# REVISITING THE REQUIREMENT OF QUIT AND RETREAT UNDER SECTION 287 OF THE CRIMINAL CODE*


## Abstract

The concept of quit and retreat in the defence of self defence is one that has undergone various interpretation. Some researchers believe the quit should be total and the retreat should be absolute, yet some do not see the need for the requirement. In this work, our aim is to clarify the concept and see reasons why it should continue to exist in our jurisprudence and its applicability. The methodology adopted here bothers on doctrinal and a major finding of this work is the improper application of the concept which will form part of the recommendation that the concept be properly applied whenever the issue arises.


**Keywords: Quit, Retreat, Criminal, Self Defence, Assault, Nigeria**

## 1. Introduction

The Nigerian Legal system desires that an offence can only be an offence when it is contained in a written enactment. In the same vein the Criminal Code contains most of the offences in Nigeria even though other enactments have their own share of crimes. Nevertheless the Criminal Code is unique in the sense that it also provides for defences that may be raised when any of these offences may be charged irrespective of where the offence was contained. It is in respect of one of the defences so provided that we undertake this research. The Criminal Code provided for the defence of self defence in two ways, self defence against unprovoked assault and self defence against provoked assault.[1] The topic of our discourse rests squarely on self defence against provoked assault as contained in Section 287. Self defence against provoked assault cannot stand unless the person who provoked the assault first quitted and retreated the altercation. It is this critical requirement in this defence that our attention is drawn to.

## 2. Conceptual Clarification

Certain concepts in this work call for clarification. To that end this work will attempt to clarify the concept of quit and retreat and as well that of self defence for provoked assault.

### Concept of Quit and Retreat

To start a clarification of this, one needs to isolate the words. The term quit has been defined as 'the act of leaving a place'.[2] Retreat on the other hand has been taken to mean 'an act of moving away especially from something difficult, dangerous, or disagreeable'.[3] Quit according to Cambridge online dictionary has further been defined as to end something or to cause it to end[4]. The same dictionary defined retreat as 'to go away from a place or person in order to escape from fighting or danger"[5]. Joining together the two words, quit and retreat simply means moving away from the conflict and seeking an end to further conflict.

* **Boniface E Ewulum**, Lecturer in the Department of Public Law, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State. E Mail: be.ewulum@unizik.edu.ng, 2347038137153

[1] Section 286 and 287 of the Criminal Code

[2] https://thesaurus.plus/related/quitting/retreat

[3] Ibid No 2

[4] https://dictionary.cambridge.org/dictionary/english/quit

[5] Ibid No 4.

In bringing the two terms together in view of the provision of Section 287 of the Code, it has become imperative to touch albeit lightly the case of *R. v Mclnnes*[6]. In the case mentioned it was stated that:

> it is not as we understand it the law that a person threatened must take to his heels and run in the dramatic way suggested by counsel for the appellant but what is necessary is that he should demonstrate by his action that he does not want to fight. He must demonstrate that he is prepared to temporarize and disengage and perhaps to make some physical withdrawal.[7]

It is therefore safe to say that the concept of quit and retreat implies that the defendant should demonstrate his desire not to continue with the altercation and or make any physical withdrawal to meet the requirement of quit and retreat.

**Self Defence**

Self-defence, as a defence, simply means that the accused person did the alleged act while in the process of defending either himself or some other person and that he had no premeditated intention to kill his attacker or to cause him grievous bodily harm'.[8] It is important to state that the defence of self defence connotes that the 'defendant agrees and/or accepts that he committed the act that led to the death of the deceased, but he was forced to do it because his life or limb was threatened either with death or with a grievous injury or harm. In other words, the plea of self-defence is inconsistent with an outright denial by an accused person that he inflicted the injuries which led to the death of the deceased. Put another way, by pleading self-defence, the Appellant is saying that he was forced to kill the deceased because the deceased attacked him and, in fear for his life or serious injury to himself, he attacked him with an axe and inflicted serious injuries on him which led to his death. That therefore, for this reason, he is not culpable'.[9] In *Fulani v State*[10] per Eko, JSC, it was stated emphatically and with clarity what self-defence entails, thus: "Self-defence, as a defence, simply means that the accused person did the alleged act while in the process of defending either himself or some other person and that he had no pre-meditated intention to kill his attacker or to cause him grievous bodily harm.

