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Research Article

THE INCOMPATIBILITY OF THE DEFENCE OF PROVOCATION AND ALIBI: A CASE REVIEW OF THE STATE V. OGUNBOYO RICHARD (UNREPORTED) CHARGE NO HAD/80C/2017

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ABSTRACT

Provocation and alibi are two of the defences available to a defendant under the English Law albeit they operate at a cross road in that the availability of one depicts the non legal availability of the other to a defendant facing allegation of crime. By its intrinsic nature, a defendant who relies on the defence of provocation has explicitly admitted both the mens rea and actus reus of the offence alleged but denied malice aforethought. In contradistinction however, alibi is an outright defence of non-participation in the offence on the ground that the defendant was elsewhere when the offence took place. The jurisprudential rational behind the defence of alibi is the impossibility of simultaneous physical presence of the defendant at two different locations. It is noteworthy to stress that the defence of alibi enjoys qualified application while considering parties to offences as a defendant need not be physically present to be culpable where he has either acted as accessory before the fact or accessory after the fact in which case, his physical presence at the scene of the alleged offence is of no moment before attracting criminal responsibility. This study examined the two irreconcilable defences of provocation and alibi through a case review with intent to unveiling whether or not a defendant can be availed of the defence of provocation in the same case where the defence of alibi earlier set up by him fails. This study however, concluded that both alibi and provocation cannot exonerate or sustain defences for the defendant at the same time because they are contrasting defences that cannot go together. The study also concluded that in applying the ingredients of the defence to the fact in issues, none of the ingredient must be left in isolation or wrongly applied to justify a defence for the defendant.

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KEYWORDS

Provocation, alibi, malice aforethought, unprovoked assault, suo motu, tripartite justice.

INTRODUCTION

In the administration of criminal justice system, certain defences are provided for alongside the nature of the offences involved. While some of these defences may outrightly avail a defendant who is standing trial for certain offences; others will only whittle down the penal sanctions prescribed for some offence. Provocation, which is one of the recognizable defences in criminal trial, applies in homicide cases.

A litany of judicial authorities have underscored the fact that provocation constitutes a partial defence in homicide cases and does not fit into justification or excuse framework that diametrically obliterates penal sanction prescribed for the offence of unlawful killing of another person. The defence of provocation is equally not for the asking by the defendant as certain elements, which co-exist must be present in the evidence placed before the court before the defence of provocation can avail a defendant.

It therefore inexorably follows that where there is no relevant or material evidence adduced before the trial court to form the view that a reasonable person in the shoes of the defendant can be so provoked and be driven through transport of passion and loss of self-control to the degree that could warrant the taking of another person's life, then, the defence of provocation will be unavailing. By its very nature, the defence of provocation connotes an explicit admission by the defendant that he was present at the scene of the crime. The defence of provocation and alibi are independent defences that cannot be raised together in a criminal trial as a defence to criminal responsibility. In this case, the court may not pay attention to the defence of the defendant.

This therefore throws up a legal dilemma as to whether the defendant who has unsuccessfully raised the defence of alibi can still be a beneficiary of the defence of provocation raised suo motu by the court in the same judicial proceedings on the basis of the principle of law that the court has a bounden duty to consider all the defences raised by the evidence before it whether or not the defendant specifically put up such defences or not. This study examines the foregoing issues among other salient legal issues as exemplified by the judgment of the trial court in the case under review.

Facts of the Case under Review

By an information filed on 14th August, 2017 by the State, the defendant, a retired military officer and who was the Head of vigilante team in Iyin Ekiti, Ekiti State of Nigeria was arraigned before the High Court, Ekiti State in Ado Ekiti Judicial Division vide Charge No HAD/80C/2017 for the offence of murder of one Felix Esan at Iyin Ekiti on 15th December, 2016 under Section 316 (1) of the Criminal Code Law of Ekiti State, Nigeria, 2012.

On the fateful day, the deceased and three of his friends namely, Awolola Samuel Oyeleye, Ayomide Adedotun and Peter Akanbi went to a nearby herbal drinking joint at Iyin Ekiti to have some drinks after returning from their place of work.

