

An Examination of the Right of Self Defence and Others in Nigeria

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ABSTRACT

The study examines the scope of the right of self defence and defence of others in criminal trial. The study establishes that a person is justified in using force to resist any one who intends to commit a felony against him or any other person in his presence. The study explains the applicable laws in Nigeria to that effect and the position of the judiciary. For a conduct to be justified, the person must have adopted such force as is necessary to avert the act if it is absolutely impossible to escape from the attack by retreating.

Recommendations are made on the best approach to be adopted in determining the liability of a person for the use of excess force in self defence.

Introduction

The right to use force in defence of oneself or another against unjustifiable attack has existed from time immemorial. The rule as to the right of self defence or right of private defence has been stated by Russell on Crime thus:¹

...a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases, he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended and if in a conflict between them he happens to kill his attacker such killing is justifiable.

Self defence or private defence has not been given a statutory definition in Nigeria, but has to be understood in the common law context of which there are two aspects.

First, a man may in defence of liberty, person or property use such force as is necessary to obtain its object and which does not cause injury that is disproportionate to the injury sought to be prevented.

Second, a man may use so much force as is necessary in repelling an unlawful attack on his person or liberty, but may not cause grievous bodily harm or death except in defence of life or limb or permanent liberty².

Applicable Laws in Nigeria

In Nigeria, the right of defending one's body or the body of any other person is codified in Section 32 (3) of the Criminal Code applicable in the southern states of Nigeria³ and section 59 of the Penal Code applicable in the northern states of Nigeria⁴.

Section 32(3) of the Criminal Code provides,

Inter alia:

A person is not criminally responsible for an act or omission if he does or omits to do the act... when the act is reasonably necessary in order to resist actual and unlawful violence threatened to him or to another person in his presence.

Section 59 of the Penal Code⁵ on the other hand reads as follows:

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

¹ Russell W.O (1958) *Russell on Crime* Stevens & Son Ltd 11th Edition, Vol. 1 at page 491

² Ofori – Amankwah, E.H.(1986) *Criminal Law in the Northern States of Nigeria* at page 252

³ Laws of the Federation of Nigeria, Cap C 38 2004

⁴ Laws of the Federation of Nigeria, Cap P3 2004

⁵ Corresponding to section 96 of the Indian Penal Code

Notwithstanding the fact that the law recognises the natural instinct of self preservation, it lays down certain limitations on the exercise of the right of self defence. This is necessary if society is not to degenerate into anarchy with everybody taking the law into his hands¹. These limitations are contained in sections 286 – 288 of the Nigerian Criminal Code² and sections 62 – 66 of the Northern Nigerian Penal Code³.

Self Defence

One of the important limitations placed on the exercise of the right of self defence is the requirement that a person who is unlawfully assaulted use only such force as is reasonably necessary to make effectual defence against the assault. This is clearly laid down in section 286 of the Nigerian Criminal Code⁴. The first paragraph of the section provides that:

When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant and is reasonably necessary to make effectual defence against the assault, provided that the force used is not intended and is not such as is likely to cause death or grievous bodily harm.

What harm or force is reasonably necessary is invariably a question of fact. In a case of brutal assault where a person's life is in danger, such force may extend to the causing of death of the assailant. The second paragraph of section 286 of the Nigerian Criminal Code provides:

If the nature of the assault is such as to cause reasonable apprehension of death or grievous harm and the person using force by way of defence believes on reasonable grounds that he cannot otherwise preserve the person defended from death or grievous harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous harm.

In *Akpan V. State*⁵, Adio (Justice, Supreme Court as he then was) in interpreting section 286 of the Nigerian Criminal Code held as follows:

When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force on the assailant as is reasonably necessary to make effectual defence against the assault. The force which may be used in such circumstances must not be intended, and should not be such as is likely to cause death or grievous harm. If the nature of the assault is such as to cause reasonable apprehension of death or grievous harm, and the person using force by way of defence believes on reasonable grounds that he cannot otherwise preserve the person defended from death or grievous harm, it is lawful for him to use any such force to the assailant as is necessary for defence even though such force may cause death or grievous harm.

