

**SUPREME COURT OF NIGERIA**  
4TH JUNE, 1993. SC.160/1992  
**CORAM:- M. L. UWAIS, S. M. A. BELGORE, A. B. WALI,**  
**O. OLATAWURA, I. L. KUTIGI, JJSC**

MANSHEP NAMSOH ..... APPELLANT

V.

THE STATE ..... RESPONDENT

*APPEALS* - Culpable homicide - Substantial discrepancies in evidence of prosecution - whether retrial is the proper order

*CRIMINAL LAW* - Culpable homicide - doubt created from the evidence - whether conviction is safe

*EVIDENCE* - Mix-ups and contradictions in prosecution evidence - failure to establish a charge beyond reasonable doubt - when declared fatal to the entire case

**FACTS**

The Appellant (a policeman) was tried for the offence of culpable homicide under the penal code before the Kano High Court. He was alleged to have shot another policeman dead. The prosecution called eleven witnesses. Appellant testified and called one witness (DW2) for his defence. The Appellant was in the company of several other armed policemen when the incident took place.

Three of the prosecution witnesses testified that they saw the Appellant when he shot the deceased. But there were lots of contradictions and discrepancies arising from the totality of testimonies of prosecution witnesses and the only defence witness, DW2. The evidence revealed that the gun that was recovered from the Appellant was neither the one fired nor assigned to him. The gun that was fired, being the one assigned to the Appellant was recovered from another policeman. The prosecution failed to resolve the contradictions. The trial Judge erroneously resolved one of the contradictions, found the Appellant guilty and sentenced him to death.

**126 NAMSOH V. THE STATE (1993) 6 KLR 125; (1993) 5 NWLR**

The Appellant appealed to the Court of Appeal which found the contradictions in the evidence to be substantial. But it surprisingly held that there is a substantial case against the Appellant and therefore, ordered a retrial of the case. Appellant appealed to the Supreme Court. The apex court had to determine whether the contradictions in the evidence adduced by the prosecution are fatal to the case.

**HELD** (unanimously acquitting the Appellant and setting aside Court of Appeal's order for retrial)

1. Certain matters that would require some explanations from the prosecution irresistibly point at the inconsistencies and contradictions in this case. (p. 136 L.17)
2. It is baffling how the Court of Appeal having arrived at a conclusion that substantial discrepancies in prosecution's evidence made it unsafe to convict the Appellant, it turned round to say that a substantial case has been raised against the Appellant. (p.137L.33)
3. The defence of accident raised by the Appellant in his statement (EXH. F.) ought to have been considered by the two lower courts. (p.138L1)
4. For any conflict, mix-up or contradiction to be fatal to the prosecution's case, it must be substantial and fundamental to the issues before the court. (p. 138 L.22)
5. The prosecution's failure to establish beyond doubt that the Appellant actually fired or used the rifle gun he held in his hands and nothing else in killing the deceased, is fatal to the entire case. (p. 138 L.40)
6. The Court of Appeal erred in ordering a retrial when it concluded that the prosecution's case created a doubt which should have been resolved in the Appellant's favour. To discharge and acquit the Appellant was the lower court's only choice. (p. 139 L.5)
7. To order a retrial in this case will be unjust to the Appellant as it will tantamount to aiding the prosecution to correct its fundamental mistakes. (p. 139 L15)

**PER KUTIGI JSC** “I cannot see how a statement such as EXH. H herein would be regarded as free and voluntary when it is evident that the so called statement was a result of questions selected by and put to the accused by the police officer himself.....