While at the joint, the wife of Peter Akanbi, one Blessing called her husband on phone as a result of

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which Peter Akanbi left his friends at the joint and went home to meet his wife. When the remaining three friends were done at the joint for the day, they equally left for home where they resided together.

On their way home, the trio heard the voice of Peter Akanbi in a hot argument with someone in front of the house of the defendant. They decided to branch there and enquired what the matter was. On getting there, Peter Akanbi explained to his said friends that he had come to report his wife to the defendant over dispute bordering on dinner as the defendant who was a neighbour had in the time past settled domestic misunderstanding between him and his wife. But in a baffling twist of events, the defendant whom he had come to report his wife to alleged him of stealing and ordered members of the vigilante who were present in his (the defendant's) house at the time to detain him. The plea of Peter Akanbi's friends to release him was rebuffed by the defendant who instead threatened to shoot them if they failed to leave. Consequently, the trio left for their home leaving Peter Akanbi to his fate in the defendant's house.

Barely forty minutes after arriving home, the defendant came in company of four members of his vigilante group to the house where the deceased and his two friends resided and alleged that their friend, Peter Akanbi on whose behalf they pleaded with him a while ago for his release had escaped from his custody and that he suspected that the said Peter Akanbi was with them hiding in the house. The deceased and his friends denied knowledge of the escape of the said Peter Akanbi or his whereabouts.

The defendant nevertheless insisted on conducting a search in the premises of the trio before he could believe them. Being gated premises, the defendant could not readily gain entrance into the premises. Awolola Samuel Oyeleye consequently went for the key to the gate and opened same for the defendant and his accompanied vigilante members so that they could come into the premises. The defendant and his team thoroughly combed the entire premises but they could not find the said Peter Akanbi anywhere.

It was after the vain search for Peter Akanbi and they were about leaving the premises that the defendant flashed his torch light at the deceased who was then sitting pressing his handset. The defendant then challenged the deceased for not attending to him since he came to the premises. The deceased replied that since his other two friends were already attending to him he needed not to. The defendant retorted that the deceased was rude to have answered him in the manner he did. The deceased however maintained that he was not rude in response to the defendant stressing that after all he was not Peter Akanbi being looked for by him. The next thing the defendant did was to pull the trigger of the gun being carried by him and shot the deceased at a very close range in the presence of the deceased's two friends and members of his vigilante team that accompanied him to the premises.

The defendant afterwards threatened to shoot the deceased's friends if they made any attempt to shout or raise any alarm to attract attention of people in the neighbourhood. In order to ensure that nobody was in the premises to rescue or render any form of assistance to the deceased after being shot, the defendant ordered the deceased's friends to follow him to his house where he detained them till the following morning under the surveillance of members of his vigilante team. The deceased was alone abandoned in the entire premises in his pool of blood while crying for help in his state of acute agony.

In the course of the night, while the deceased's friends were in the defendant's house, the defendant went out in his vehicle with his driver, called Kazeem and

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some members of the vigilante group and returned about two hours later only for the defendant to inform the deceased's friends that he had gone back to their house and he could not see the deceased there anymore. For fear of their own safety having witnessed how the defendant callously shot their friend and coupled with the ferocious stance the defendant had for no reason assumed towards them that night, they wisely kept mute when the defendant informed them that he could not find the deceased in their house.

The following morning, the defendant released the deceased's friends to go home without leveling any form of allegation against them for detaining them in his house for a whole night. On entering their premises, the deceased's friends saw a pool of blood and traces of how someone was dragged on the ground with blood stains all over the place. The deceased's friends could not see the deceased anywhere in the premises. Hence, they proceeded to report the incident to the police which led to the arrest of the defendant. After many days of police investigation into the matter, the corpse of the deceased was discovered and retrieved from the site of a very deep gully in the area where the town shared boundary with another town called Awo Ekiti. The near decomposed corpse was hanging on bush plants which prevented it from entirely rolling down the gully site.

In the course of police investigation into the case, the police consulted the authorities of the Ekiti State University Teaching Hospital, where a pathologist, one Dr. Emmanuel Abidemi Omonisi conducted a post mortem on the corpse which established the course of death to be loss of blood arising from gunshot. Upon the conclusion of police investigation into the matter, the State formally arraigned the defendant in the High Court for the offence of murder of the deceased.