**3. Historical Background to Self Defence**

It has been said that Self-defence has a long history in the common law. The Royal Commission first appointed to consider codification of the criminal law in England said in 1879:

> We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty and property against

[6] (1971) 3 All E.R. 295
[7] Pg 300
[8] *Mohammed v State* (2021) LPELR-54414(CA)

[9] *Mamman v State* (2022) LPELR-59194(CA)
[10] (2018) 45195(SC) 31-36, F-B,

> illegal violence, and permits the use of force to prevent crimes, and to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent'.[11]

The clear thing here is that the requirement for self defence has always been there. The history of Nigerian Criminal Code cannot be complete without the mention of Sir James Fitz James Stephen who majorly authored the Queensland Criminal Code upon which Nigeria's Criminal Code was modelled after. Thus, the background of self defence flowed from the same enactment which coloured the Nigerian Criminal Code. It is Rusell who stated that:

> 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'[12].

The issue of self defence is as old as man itself. The defence of self defences presumes that a man has the right to defend himself from any attack and more so from an attack that takes place in his castle. Lowery Jnr has this to say on Self defence,

> No concept in the law seems clearer than the right of a man to kill in the necessary defense of his own life. This basic idea seems so fundamental as to admit no room for question. And yet an examination of the history of self-defence reveals a startling difference between its present state and its early origin. From the very beginning of the jurisdiction of the king s courts over criminal cases, homicide was justifiable and consequently without penalty only where committed in execution of the law.' Such cases as killings under the king s warrant, or in the pursuit of justice, or the killing of an outlaw, or a thief caught in the act, or other manifest felon who resists capture- would seem always to have been justifiable. The penalty for all other cases of

[11] Criminal Code Bill Commission *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences: With an Appendix Containing a Draft Code Embodying the Suggestions of the Commissioners* (C2345, Eyre & Spottiswoode for HMSO, London, 1879) at 11, referred to in Criminal Law Reform Committee *Report on Self Defence* (Report 15, November 1979) at [5]. The Royal Commission included Sir James Fitzjames Stephen, who first drafted a bill to state the law relating to murder, which became known as the "Stephen Code". See Jeremy Finn "Codification of the Criminal Law: the Australasian parliamentary experience" (paper presented to Comparative Histories of Crime Conference, Christchurch, September 2003). Accessed fromhttps://www.lawcom.govt.nz/sites/html-pubs/r139/Chapter+5+-+Self-defence+in+New+Zealand/History+of+self-defence+in+New+Zealand.html#FootNoteID_374 on 14/11/2023

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

> homicide was plainly and simply death or mutilation and even as late as the 19th century in England the law provided for forfeiture of goods and payment of fines to the king, although for a long time the rule had not been enforced.[13]

Lowery Jnr continued by stating that, '

> It seems sufficient to say however in either event, that self-defense, while originally not an excuse for homicide, but merely a ground for pardon, became an excuse in equity, and was at last accepted at law. From these roots has sprung our modem law of self-defense.[14]

It therefore follows that a person has a right to the defence of his life where he reasonably believes that the life is in danger. The defence of self defence as earlier stated has been captured under Section 286 and 287 of the Criminal Code. Section 286 provides for Self defence against unprovoked assault while Section 287 discusses self defence against provoked assault. It is therefore self defence against provoked assault that has the requirement of the concept under discourse in this work. We shall therefore devote our energy to that knotty requirements.