To all intents and purposes therefore EXHIBIT H was not legal evidence and was clearly inadmissible” (p. 139 L.35 & p. 1401.13)

## **REPRESENTATION**

Olajide Ayodele, for the Appellant

L.M. Aikawa, Director of Public Prosecutions, Ministry of Justice, Kano State, Shuaibu Sulaiman, State Counsel, Ministry of Justice, Kano State, for the Respondent

## **CASES REFERRED TO**

1. Abodundu & Ors. v. The Queen (1959) 4 FSC 70
2. Ikemson & Ors. v. The State (1989) 3 NWLR (Pt 110) 455
3. Okoioduwa v. The State (1988) 1 NWLR (Pt 76) 33
4. Nwosu v. The State (1986) 4 NWLR (Pt 35) 348
5. Akinfe v. The State (1988) 3 NWLR (Pt 85) 729
6. Nwuzoke v. The State (1988) NSCC Vol.19 361
7. Onubogu v. The State (1974) 9 SC 1
8. Bakare v. The State (1987) 1 NWLR 570
9. Takida v. The State (1969) 1 ALL NLR 270
10. Nabamu v. The State (1979) 6 SC 153
11. Enahoro v. The Queen (1965) 1 ALL NLR 125
12. The State v. Kwaghbo (1962) NWLR 4
13. Duru v. Nwosu (1989) NWLR (Pt 113) 24
14. Bakin v. The State (1981) 5 SC 75

## **STATUTE**

Penal Code S. 221 (a)

**LEAD JUDGMENT BY KUTIGI JSC**

The appellant faced a one count charge at the High Court of Justice Holden at Kano as follows -

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*"THE CHARGE*

*That you MANSHEP NAMSOH on or about the 16th May 1988 at about 15:45 hours at Police Mobile Force barracks Hotoro Area of the Kano Municipal Local Government within the Kano Judicial Division, committed the offence of culpable homicide punishable with death in that you caused the death of one MIRI TIMKAT by doing an illegal act, to wit shooting him with a rifle gun on his neck with the intention of causing his death thereby committing an offence under section 221 (b) (sic) Section 221 (a) of the*  
15 *Penal Code."*

The charge was read and explained to him and he pleaded not guilty to the charge. At the trial the prosecution called a total number of  
20 eleven witnesses while the appellant testified on his own behalf and called one other witness.

The facts of the case on which the prosecution relied may be summarised briefly as follows. The appellant was among 35 policemen  
25 who went on township patrol on the fateful day, 16th May 1988. They were each issued with a rifle and ten rounds of ammunition by Sergeant Bulus Fyang (PW.10). The number of rifle issued to each officer was recorded against the name of each officer before he signed and collected same. Sixteen of the officers including the appellant were put together in  
30 one vehicle. The others were put in another vehicle. The patrol unit was under the command of Seth Agolware an Assistant Superintendent of Police. He testified as PW.5. When the unit was returning from patrol the appellant was sitting inside the vehicle between P.C. Mara Guanshok (PW.1) and P.C. Isaac Akogwu (PW.2). Both PWs 1 & 2 said while in the vehicle  
35 they saw the appellant cocking his rifle. They asked him why and before he said anything, he had shot at the deceased P.C. Miri Timkar, in the neck. The deceased was on duty at the gate of the barrack. The vehicle stopped. The armoured carrier in which the commander of the unit (PW.5) was travelling and the other vehicle conveying the remaining policemen which

were respectively in front of and behind the appellant's vehicle also stopped. PW.5 then ordered all the policemen to come down and stand by their respective vehicles. He instructed them to ground their arms and stand three paces away from their arms. He checked their ammunitions. All the men were found with the correct number of ammunitions issued to them except the appellant who could not account for two of the ammunitions 5 issued to him. PW.5 ordered the detention of the appellant.

He took possession of appellant's rifle. He said he examined the rifle and found one ammunition to have been expended while one was still in the rifle chamber. PW.5 said he handed over the rifle together with the maga- 10 zine and nine live ammunitions he collected from the appellant to Inspector Inuwa Wada (PW.6). The rifle was identified by its number K2301105. It was admitted in evidence as Exhibit D. The expended ammunition was tendered as Exhibit E. It was PW.6 who administered the words of caution before the appellant volunteered to make the statement Exhibit F. The 15 appellant also made additional statement which was tendered as Exh. H by P. W.7 PW 7 also collected post mortem examination report (Exhibit G) from one Dr Stephen at the Murtala Mohammed Hospital Kano. The doctor carried out post mortem examination on the dead body. Sgt. Bulus Fyang. (PW.10) was at the material time the person in charge of the arms 20 register at the armoury section. He confirmed that the rifle issued to the appellant was rifle No. No. K2301105 (Exhibit D). When the witness cross checked this number with the appellant in the cell, he discovered that the rifle with the appellant was not the one he issued to him. He then ordered all the men to check the numbers of their rifles. It was then that rifle No. 25 K230 11 05 (Exhibit D) was found with P.C. Isaac Akogwu (PW.2). PW.10 said he received the rifle from PW.2 and examined it. He found one round of ammunition inside the rifle Band one ammunition already used. The rifle with which the appellant was detained was rifle No. K2.'97302006. This rifle was not examined by anyone. It was the rifle Exh. D which was 30 found with P.C. Akogwu (PW.2) that was used or fired on the day. PW.5 was informed of this discovery by PW.10. He simply took the rifle K2301105 and the ammunitions from PW.10 and that was the end of the matter.