During trial, the prosecution called (7) seven witnesses which included the deceased's three friends i.e Awolola Samuel Oyeleye, Ayomide Adedotun and Peter Akanbi. Peter Akanbi's wife-Blessing, the said pathologist and police investigating officers also testified for the prosecution. The defence on its part called (5) five witnesses which included the defendant.

The totality of the testimony of the prosecution witnesses was essentially as the foregoing narration of the facts of the case. The thrust of the defence of the defendant was anchored on alibi as he claimed not to be present at the scene of the murder of the deceased but was in his house throughout the material time of the incident that culminated in the death of the deceased.

Issue for Determination

Upon the close of evidence, counsel filed their respective written addresses wherein a sole issue was formulated thus:

Whether the prosecution has succeeded in proving the offence of murder against the defendant beyond reasonable doubt?

In resolving the issue formulated, the trial court evaluated the totality of the evidence adduced before it in relation to the essential ingredients of the offence of murder which the prosecution must prove to secure a conviction of the defendant to wit

(a) That the victim is dead

(b) That the act or omission of the defendant which caused the death of the deceased was unlawful and

(c) The act or omission of the defendant which caused the death of the deceased must have been

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intentional with knowledge that death or grievous bodily harm was its probable consequence.

In the course of evaluation of the evidence before it and in arriving at the findings that the prosecution has successfully proved the essential ingredients of the offence of murder against the defendant; the court made some far-reaching findings which include the following.

On page 25 of its judgment, the court held thus:

What then happened to the late Felix Esan after he was shot and left in a pool of blood while the defendant and his cohorts left with the PW1 and PW2 to the defendant's house. It was again the evidence of the PW1 that after about 40 minutes in front of the defendant's house, the latter came out with one of his hunters and asked his driver named Kazeem to bring out the car. The defendant, two hunters and Kazeem then left in the car.

The court went further on page 27 of its judgment to hold thus:

In view of the believable evidence of the PW1, PW2 and PW6 that the defendant went out and came back claiming that he could not find Felix Esan, who else was in a better position than the defendant who went out leaving the PW;1 and PW2 behind to explain how the deceased ended up in a pit along Iyin – Awo road? There was no evidence of anybody save the defendant and his cohorts who knew that the deceased was shot at that night. It is only logical that someone who was involved in the shooting of the deceased would have been involved in the disappearance of the body. It is not likely that someone who was not involved in the shooting would come out in the dead of the night to remove the body… it was for the defendant to explain where he went that night after leaving the PW1, PW2 and PW6 in his premises.

Equally, on page 28 of the judgment, the court went further to hold thus:

In the absence of an explanation, the court is entitled to infer in the face of overwhelming circumstantial evidence that the defendant killed the deceased and dumped him in a pit along Iyin- Awo road.

In removing any possible shred of doubt as to what and who killed the deceased, the court while reviewing the evidence of the pathologist who testified as PW3 held on page 26 of the judgment thus:

The evidence of the PW3 to the effect that the deceased died of gunshot injury obviously provided the causal link between the act of the defendant in shooting the deceased and the death of the deceased.

Notwithstanding the above sound reasoning of the court as to the culpability of the defendant in the gruesome murder of the deceased, the court nevertheless proceeded to suo motu raise the defence of provocation for the defence and resolved same in favour of the defendant thereby reducing the offence of murder to manslaughter.

In convicting the defendant for the offence of manslaughter, the trial court on pages 33 and 34 of its judgment held thus:

Now the law is settled that in a trial for murder the court has a duty to consider all the defences raised by the evidence before it, whether the person charged specifically put up such defences or not. The defences so thrown up by the evidence must be properly and adequately considered, no matter how weak or stupid they may appear. See: Ashare Ayaba v. The State (2018) LPELR 44495 (SC) PP 18-19 Paras C-A Was the

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defendant provoked to have shot the defendant on the said day? It could be seen that the defendant denied being at the scene of crime thereby foreclosing other defences that might have been available to him. As earlier held, it is incumbent on me to consider any defence that might be opened for consideration. It was clear from the evidence of the PW1 and PW2 that there was an altercation between the defendant and the deceased that night before the defendant shot the deceased. It was also clear from the evidence of the PW1 and PW2 that it was during the altercation that the defendant shot at the deceased. This obviously had thrown up the defence of provocation... the defence of provocation would therefore avail him with the effect of whittling down the punishment stipulated from the offence of murder to manslaughter. The defendant is accordingly convicted of manslaughter.