The above dictum was cited with approval by the Court of Appeal in *Karimu V State*¹, where the court ruled that before the defence of self defence can avail an accused or can lawfully be invoked, three fundamental principles must be established, viz:

¹ Chukkol, K.S. (1989) *The Laws of Crimes in Nigeria*. ABU Press Limited Zaria at P. 100

² Corresponding to sections 271 – 273 of the Queensland Criminal Code in Australia

³ Corresponding to Sections 96 – 106 of the Indian Penal Code. In England, the right of private defence is not governed by any statute and as such the right is governed by the common law.

⁴ Section 271, Queensland Criminal Code

⁵ (1994) 9 N.W.L.R (part 368) at P. 347

- a. the defence can only be invoked against a person who is an assailant or an aggressor;
- b. the person attacked or assaulted or threatened with violence by the assailant must be in actual fear or belief of reasonable apprehension of death or grievous harm;
- c. the force used to repel the attack by the assailant must be proportionate to the force used in the attack.

Under section 60 of the Penal Code, it is provided that subject to restrictions contained in the code, every person has a right to defend his own body, and the body of another person against any offence affecting the human body. One of the restrictions is that “the right of private defence in no case extends to the infliction of more harm than is necessary to inflict for the purpose of defence”². Also, under Section 65 of the Nigerian Penal Code³, private defence may, in certain circumstances, extend to killing where the act being repelled is one of the following categories:

- (a) an attack which causes reasonable apprehension of death or causing grievous hurt; or
- (b) rape or assault with intent to gratify unnatural lust, or
- (c) abduction or kidnapping

Under the Penal Code of Nigeria, express provisions are made which give an accused person a right to kill in self defence where the act repelled is either rape, assault with intent to gratify unnatural lust, abduction or kidnapping. In construing the Nigerian Penal Code provisions on the right of private defence, the Supreme Court in *Kwagshir V State*⁴ held that four cardinal conditions must exist before the taking of the life of a person is justified on the plea of self defence. These are:

- a. the accused must be free from fault in bringing about the encounter;
- b. there must be present an impending peril to life or of great bodily harm real or so apparent as to create honest belief of an existing necessity;
- c. there must be no safe or reasonable mode of escape by retreat; and
- d. there must have been a necessity for taking life.

In order for conduct to be justified, the accused must only have adopted such force as is necessary to avert the attack. “Such force as is necessary” involves a consideration of the following issues:

1. The Necessity for any Defense Action

It is quite clear that the person seeking to rely upon the defence must believe his action to be necessary. If the aggressor is seeking to disguise his status behind a smoke-screen of self defence, the defence will not apply to him. What is the position if the response is not in fact necessary, but the defendant genuinely believes he is about to be attacked? Under the Nigerian Criminal Code, the test of reasonableness of belief is objective. In *R V. Onyemaizu*⁵, it was held that the defence is not open to an abnormally nervous or excitable person who, on being assailed by a comparatively minor assault, or an assault of any nature which falls short of that which is described in section 286 of the Criminal Code, unreasonably believes that he is in danger of death or grievous harm.

Under the Nigerian and Indian Penal Codes, the test is subjective. It was held in *Kwagshir V State*⁶ that one of the cardinal conditions of the plea of self defence laid down by the court is that there must be present an impending peril, to life or of great bodily harm, either real or so apparent as to create honest belief of an existing necessity. The subjective approach in determining the necessity of the accused person’s action is to be preferred because if a court were to rely wholly on the belief of a “reasonable man” to the exclusion of the accused person’s mistaken and honest belief of the facts, a lot of questionable decisions would be arrived at where the person who ought not to be found guilty of murder will be convicted.