The appellant on the other hand said in his evidence that he was 35 inside the vehicle with others when he heard a sound of a rifle. P. W.5 stopped the vehicles and as he (PW.5) was asking them who fired the shot, PW.2 pointed at him. He said PW.5 ordered him to be detained with his rifle No. K2 97302006. He stressed that necessary entries were made by

P.C. Anthony Ado (D.W.2) in the station diary where he was detained. He confirmed that it was Exh. D (Rifle No. K2 301105) that the signed for and collected on 16/5/88. He did not know where Exh. D was at the time of the incident. He voluntarily made the statement Exh. F. He said the additional statement (Exh. H) was a result of question and answer session between  
5 Sgt. Titus (P.W.7) and himself. That Exh. H was written wholly by P.W.7 himself. P.C. Anthony Ado (D.W.2) confirmed the story of the appellant about the discovery of rifle K2301105 with P.W.2. He also confirmed that the appellant was brought to him together with rifle K2 97302006 by P.W.5 and that he made immediate necessary entries in the Police Station Diary  
10 which was tendered as Exhibit K. He said Exh. D was brought to him by P.W.5 long after the appellant had been detained. He had no idea of the whereabouts of rifle K2 302006 at the time of trial.

15 In a reserved judgment, the learned trial Judge reviewed the evidence before him including the statements of the appellant under caution (Exhibits F&H) which he regarded as confessions, and found the appellant guilty as charged and sentenced him to death.

20 Dissatisfied with the decision of the trial court, the appellant appealed to the Court of Appeal, Kaduna on four grounds of appeal. Three issues were formulated for determination thus -

25 *"(i) Whether the conviction of the appellant can be sustained on the face of the contradictions which are patent in the case of the prosecution and the unexplained issue of the recovery of the rifle gun which released the fatal shot in the hands of P.W.2 Isaac Akogwu immediately after the incident.*

30 *(ii) Whether the retraction of the statements made to the Police by the appellant in his evidence in court has no effect whatsoever on reliance being placed on the said statement by the court for the purpose of convicting the appellant.*

35 *(iii) Whether Exhibit K is inadmissible in evidence to the extent that it agrees with the testimony of D.W.2, P.C. Anthony Ado and whether in all the circumstances of this case Exhibit K is inadmissible in any event.*

*The Court of Appeal (Coram. Uthman Mohammed, Achike and Oduwole, JJ.C.A.) Carefully considered the issues and particularly issues (i) & (ii) above and found in favour of the appellant. The appellant was however not discharged and acquitted of the charge. The Court of Appeal (per Mohammed J.C.A.) held the view that-*

*"It is clear from the facts and evidence that a substantial case against the appellant has been raised. I have invited both counsels during submissions in this appeal to address us on the possibility of ordering a retrial. I have been guided by the factors which would occasion an appeal court to order for a retrial as were enunciated by the Federal Supreme Court in the case of Yesufu Abodundu & Ors. v. The Queen (1959) SCNLR 162; (1959) 4 FSC 70."* Consequently the appellant was ordered to be tried again for the same offence before another Judge.

The appellant still dissatisfied with the judgment of the Court of Appeal has further appealed to this Court. Four grounds of appeal were filed. Counsel on both sides filed and exchanged briefs of argument. They were adopted and relied upon.

They were also amplified by oral submissions at the hearing.