Ordinarily, the offence of manslaughter where established attracts life imprisonment. However, sequel to the plea of allocutus made by the defence counsel, the defendant was sentenced to (25) twenty-five years imprisonment by the trial court.

In yet another twist of events, the defendant had barely served six (6) months out of his term of imprisonment when the Ekiti State Government through the State Governor exercised power of prerogative of mercy pursuant to the 1999 Constitution of Nigeria as amended to set the defendant free unconditionally.

Legal Critique of the Decision of the Trial Court

Arising from the general consideration of the evidence available in the case, the following issues become pertinent to unravel the legal justification or otherwise of the decision of the court in the case to wit:

(a) Whether all the essential elements of provocation must be proved before the offence of murder can be reduced to manslaughter?

(b) Whether the defences of alibi and provocation can be simultaneously available to the defendant in the same criminal proceedings?

(c) Whether the duty of court to consider all defences open to a defendant in a capital offence will still arise where same are not backed with evidence?

Consideration of Issue One: Whether all the essential elements of provocation must be proved before the offence of murder can be reduced to manslaughter?

The defence of provocation is provided for by the Criminal Code. However, before the defence of provocation can avail a defendant, certain essential elements must be present as stipulated in Section 284 of the Criminal Code Act and which said section is herein reproduced thus for ease of reference:

A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self–control and acts upon it on the sudden and before there is time for his passion to cool; provided that the force used is not such as is likely to cause death or grievous harm.

From the above import of the defence of provocation, it is evident that there are both objective and subjective components to the defence of provocation. A central concern of the objective standard is the extent to which the accused's own personal characteristics and circumstances should be considered. The subjective element of the defence of provocation dwells on the accused's subjective perceptions of the circumstances, including what the accused believed, intended or knew.

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Generally, the elements which a defendant must prove to avail himself of the defence of provocation are as follows

(a) There was the deceased person's act of provocation which caused his loss of self-control.

(b) He killed the deceased in the heat of passion.

(c) At the time of killing, the heat of passion had not waned and

(d) The resentment or mode of retaliation by the defendant must be proportionate to the provocation offered by the deceased.

The above elements which must be read conjunctively in summation require the defendant to prove that it was the deceased who gave the cause for provocation and that due to the deceased's person's sudden act of provocation, he killed the deceased person on the spur of the moment before his passion could abate or vaporize. In other words, the provocative act must be such that would deprive him of self-control suddenly and temporarily and that the mode of resentment is not disproportionate to the offered provocation.

On the strength of the criterion prescribed in Section 284 of the Criminal Code before the defence of provocation will avail a defendant, it becomes pertinent to highlight the following issues in the context of the instant case:

(i) Was there evidence of provocative act on the part of the deceased (i.e. Felix Esan) which caused the defendant to lose self-control? If this issue is answered in the affirmative, the next pertinent question is;

(ii) Was the act of shooting the deceased proportionate to the provocation offered by the deceased person?

It is hardly necessary to emphasis the fact that mere utterances or words can constitute provocation to a reasonable man. In the instant case, there was evidence on record that the defendant went to the house of the deceased in search of one Peter Akanbi whom he said escaped from his custody. It was in the course of the visit and search of the premises where the deceased was living with his friends that the defendant challenged the deceased for giving the defendant the necessary attention. The deceased however felt otherwise, moreso, as his other two friends in the premises (i.e Awolola Samuel Oyeleye and Ayomide Adedotun) were already attending to him coupled with the fact that he was not the one the defendant was actually looking for. The defendant considered the response of the deceased harsh or rude to him. It was just on the basis of this mere altercation which was even orchestrated by the defendant, that the defendant pulled the trigger and shot at the deceased at a very close range where he was quietly sitting down.