## 4. Quit and Retreat under Section 287

Section 287 of the Criminal Code provides 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 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'

[13] Jack Lowery Jnr, The Historical Development of Self-Defense as Excuse for Homicide, available online at https://uknowledge.uky.edu/klj accessed on 23/11/2023 at 2.08pm

[14] Ibid

It is important at this stage to highlight the fact that self defence is an affirmation that the defendant killed the deceased. The defendant however is alleging that his act of killing the deceased was on the basis of the need to preserve his own life. In further consideration of that affirmation the issue of who initiated the aggression arises. For the provision under Section 286, it is common knowledge that the defendant was not the initial aggressor. Section 286 provides as such:

> When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant as 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 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 ground, 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 provision of Section 287 particularly in the second paragraph made it clear that the protection offered in the first paragraph did not extend to a case in which the person using the force which causes death or grievous harm, first began the assault with intent to kill or to do grievous hard 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 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. (Emphasis mine) This is the crux of this work. To achieve the aim of this work we must revisit the defence in full. In *Okorodudu v State*,[15] it was held that by Section 286 of the Criminal Code, where a person who did not provoke an assault is unlawfully assaulted, the law expects him to defend himself. But in defending himself, he is expected to use such force on his assailant as would be reasonable to make an effective defence. Where the defence is disproportionate to the assault, self-defence will not avail. This raises the issue of reasonability which is not our concern in this work. Furthermore, the defence must not be intended to cause death or grievous harm.[16]

In *Ekeozor v State*,[17] it was held that for self defence to avail the appellant, the onus is on the defence to show that: a) he was assaulted by another, b) he has not provoked the person assaulting him c) the nature of the assault may be one that causes reasonable apprehension of death or grievous harm. d) he used reasonable

[15] *Okorodudu v State* (2014) LPELR-23210(CA)

[16] See also *Odunlami v The Nigerian Army* (2013) LPELR (20701) 1 at 21 - 22

[17] (2016) LPELR-40951(CA)

force to defend himself. e) he never intended to kill that person or inflict grievous bodily harm. The Supreme Court settled the issue of self defence by stating that the defence of self defence by nature is determined essentially on facts and circumstances of each case. In *Ita v State*,[18] it was held that for self-defence to be of great avail to the Appellant, there would have been reasonable apprehension of death or grievous harm to him and 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.[19]The simultaneous factors or requirements for self-defence have been laid down to include that:- (a) There was an act of grave and sudden provocation or that he was assaulted by another, (b) he has not provoked the person assaulting him, (c) there was the loss of both actual and reasonable self-control, (c) The retaliation must also be proportionate or the nature of the assault may be one that causes reasonable apprehension of death or grievous harm, (e) he used reasonable force to defend himself, (f) he never intended to kill that person or inflict grievous bodily harm, (g) there would have been no way of escape for the Appellant in the circumstance, and so on and forth as the case may be. All the above elements must co-exist and be within a reasonable time. In determining what should constitute provocation, the Court does not consider the susceptibilities of the accused. The guiding principles of self-defence are necessity and proportion.

It is imperative that in doing this analysis recourse should be had to other jurisdictions. In Australia, the Criminal Code contained equivalent of our Section 287. Section 272 of the Australian Code states thus:

272[20] Self-defence against provoked assault

> (1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.
>
> (2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm

[18] (2022) LPELR-58817(SC)
[19] See Per Coker, JSC, in *Sunday Udofia v The State* (1984) LPELR-3306(SC) (PP. 26 PARAS. C).
[20]Then Australian Criminal Code 1899

> to some person before the necessity of so preserving himself or herself 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.

Subsection 2 of the said Section 272 is very material to this discussion. It specifically highlighted the fact that the defence of self defence will not avail a person who first begun the assault while using deadly force. It submitted that such defence will only avail such a person if he declined further conflict and quitted it or retreated from it as far as was practicable. This mirrors the provision in our Section 287. It is therefore inherent to assert that the defence in this section is not available to the initial aggressor especially where he commenced the aggression with lethal force. This is specifically the position. However, the Law has given recognition to the initial aggressor's right to life especially where he believes his life is in danger and the only way to save his life is to take the life of the deceased. It is critical here to further state that if a provoked assault is not serious then the person who provoked it must bear the consequences and tolerate same. In *R v Dayney*[21] the Queensland Court of Appeal submitted that.

> it is logically consistent with the distinction between cases within s271 and those within s 272, that this final clause of s 272(2) should qualify the protection afforded by s 272 in every case. In cases of both unprovoked and provoked assaults, it may be relevant to consider whether the accused person sought to withdraw from the conflict, because that may be relevant to a consideration of whether he or she reasonably believed that it was necessary to use force in self-defence. But the absence of a withdrawal, when that would have been practicable, has a particular relevance where the accused person was the instigator of the conflict.