2. The Amount of Responsive Force that may be used.

It has long been accepted that the accused may only use such force as is reasonable in the circumstances. The general rule is that response must be proportionate to the attack. Section 298 of the Nigerian Criminal Code which codifies the concept of excessive force is somewhat vague. The section which is in essence a reproduction of section 52 of the Tasmanian Penal Code of Australia provides:

“any person authorised by law to use force is

¹ (1996) 7 N.W.L.R (Part 462) at P. 579

² Section 62, of the Penal Code

³ Section 100 of the Indian Penal Code

⁴ (1995) 3 N.W.L.R (Part 386) at P. 651

⁵ Supra

⁶ Supra

criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess”

The section does not say what the accused’s liability will be if, by making an error of judgment, he uses force in excess of what could be reasonably necessary for his defence. The Courts have not made particular reference to section 298 of the Criminal Code, but it is clear that they have followed the English common law rule that an excessive use of force would defeat a plea of self defence. *In State V. Emmunu*¹, the accused shot and killed the deceased whose action, by putting his hand in his pocket frightened him, the court rejected the plea of self-defence on the ground that the accused’s action was unwarranted in the circumstances.

The approach adopted under the Nigerian Penal Code is quite different. Under the Penal Code, killing occasioned by the use of excessive force in private defence is manslaughter only, not murder.

Section 222 (2) of the Penal Code² provides:

“...culpable homicide is not punishable with death if the offender in the exercise (in good faith) of the right of private defence exceeds the powers given to him and causes death...”

When it is established that the right of private defence exists, the court usually applies what has been described as the “golden scale” principle to question whether or not excessive force was used. In *Radhe v Emp*³, five persons found cattle trespassing on their land and as they were legally entitled to do, rounded them up. There and then they were attacked by Z on whom they successfully inflicted wounds. Their conviction for causing hurt was quashed on appeal when it was pointed out that Z had been a “very obstinate fellow”, and probably that every blow dealt to Z was necessary to stop Z. The view was further expressed that once it was found that their right of defence exists, it is very difficult to expect an accused person to weigh with a golden scale the maximum force necessary to keep within the right. It is submitted that the Penal Code of Nigeria approach to the problem of excessive force used in self defence should be followed by the Criminal Code jurisdiction in Nigeria for where a person truly acts in self defence, it is difficult to see how he can regulate the force used in such defence.

3. The Duty to Retreat

It can be argued that if it is possible to escape from the attack by retreating, then it is unnecessary and unreasonable to use defensive force. As the bulk of our law is the English Common law, the concept of retreat has found its way into Nigeria but apparently restricted to cases of provoked assaults only. Section 287 of the Criminal Code provides in part as follows:

When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults him with such violence as to cause reasonable apprehension of death or grievous harm, and to induce him to believe, on reasonable grounds, that it is necessary for his preservation from death or grievous harm to use force in self defence, he is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous harm.

This protection does not extend to a case in which the person using force, which causes death or grievous harm, first began the assault with intent to kill or to do grievous harm to some person; nor to a case in which the person using force which causes death or grievous harm endeavoured to kill or to do grievous harm to some

¹ (1968) NWLR at page 15.

² Corresponding to Section 300 of the Indian Penal Code

³ (AIR) (1923) AH 357

person before the necessity of so preserving himself arose, nor in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.

The English common law used to adopt a strict approach that a “retreat to the wall” was required before extreme force could be justified. Under the Nigerian Penal Code, there is no requirement for retreat.

4. The Imminence of the Attack

It has been stated that restricting rights of self defence to pure defensive retaliation could effectively condemn some innocent persons to death or other injury. In certain limited circumstances, the law must permit the right to strike first. Lord Griffiths said in *R Vs Beckford* that “a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot, circumstances may justify a pre-emptive strike”¹. The problem however is in defining the parameters of such a right. Allowing too much anticipatory defensive action could become a charter for vigilantism. The Criminal Code and Penal Code do not contain any similar provisions.

However, section 102 of the Indian Penal Code provides that:

The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence although the offence may not have been committed and it continues as long as such apprehension of danger to the body continues.