It is difficult to discern from the foregoing scenario and circumstance how the response of the deceased can amount to provocation of such degree that was capable of causing the defendant to suddenly lose self-control as to warrant the act of shooting the deceased.

On whether the act of shooting the deceased by the defendant was proportionate to the alleged act of provocation offered to the defendant, it is to be observed that given the nature of the altercation between the defendant and the deceased and coupled with the circumstances in which the altercation occurred, the act of shooting the deceased by the defendant cannot be said to be reasonable or proportionate to any act of provocation that the deceased's response might have created in the mind of the defendant. In other words, the mode of

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resentment of the defendant was not proportionate to the provocation offered by the deceased.

It is now settled law that the defence of provocation cannot stand in detachment from the mode of resentment of the provocation offered. Thus, to succeed in invoking the defence of provocation, the defendant must as a matter necessity scale the hurdle of proportionality test alongside other requirements.

In Mancini v. The Director of Public Prosecutions Viscount Simon while stressing on the circumstances when the offence of murder will be reduced to manslaughter held thus:

It is not all provocation that will reduce the offence of murder to manslaughter. Provocation to have that result must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death… The test to be applied is that of the effect of or evocation on a reasonable man, as was laid down by the court of Criminal Appeal in Lesbini 11 CAR In applying the test, it is of particular importance to take into account the instrument with which the homicide was effected; for to retort, in the heat of passion induced by provocation by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.

Interestingly, while dwelling on the issue of provocation in its judgment, the trial court in the case under review demonstrated its knowledge or consciousness of the proportionality test when it held on page 34 of the judgment thus:

The law is settled on the character of the defence of provocation where it succeeds, it has the effect of whittling down the punishment stipulated from the offence of murder to manslaughter. However, for provocation to constitute a defence in murder cases, it must consist of three elements which must co-exist namely: (a) that act of provocation was done in the heat of passion (b) that the loss of self-control was actual and reasonable, that is to say, the act was done before there was time for cooling down (c) that the retaliation is proportionate to the provocation.

For the reason not stated in the judgment, the trial court omitted or did not consider leg (c) of the elements highlighted above before it straight away convicted the defendant of manslaughter.

One is not oblivious of the fact that the issue of whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered and whether in any particular case the person provoked was actually deprived by the provocation of the power of self-control and whether any force used is or not disproportionate to the provocation are all questions of fact.

The fact established in the court did not disclose the statutory defence of provocation. The Supreme Court in Christopher v. State held that 'the trial court and intermediate court would only consider a defence available to the person on the facts established in the trial court'. From all fair perspectives, the factual situation in the case under review depicts none justiciability of the action of the defendant to the response of the deceased in the circumstance of this case; more so as the deceased's response was provoked or caused by the defendant.

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If the trial court had been painstaking in considering the proportionality test in the case, it would have been impracticable for it to arrive at the verdict of manslaughter in favour of the defendant as there can be no reasonable juxtaposition between a mere altercation arising from alleged harsh response or rudeness and shooting by the defendant of the deceased who was unarmed and who quietly sat down pressing his handset.

Consideration of Issue Two: Whether the defences of alibi and provocation can be simultaneously available to the defendant in the same criminal proceedings?

The question as to whether the defendant who has in the instant case unsuccessfully raised the defence of alibi can still be entitled to the defence of provocation in the same proceeding, presents yet another knotty and recondite jurisprudential legal issue in the judgment of the court.

As earlier stated herein, the defence of alibi is to the effect that the defendant was not the person or one of the persons who committed the alleged offence as he was physically elsewhere when the offence was committed.

In adumbrating on the meaning and import of the defence of alibi, the Supreme Court of Nigeria in Yalia v. State held thus:

Alibi means elsewhere it is a defence based on the physical impossibility of a defendant's presence at the scene of a crime. In other words, alibi means when a person charged with an offence says he was not at the scene at the time of the alleged offence was committed, as such, he could not have committed the offence.