Further in *Viro v The Queen*,[22] Gibbs J had this to say,

> In my opinion, in Australia the fact that the person raising self-defence was the aggressor is an important consideration of fact, but not a legal barrier to the success of the plea. The matter may be regarded in a similar light to a failure to retreat. It is obvious enough that a person cannot rely upon the plea of self-defence unless the violence against which he sought to defend himself was unlawful. If, therefore, one man makes a violent attack upon another with intent to rob him, and the man attacked defends himself, using more force than is reasonably necessary, the original assailant cannot be said to be acting in self-defence in trying to overcome the other's resistance, since that resistance was lawful. However, if the original assailant has desisted

[21] [2020] QCA 264

[22] *Viro v The Queen* - [1978] HCA 9 - 141 CLR 88; 52 ALJR 418

> from his attack, and his intended victim no longer needs to defend himself, and cannot reasonably believe that he is still in danger, but nevertheless takes the offensive and out of anger or revenge himself becomes the attacker, the original assailant is not obliged to let himself be killed or injured without any attempt at resistance. Nevertheless, in such a case it is difficult to see how, as a matter of fact, the conduct of the aggressor, which commences as a criminal assault with an intent to commit a serious crime, can become transmuted in split seconds into lawful self-defence, unless the aggressor has clearly broken off his attack. In such circumstances the fact that he did not retreat when he had an opportunity to do so assumes a special significance.

The facts in Viro's are as follows: Frederick Viro in company with three others and pursuant to a plan attempted to rob a drug trader, John Rellis, by assaulting him with a jack handle. The robbery attempt, in the confined space of a motor vehicle, allegedly miscarried and, according to Viro, he felt it necessary to stab Rellis in self-defence as Rellis had retaliated with his own knife. Viro's stabbing of Rellis proved fatal. It is therefore a clear case of an initial aggressor seeking relief under the Law especially under our Section 287.

Again in *Zecevic v Director Public Prosecution*[23], Dawson and Toohey JJ, submitted as follows:

> There is, however, one situation which requires particular mention. It should, we think, be regarded as raising only evidentiary matters to be considered in arriving at an answer to the ultimate question, although in code States it is treated as raising matters of law [e.g. s 272 of the Qld Code] … Where an accused person raising a plea of self-defence was the original aggressor and induced or provoked the assault against which he claims the right to defend himself, it will be for the jury to consider whether the original aggression had ceased so as to have enabled the accused to form a belief, based on reasonable grounds, that his actions were necessary in self-defence. For this purpose, it will be relevant to consider the extent to which the accused declined further conflict and quit the use of force or retreated from it, these being matters which may bear upon the nature of the occasion and the use to which the accused made of it.

The issue of quit and retreat is very essential in self defence against provoked assault. The issue of reasonability and honesty is not why we are here. Our major focus and concern is whether an initial aggressor can find shelter under the defence of provocation. The answer we have seen here shows that yes he can, provided he quitted and retreated from the conflict as far as practicable. The question therefore is when can it be said that he has quitted and or retreated? Does he have to run away completely? The answers are not far-fetched. It is important that the person should rely on the provision and ensure that the requirements listed

[23] (1987) 162 CLR 645

are complied with. The provisions of the Law presupposes a complete meeting of the requirement in the first paragraph that is to say the use of force as is reasonably necessary for such preservation even though such force may cause death or grievous harm. The provision went on to nullify this defence for someone who was the initial aggressor. Thus it said that the provision in the first paragraph does not extend to the man who initiated the assault especially if he initiated the assault with intent to kill or do grievous harm. However, the table turned when the same provision suggested that such a person can utilize this defence but must first decline further conflict and quitted it or in the alternative retreated from it as far as was practicable. The usage of the phrase declined further conflict is merged with the phrase quitted it. Thus it becomes imperative that to benefit he must have declined further conflict and at the same time quitted it or where it is not possible to quit he retreated from it as far as practicable. The operative words here are 'declined further conflict, quitted it or retreated as far as was practicable.' The whole issues here are objective. It must be seen that the defendant declined further conflict and quitted same. It should also be seen that he retreated as far as was practicable. It is important that this retreat and quit is different from the principle of retreat to the wall in the castle. The concept of retreat to the wall is applicable to an initial aggressor who was engaged in a non-deadly aggression and in such circumstance such an aggressor is expected to retreat to the wall.[24] However, authorities abound that a man in his castle is not expected to retreat as there is no safer place to retreat to than his house. It is imperative to state clearly that the major principle in self defence is 'necessity.'[25] Absence of necessity was clearly shown in the case of *Famakinwa v State*[26] where the Court of Appeal per Iyizoba JCA held that:

> Self defence is a complete answer to a charge of murder but to avail himself of this defence, the appellant must show that his life was in such grave danger by the act of his attacker that the only option left for him to save his own life was to kill his attacker. He must show that he did not want to fight and was prepared to withdraw. This was far from the situation here. The appellant had disarmed Seyi Omomofe, his alleged attacker. His life was no longer endangered. All he needed to do was to withdraw from the fight. Rather than withdraw, the appellant then decided to retaliate and said so expressly. In the attempt to revenge, he aimed the knife at Seyi who dodged, and the knife was driven viciously into the chest of the deceased. The appellant cannot rely on the defence of self defence because his action was avoidable. In Ekanem v State[27], it was held that the law requires that the following ingredients must be established viz: (i) The accused must be free from fault in bringing about the encounter. (ii) There must be present an impending peril to life or of great bodily harm either real or so apparent

[24] *People v. Walters*, 223 Mich. 676, 682-683; 194 N.W. 538 (1923); *People v. Riddle*, 467 Mich. 116, 128 n.19 (Mich. 2002)
[25] *People v. Daniels*, 192 Mich. App. 658, 672; 482 N.W.2d 176 ; *People v. Riddle*, 467 Mich. 116, 127 (Mich. 2002)

[26] (2012) LPELR-9748(CA)
[27] (2009) LPELR-4105(CA)

> as to create honest belief of an existing necessity. (iii) There must be no safe or reasonable mode of escape by retreat; and. (iv) There must have been a necessity for taking life. To sustain the defence all the four ingredients must coexist. It is therefore the correct proposition of the Law that a party relying on the defence of self defence has a duty to show by evidence that his life was so much endangered by that act of the deceased that the only means of escape from imminent death was to kill the deceased.[28]

It is correct to say that the issue of quit and retreat is applicable only to the defence in Section 287 and not 286. However, some courts have insisted that for an accused to avail himself of the defence of self-defence, he must show by evidence that he took reasonable steps to disengage from the fight or make some physical withdrawal.[29]This is actually wrong as that did not form part of the requirement for self defence for an unprovoked assault. It therefore remains crucial to safely distinguish the two and when the issue of retreat and quit becomes applicable.

## 5. Conclusion

In concluding this work, it behooves on us to state that Self Defence in Nigeria just as in Queensland Australia is captured under two heads. The first head is under Section 286 which deals with self defence for unprovoked assault. The defence presupposes that the beneficiary of the defence did not have a hand in the assault before the need to preserve his life arose. Further we repeat that necessity and honesty are the key words. The issue of reasonability of the force used even though part of the requirement is an issue for another day. Section 287 on the other hand provides for self defence for provoked assault. To leverage on this, the defendant must have declined further conflict and quitted or retreated from it as far as was practicable. Here, it is right to state that it was the defendant that first began the assault with intent to kill or to do grievous bodily harm to the deceased before the necessity of so preserving himself arose. To further stand on the defence, he must have shown that he declined further conflict, and quitted it or retreated from it as far as was practicable, before the necessity to preserve himself/herself from death or grievous bodily harm arose. In doing this, it is common to note that the burden remains on the prosecution at all times to prove that the defendant was not acting in self-defence and the prosecution must do so, beyond reasonable doubt before the defendant would be found guilty.

[28] *Nwede vs. State* (1985) 2 SCC 1351

[29] *Bassey v The Queen* (1963) LPELR-25405(SC)