of the confessional statement (exhibit D) and I find as a fact that the confession is consistent with other facts that have been ascertained and proved. I also find that the confessional statement is free and voluntary, fully consistent and probable and that the statement has been corroborated by witnesses for the prosecution which showed that the confessions are true. See the case of Queen v. Obiase (1962) 1 All NLR. 651 and the case of Kanu and Anor. v. The Queen 14 WACA. 30".

The Court of Appeal is bound to accept this finding. So is this Court. It has not been contended seriously that the finding is perverse, or that there is no evidence on which the learned judge could come to such a finding.

The argument of Mr. Akinrinsola for the appellant on ground 1 which challenges the voluntariness of exhibit D, has proceeded on the erroneous supposition that there was no finding of fact on the voluntariness vel non of the making of exhibit D. Ground 1 of the grounds of appeal is as follows-

The Honourable Court of Appeal erred in law and misdirected itself by accepting that the appellant made a confessional statement (exhibit D) when the court declared at page 101 of the record:

"As most of the issues raised revolved round the appellant's confessional statement (exhibit D), I think that the relevant area of the statement. . . should be set out…" when exhibit D was in law clearly inadmissible.

It is relevant to point out here that what was being rejected in exhibit D were not the contents, but that appellant did not say what was said therein voluntarily. Having settled the question of voluntariness of the confession against the appellant, the statement exhibit D is admissible and its probative value relative to its category of evidence. This ground of appeal lacks merit and ought not to have been raised in this Court. The ground fails and is dismissed.

It is convenient to consider the arguments in grounds 2 and 3 which deal with the issues of provocation and self-defence together. They are as follows-

Ground 2

The Honourable Court of Appeal erred in law when it concluded at page 104 of the record thus:

"The plea of self-defence was. . . also rightly rejected".

PARTICULARS

(i) It was the testimony of the 2nd accused that led the trial court to discharge and acquit the 2nd accused whom the trial court found to have conspired with the husband to 'punish' the deceased.

(ii) The 2nd accused in her evidence-in-chief said as follows at page 25 of the record: "When the man knocked the door I opened the door for him because I thought that he was my husband. It was dark and there was no light. Later my husband entered and the man held my husband the 1 st accused by the neck. I then started to shout for help". Under cross-examination the 2nd accused said:

(iii) "At the time my husband entered there was no light. I know that the deceased held my husband's neck even though there was no light".

(iv) In his evidence-in-chief the appellant confirmed the uncontradicted testimony of his wife the 2nd accused thus: "When the deceased gripped my neck, the cutlass fell, I then fell on the cutlass, at that time I did not know how my hand got hold of the cutlass. I then saw that the deceased ran out".

Ground 3

The Honourable Court of Appeal erred in law and misdirected itself by upholding the judgment of the trial court that the defence of provocation was not available to the appellant by the following pronouncement of the Court of Appeal at page 103 of the record:

"Furthermore, as held, rightly, by the trial judge in my view, the infliction of matchet cut on the deceased is not a reasonable means of retaliation in the circumstances revealed for the act of provocation".

PARTICULARS

(i) Having regard to the evidence on record the defence of provocation as provided in section 283 and 318 of the Criminal Code clearly is available to the appellant.

(ii) Under cross-examination, the appellant said as follows:-

"At the time I entered the house I did not know it was the deceased who was having sex with my wife…. Before that day I did not know that the deceased was having affairs with my wife."

(iii) In his evidence-in-chief the uncontradicted testimony of the appellant was:

"… it is not true that I went to the house of 2nd P . w. that day. I did not discuss with her that her husband has spoilt my family twice. I did not ask her to tell her husband to come to my house …. My wife did not at any time tell me that the deceased was courting her… The deceased and my wife were on my bed having sex...

(iv) In her evidence-in-chief, the 2nd accused who was discharged and acquitted and also the appellant's wife said:

"… the deceased entered into our house and held me by the hand. He then tore my pant by force. I started to shout and my two children started to cry."