The act of raising the defence of alibi by the defendant does not ipso facto translate to a verdict of innocence save and except where same was timeously raised by the defendant, investigated by the police or relevant security agencies and there is no evidence of an eye witness to dislodge the defence. Indeed, it is incumbent on the defendant who relies on the defence of alibi to give some facts and circumstances of his whereabouts at the earliest opportunity and the persons with whom he was at the material time.

Where the defendant has raised the defence of alibi promptly and equally supplied particular details of the alibi raised, it becomes imperative for the police to investigate such alibi as failure to do so may be fatal to the prosecution's case. This burden of proof is solely the responsibility of the prosecution and does not shift. The police must be painstaking in their investigation so that criminals are not allowed to escape justice; failure to perform this duty may affect the case of the prosecution. Where it is raised by the defendant for the first time during trial, it is expected of the defendant to adduce evidence that supports his defence. Where alibi raised is successful, it is exculpatory as it discharges the defendant from criminal liability because the defendant is deemed not have participated in the crime and was not at the scene of crime (provided he is not an accomplice).

The defence of alibi would however crumble where the defendant is fixed at the scene of the crime by the victim or other eye witness. In such circumstances, the investigation of a claim of alibi would serve no useful purpose.

In the case under attention, the defendant claimed to be in his house and that he did not go to the deceased's house when the murder of the deceased occurred on the night of 15th December, 2016. However, in contradistinction to the evidence of the defendant, PW1 and PW2 who were eye witnesses gave credible evidence that it was the defendant who shot the

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deceased in their presence in their house on the night of 15th December, 2016.

In reviewing and dislodging the defence of alibi raised by the defendant, the trial court on page 24 of its judgment held thus:

I believe the PW1 that the defendant shot the deceased that day. This believable evidence of the PW1 was corroborated by the equally believable evidence of the PW2 (Ayomide Adedotun) who testified further that after the defendant shot the deceased the defendant took him and the PW1 to his (defendant's) residence... It was therefore not in doubt that on the night of 15th December, 2016 the defendant with some hunters traced the PW5 to the house of PW1 where they met the PW1, PW2 and the late Felix Esan, that the defendant thereafter had an altercation with the deceased Felix Esan consequent upon which the defendant shot at Felix Esan who was in a pool of blood, that the deceased was left in a pool of blood while the defendant and his cohorts left with the PW1 and PW2 to the defendant's house... The defendant was not being truthful by denying his presence in the house of the deceased on the night of the incident. If the defendant could deny the obvious by denying being present at the deceased's house on the night of the incident, it should therefore be little surprise that he would also deny having shot the deceased.

Against the foregoing position of the trial court, it is clear as crystal that the defence of alibi raised by the defendant is of no moment in view point of the evidence before the court because the evidence of PW1 and PW2 extinguishes the defence of alibi raised by the defendant.

Both alibi and provocation are two diverse defences that cannot be relied on by the defendant at the same time and in respect of a single offence. Alibi and provocation are independent defences that cannot stand together. While the former exonerates the defendant from criminal liability, the later mitigates the criminal liability of the defendant. Where the defendant alleges that he was not physically present at the scene of crime and did not participate in the crime, he cannot also raise a plea of acting under provocation that he committed the crime as a result of sudden loss of self-control and provocative act. When this is done, it destroys the existence and justification for the defence of alibi and holds the defendant liable for the crime committed, this would amount to the defendant approbating and reprobating at the same time. These defences have the tendencies of springing confusion in the course of criminal trial and subsequently revealing the truth.

Consideration of Issue Three: Whether the duty of court to consider all defences open to a defendant in a capital offence will still arise where same are not back with evidence?

The principle of law that imposes a duty on the courts to consider all possible defences available to the defence even if they were not raised by the defence is commonly resorted to where the defendant is facing a capital offence as in the instant case. However, this avowed principle admits some exceptions, after all, there is no law without an exception.

The defendant in this case raised the defence of alibi. By its nature and legal connotation, a successfully raised defence of alibi exonerates the defendant on the basis that the defendant was not physically present at the scene of the crime. On the other hand, the defence of provocation by its own nature admits of the physical presence of the defendant at the scene of the crime and only relates to the effect that the defendant was precipitated or triggered by sudden rage to act in the way he did. The defence of provocation as opposed

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to the defence of alibi does not entirely exonerate the defendant but merely reduces the punishment prescribed for murder to manslaughter.