Under section 63 of the Nigerian Penal Code, there is no right of private defence where the assaulted can have recourse to the protection of public authorities. Whether or not a victim of an unprovoked assault has a reasonable time to have recourse to public authorities as required by this section is a question of fact. It must be observed that this section of the Penal Code is more likely to be complied with in the breach as the public authorities are in no position to guarantee the safety of the citizenry of this country.

The English Common law along with the Nigerian Criminal Code do not have similar provisions. Another limitation placed on the exercise of the right of private defence is the exclusion of the right in cases where a person suffers what could have been ordinarily an assault but considered lawful if done by some public servants in the exercise of their lawful duties². Even though the Criminal Code does not contain this limitation, it is submitted that the same principle would apply.

Defence of Others

Under the common law of England, the courts have equated the defence of others with the prevention of crimes. In *R V Duffy*³, it was held that a woman would be justified in using reasonable force when it was necessary to do so in defence of her sister, not because they were sisters, but because “there is a general liberty as between strangers to prevent a felony”. The principles applicable are the same whether the defence be put on the grounds of self defence or on the grounds of prevention of crime. The degree of force permissible should not differ for example, in the case of a master defending his servant from the case of a brother defending his sister or, indeed, that of a complete stranger coming to the defence of another under unlawful attack.

Under Section 288 of the Nigerian Criminal Code, whenever it is lawful for any person to use force in any degree for the purpose of defending himself against an assault, it is lawful for any other person acting in good faith in his aid to use a like degree of force for the purpose of defending such first-mentioned person. In *State V. Agbo*⁴, the court held that this defence availed the accused who, having observed the deceased inflict a fatal accident matchet cut on one of the accused person’s son’s and cut the other on the knee with the matchet, snatched the matchet from the deceased and killed him.

¹ (1988) IAC 130 at page 144

² See Section 64 of the Nigerian Penal Code.

³ (1966) 1 All ER, P. 62

⁴ (1963) 3 E.C.S.L.R at P. 4

Under Section 60 (a) of the Nigerian Penal Code, every person has a right to defend his own body, and the body of any other person against any offence affecting the human body.

The Burden of Proof

On the issue of burden of proof, the accused will normally raise the issue of self defence where it is relevant but the burden of proof remains throughout on the prosecution and it is not at any time on the accused for him to establish that defence if the court is left in doubt as to whether the accused was acting in self defence, he should be acquitted. In *Baridam V State*¹, the Supreme Court held that:

The onus is always on the prosecution to disprove the accused's defence of self defence and not on the accused to establish his plea. Thus, the defence of self defence will only fail where the prosecution shows beyond reasonable doubt that what the accused did was not done by way of self defence.

Conclusion

In conclusion, it must be said that where the right of private or self defence does not avail an accused, the same facts upon which the plea was raised may support the defence of provocation. It is necessary to bear this in mind because a successful plea of self defence would result in an acquittal, an unsuccessful plea would result in a conviction for murder. If the defence of provocation is relied upon in the alternative and accepted, a conviction for manslaughter may be entered against the accused.

As observed earlier, the test of whether the accused's action was necessary under the Criminal Code is objective. It is suggested that the test be a subjective one whereby the honest belief of the accused should be the criteria for deciding whether the accused's action was necessary in the circumstances. This would ameliorate the harsh provisions of the law as applied to the accused.

With regard to the issue of excessive force under the Nigerian Criminal Code, it is suggested that the court in deciding cases should make use of the provision of section 298 of the Criminal Code in determining whether or not to convict defendants who have used excessive force in self defence for murder or manslaughter. The current attitude of slavishly adopting common law decisions on this point does not augur well for the development, proper interpretation and implementation of our statutory laws. It is quite certain that if section 298 of the Criminal Code is relied upon in determining the liability of an accused for the use of excess force in self defence, the courts would be able to avoid the rigid stance of the common law concerning this issue.

¹ (1994) 1 NWLR (Part 32) at page 250

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