The evidence of provocation relied upon by the appellant appears from the evidence of P. W.2, P. W.3 and the appellant's evidence. In the morning of the 26th April, 1979, at about 6.30 a.m. appellant had reported to P . W.2 that the deceased who was her husband was spoiling his family. He did not elaborate. He returned at about 3 p.m. to P. W.2 to ask for the deceased and to leave a message that the deceased should see him when he returned from work. On the same date he lodged a report to the police about the deceased having extra-marital affairs with his wife. On the 18th - April, 1979, he had invited P. W. 3, to complain to him that his wife the second accused was having a boy-friend. In his statement to the police exhibit D, appellant stated that he hid under their matrimonial bed to wait for the deceased and the second accused to start their sexual intercourse before he came from under the bed to intervene. His evidence in court was quite different. He walked into an unlocked but dark room with their young children crying and the deceased and his wife, the second accused crying but having sexual intercourse. The deceased jumped off the bed and gripped him by the neck. Appellant admitted having the cutlass with which he went to work as a night guard. The cutlass fell when deceased gripped him by the neck, and appellant fell on the cutlass. But in a manner appellant is unable to explain he got hold of the cutlass and the deceased ran out. He did not admit he dealt any blows on the deceased.

The learned trial judge considered the defence of provocation and referring to the facts of this case having considered Mancini v. D.P.P.(1941) 3 All ER. 272, Mensah v. The King (1945) 11 WACA 2 and Green v. The Queen (1955) 15 WACA. 73, said at p. 72, "It is not enough for the accused to prove that the act of the insult on the victim's part was provocative; he must actually establish that he was in fact provoked thereby before retaliating in the way he did."

After stating the circumstances when appellant can rely on provocation the trial judge said, at p.73 "In his case, the 1st accused person not only has sufficient time to cool down because he has reported the deceased to the police and he was asked to maintain peace; he also deliberately invited the deceased to his house twice on that day covering a period of between 9 a.m. and about 9 p.m. when this gruesome act was performed. I hold that the defence of provocation was not available to him rather I hold that he deliberately invited the deceased to his place to punish him. . ."

This finding was accepted as correct by the Court of Appeal and I think it is right. Whether there is evidence sufficient to constitute provocation is a finding of fact which is the duty of the trial judge. See D.P.P. v. Camplia (1978) 67 (Cr. App. R. 14). It is only after this fact has been found that the trial judge decides whether the acts complained of in the evidence are sufficient to constitute provocation as defined. The learned trial judge found that the intention to punish the deceased for the insult on his family had been formed before he invited the deceased to his house on the 26th April, 1979, and that appellant had sufficient time to cool off between 9a.m. and 9 p.m. on the fateful day and that after he had been warned by the police to maintain peace. That the act was premeditated is confirmed by the evidence of the wife of the deceased to whom appellant first complained. There was therefore not before the learned trial judge any evidence on which a finding of provocation can be based. On the contrary, the learned trial judge considered at great length the evidence before him sufficient to establish the defence. It is quite clear from the evidence before the learned trial judge that the acts relied upon by the appellant as constituting provocation were first, the reports to him by his wife, the second accused, that the deceased was making sexual advances to her.

These were acts which can by no means be regarded as reasonable to sustain a defence of provocation. This was dismissed by the learned trial judge rightly as insufficient-see Sunday Igbani Green v. Queen (1055) 15 WACA 73.

The second act, if believed, and as aptly described by counsel for the respondent in his brief, as self-induced provocation, is the collusion with his wife, to lure the deceased into their residence to pretend to be agreeing to have sexual intercourse with him. By no hypothesis can such a stratagem qualify as provocation within the definition of s. 318 of the Criminal Code. This is because this enacted act of provocation cannot be described as sudden. It can also not be said that appellant did not have sufficient time for passion to cool down, because it is a calculated attempt at retaliation, and not a response to a sudden passion. It is well settled that to establish provocation, the three constituent elements must be complete.

These are-

(a) The act of provocation.

(b) The loss of self control both actual and reasonable.

(c) The proportionate retaliation.

All the three elements must co-exist and within a reasonable time. The incident enacted by the accused persons which resulted in the murder of the deceased, is self-induced, and what was described as a provocative incident in Lee Chun-Chuen v. R (1962) 3 WLR 1461, 1468. It is only, if real, one of the constituent elements of provocation. Provocation in law means something more than a provocative incident. The standard of reasonableness applied is objective. In determining what should constitute provocation the court does not consider the susceptibilities of the accused-See Olubu v. The State (1980) 1 N.C.R. 309 at p. 321.