The defences of provocation and alibi are therefore patently dissimilar in nature and legal import. It is this dissimilar feature that constitutes a legal concern in the judgment of the trial court in entering a verdict of manslaughter for the defendant when the defence of alibi raised by him had failed. Defences that are mutually exclusive and inconsistent cannot be raised or avail a defendant at the same time as was exhibited in the judgment of the trial court under reference.

The Supreme Court of Nigeria while considering a similar situation of whether the defences of provocation and self-defence may avail a defendant simultaneously held in Agu v. State thus:

Sections 286 and 287 provided for defence of self-defence, while Section 284 provides for the defence of provocation. The defence, of self-defence is an exculpatory defence because where it is established, it exonerates the accused person, while the defence of provocation is merely an attenuating or a mitigating defence. Where available, it merely attenuates or demotes the offence from murder to manslaughter. In effect, the defence of provocation does not exonerate the accused. It only earns him a mitigation of the punishment due for the offence of murder to a manslaughter. It is thus, the dissimilarity in the consequences of the availability of these defences that make them mutually exclusive and inconsistent defences that cannot avail an accused at the same time. In the instant case, where the appellant raised defences of self-defence and provocation simultaneously at the trial, the trial court's findings rejecting the defences were rightly upheld on appeal.

While it may be imperative in the interest of justice to consider all defences open to a defendant in a capital offence, even where the defendant did not raise same, it however amounts to a futile judicial voyage for a court to sheepishly embark on consideration of defences out of an acclaimed sense of duty to consider all defences where in reality there is no sustaining evidence on record to support such defences or the defence raised by the court. The court is evident irreconcilable with the defence raised by the defendant himself.

In the instant case, the trial court suo motu raised the defence of provocation and resolved same in favour of the defendant and consequently entered a verdict of manslaughter against the defendant. The available evidence in the case does not support the defence of provocation stricto senso. The foregoing submission has been given judicial backing in a number of cases.

In Wasari Umani v. State Nnamani JSC as he then was held thus:

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

Equally in the recent case of Bello v. Federal Republic of Nigeria the Supreme Court of Nigeria held thus:

A court must consider all the defences open to the accused including even that which accused has not raised or proffered. That principle however cannot be applied in a vacuum as the defence or defences must align with facts available to the court. It cannot be said that once an accused asserts that a particular defence avails him, the court is obligated to grant that wish

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without a backing by evidence acceptable, cogent and showing to demolish the version of the transaction as proffered by the prosecution. In the instant case, where the defence of self defence raised by the appellant was not supported by evidence at trial, the lower court rightly held same was properly discountenanced.

CONCLUSION AND RECOMMENDATION

The case under review obviously show case an instance of the misconception and misapplication of the defence of provocation and the duty on the court to consider evidence that the defendant facing capital offence may be entitled to in criminal trial and which development culminated in manifest injustice to the victim of the crime committed by the defendant. Although theoretically, crime is generally said to be committed against the State; this is because, whenever crime is committed, it occasions an infraction of the criminal law put in place by the State. Equally, the State controls the apparatus and or machinery of administration of criminal justice system with which to redress such act of criminality in the course of which the State shoulders the financial implication for such redress in terms of prosecution and provision of custodial facilities.

In reality however, the State is not always the total or direct victim of the crime committed. The immediate victim of crime is usually the citizen or individual who feels the sharp edge and pains of the end result of act of criminality either through loss of material possessions, bodily injury or outright loss of the loved ones or any other personal discomfort as the case may be.

The deceased who was dastardly and callously murdered by the defendant in the case under review was already of age and of working class before his life was abruptly terminated. The pains and sense of loss experienced by the parents of the deceased and the loved ones can be better imagined than expressed.

The the interest of justice would have been better served by adherence to the clear position of the law which renders the defence of provocation inapplicable in the circumstance of the case. In the administration of criminal justice system, justice is a tripod phenomenon. In Godwin Josiah v. The State the Supreme Court per OPUTA JSC held thus:

Justice is not a one way traffic. It is not justice for the appellant only. Justice is not even only a two way traffic–justice for the appellant (accused) of a heinous crime of murder, justice for the victim... whose blood is crying out to heaven for vengeance and finally justice for society at large-the society whose social norms and value had been desecrated and broken by the criminal act complained of.

Given the gruesome manner in which the defendant killed the deceased and the callousness exhibited thereafter in dumping the corpse at a gully site in a desperate attempt to cover up his barbaric and dastardly act; ordinarily, the instant case should be one where the defendant ought to be made to face full wrath of the law for the offence of murder.

A safe balance must be maintained between the duty of the court to consider the defences that a defendant is entitled to in a capital offence and the sacred duty of watchfulness on the part of the court to exercise restraint not to fill the yawning gap in the case of a party because such duty does not appertain to judicial function of the court.

Evidently, it cannot be safely asserted that legally, the interest of justice has been fairly served in the case under review as far as the defence of provocation is

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concerned. Even if it is assumed in the extreme that the response of the deceased to the defendant was anything rude or harsh and thereby provoking in nature, it was clearly a self-inflicted or provoked response as the deceased had practically done nothing abinitio to provoke or interfere with the mission of the defendant in the premises but rather quietly sat down pressing his handset.

On the meaning of the word 'harsh' the Supreme Court in David v. C.O.P Plateau State Command held thus:

The word 'harsh' is an adjective meaning or conveying the meaning of the sentence being cruel, severe and unkind. It is also suggestive of the feeling that the sentence is severe, unfeeling, brutal etc.

It is noteworthy to observe here that the defendant on the day of the incidence had earlier threatened to shoot the deceased and his friends if they failed to go their house when they went to the defendant's house to plead for the release of their friend, Peter Akanbi who was then being detained by the defendant for alleged act of theft. One can then reasonably assume that the calm or measured posture of the deceased towards the defendant while in the premises to search for the said Peter Akanbi was understandable as it was to avoid another round of confrontation with the defendant.

Indeed, the avoidable altercation between the deceased and the defendant would not have occurred if the defendant and his team had peacefully walked away having vainly searched for Peter Akanbi in the premises. It is submitted that a defendant who pleads the defence of provocation must himself be free from blame in bringing the encounter that occasioned the provocation for the defence to avail him.

If anything, the defence of provocation raised suo motu by the court and given the circumstances in which it arose has cheaply allowed the defendant to benefit from his own wrong contrary to the well-established principle of law that a man cannot create a crisis situation and turn around to plead the same crisis created by him as an availing factor of liability. In Alade vs. Alic (Nig.) Ltd the Supreme Court held thus:

A party should not be allowed to benefit from his own wrong. The Latin maxim is nullus conmodium capere potest de injuria sua pira.

The State as the prosecuting side and which ordinarily has the statutory right to challenge the decision of the trial on appeal was patently not disposed to doing so as evident in the gesture of the State in releasing the defendant unconditionally from incarceration pursuant to the exercise of power of prerogative of mercy. The gesture of the State in setting the defendant free in the circumstance evidently raises the worrisome concern as to the likelihood of abusive exercise of the power of prerogative of mercy by the government for some ulterior motive especially under the democratic setting where political consideration is often elevated to the realm of supreme importance over and above the common good of the society. The bewilderment and the ultimate attitudinal disposition of the relatives of the deceased in the case under review towards the administration of criminal justice in Nigeria are better imagined than expressed.

It is vital to note that the defence of alibi and provocation cannot avail a defendant in respect of the same criminal offence because they are unrelated distinct crimes and cannot stand together. These defences, when raised together in respect of the same crime, places the court in the realm of the impossible thereby revealing the truth behind the commission of the crime. This study however recommends that in the

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application of the defence of provocation in criminal proceedings, courts should take appropriate measure and evaluation of the fact of the case and ensure that it meets all the requirements of provocation because none of the elements can be applied in isolation. In other words, courts should guide themselves so as to avoid sentiment but ensure that certain provisions or ingredients of a defence are not wrongly applied or the fact in issue are not disproportionately applied to the elements of the defence in question.

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