The appellant's counsel's argument on the ground of provocation ignores the central issue. His submissions on provocative words and what he regards as done in the heat of passion, and the decisions and books of authority cited, in view of the facts of this case are clearly irrelevant. Appellant did not suddenly see the deceased having sexual intercourse with his wife. He was waiting for that to happen, and cannot in that circumstance describe the incident as sudden. It is therefore not the same situation as was stated in D.P.P. v. Leonard Holmes (1946) 31 Cr. App. R. 123 at p. 129. . . that if a husband discovers his wife in the act of adultery and thereupon kills her, he is guilty of manslaughter only and not murder.

Neither does it correspond with the view of Baron Park in Pearson's Case (1835) 2 Lewin216 where it was said, "if a man kills his wife or the adulterer in the act of adultery it is manslaughter, provided the husband has occular inspection of the act and only then." Associated with the defence of provocation is the question of self-defence, which, in this case, if accepted, would have been excessive. In certain cases and this is clearly not one of them, provocation merges into self-defence. Under s. 286 of the Criminal Code an unprovoked assault which creates imminent apprehension of death or grievous harm enables a person so threatened to resort to such force as is necessary to preserve himself from such imminent danger even though such force results in the death of a human being. For this defence to be available and to exclude criminal responsibility the accused must face imminent apprehension of death or grievous harm from his victim. As was said in R. v. Onyeamaizu (1953) NRNLR. 93

"The legal right to kill in self-defence cannot be made to depend upon the temperament, phlegmatic or excitable nature of the individual killer. For those who claim to have exercised this legal right to kill, the law insists upon one standard. It is the standard of the reasonable man."

The evidence of the appellant in the trial court, which the learned trial judge rejected, is that the deceased on jumping down from the bed, gripped the appellant by the throat and a scuffle ensued. Appellant fell down, cutlass in hand and on the cutlass. Appellant did not know how he used the cutlass on the deceased. But in the statement of the appellant, exhibit D, he explained how he dealt several matchet blows on the deceased. In the opinion of the learned trial judge, the use of the matchet on the deceased in the circumstance is anything but reasonable force. It means retaliation. The guiding principles of self-defence are necessity and proportion. Two questions ought to be posed and answered. These are on the evidence before the court was self-defence necessary? If it was, was the injury inflicted proportionate to the threat offered, or was it excessive?

There is no doubt if the accused can show necessity for his conduct on the facts as he reasonably believed them to be a valid defence sufficient to secure his acquittal can be made-See R v. Nwibo (1950) 19 NLR. 124. If however the threat offered is disproportionate with the force used in repelling it, and the necessity of the occasion did not demand such a self defence, then the defence cannot avail the accused-See R v. Dnyeanaizu (1958) NRNLR. 93. The defence is weakest were the position of the victim as in this case is weaker than that of the accused. In such a situation the issue of self-defence does not arise and the defence is not available.

In this appeal, the evidence accepted by the learned trial judge excluded any question of self-defence on the part of the appellant. The learned trial judge did not believe that there was a scuffle between appellant and the deceased. Even if there was a scuffle the evidence was that the deceased was not armed whilst appellant was armed with a cutlass. The Court of Appeal agreed with the learned trial judge's rejection of the story. I agree entirely with these findings of fact. The trial judge was on the evidence before him correct in holding that the story about the scuffle is untrue and the Court of Appeal was right in holding that the trial judge was right. I agree entirely with these concurrent findings of fact of the two lower courts-See Etowa Enang and Drs. v. Fide/is Ikor Adu and Drs. (1981) 11-12 S.C. 25. The defences of provocation and self-defence were rightly rejected by the learned trial judge and also rejected by the Court of Appeal. The evidence of a conscious plan to lure the deceased into appellant's house, a calculated plan by appellant's wife to feign agreement to sexual intercourse with the deceased, and a premeditated intention to kill the deceased is overwhelming. The prosecution has on the evidence disproved that appellant neither acted in provocation nor in reasonable self-defence - See Woolmington v. D.P.P. (1935) A.C. 462. and Chan Kau v. R. (1955) A.C. 206. Grounds 2 and 3 of the grounds of appeal therefore also fail and are dismissed. These are my reasons for dismissing the appeal on the 27th September, 1984.

**KAWU, J .S. C**.

I have had the advantage of a preview of the reasons for judgment just read by my learned brother, Oputa, J.S.C. I adopt the said reasons in their entirety. It was for these reasons that I concurred in the unanimous judgment of this court on the 27th September, 1984 that the appeal be dismissed.