Mr. Ayodele learned counsel for the appellant in his brief formulated the following issues for determination -

*"1. Whether a substantial case has been made out against the appellant in view of unexplained issue of the mix-up of the rifle guns.*

*2. Whether having regard to the conclusions reached by the court below on the state of the evidence adduced at the trial, the court was right in ordering the retrial of the appellant on the same charge.*

*3. Whether the court below was right in taking up a portion of the statement of the appellant which the trial court had found is in conflict with the oral testimony of the appellant in court."*

Issues 1 & 2 were argued together. Learned counsel pointed out that the trial court was aware of the mix-up of the rifle guns which created a doubt in the case of the prosecution. That although the evidence of PWs. 1, 2 & 3 created the impression that the appellant committed the offence, the evidence of PW.10 introduced a new twist in the case of the prosecution. He said the evidence of PW.10 made it abundantly clear that the gun (Exhibit D) which was fired and which still had ammunition lodged in it was found on PW.2 (P.C. Isaac Akogwu). On the other hand both PWs 1 & 2 said in their evidence that the appellant was disarmed by P.W.5 before he

was taken to a cell for detention. He said there was no evidence whatsoever that the rifle No K2-302006 found on the appellant had been fired. In fact the said rifle was never taken to the Ballistician for examination nor was it submitted to anyone for examination. He referred to the judgment of the High Court on page 27 lines 18 - 25 and submitted that it was not the duty  
 5 of the trial court to help the prosecution find an explanation for the lapse in the evidence adduced against the appellant. That if there was a need for an explanation, the prosecution ought to supply the explanation by asking the witness who gave evidence on the issue.

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He submitted that the Court of Appeal agreed with the above submission and also agreed that the discrepancies in the prosecution's case were substantial and, unexplained and that it was unsafe convict the appellant, it was therefore no more open to the court to come to the conclusion that a substantial case had been made out against the appellant. It  
 15 was contended that since the discrepancies created a doubt as to the guilt of the appellant and made it unsafe to convict him on the charge, the doubt so created ought to have been resolved in favour of the appellant. He ought to have been discharged and acquitted. He referred to the case of  
 20 *Ikemson v. The State* (1989) 3 NWLR (Pt. 110) 455. He said whatever case was made out by the prosecution against the appellant had been destroyed by the lingering doubt created in the case. That apart from the mix-up of the rifle guns, the star witnesses P.W.s.1 & 2 on one side contradicted P.W.s 5, 8, & 9 on the other side, and that the case for the prosecution  
 25 had been destroyed by in-built discrepancies and contradictions which remained unexplained.

It was further submitted that a retrial is not ordered to enable the  
 30 prosecution patch up an otherwise hopeless case. That the issue whether or not to order a retrial would depend on the circumstances of each case as disclosed by the evidence at the trial. And that courts have always made it a point that where the prosecution has left yawning gaps and lapses in its case, an order for retrial would not be made to enable it close up such  
 35 gaps. He referred to the following cases *Yesufu Abodundu & Ors. v. The Queen* (1959) 4 FSC 70; (1959) SCNLR 162; *Okoduwa & Ors. v. The State* (1988) 2 NWLR (Pt.76) 333 *Nwosu v. The State* (1986)4 NWLR (Pt.35) 348; *Akinfe v. The State* (1988) 3 NWLR (Pt.85) 729.



The court was urged to allow the appeal and to acquit and discharge the appellant.

Mr. Aikawa learned Director of Public Prosecutions for the respondent rightly in my view conceded that there was a mix-up and discrepancies in the evidence adduced by the prosecution concerning the rifle gun used in shooting the deceased. He however contended that the evidence adduced at the trial revealed a substantial case against the appellant. He said PWs. 1, 2 & 3 positively testified that they saw the appellant shoot the deceased, and that when the unit commander, P.W.5, checked the ammunitions of all the men, only the appellant could not account for two ammunitions. He said this evidence was not contradicted anywhere on the record. The Court of Appeal was therefore right to have ordered the retrial of the appellant before another Judge on the authority of *Abodundu & Ors. v. The Queen* (supra) and *Okoduwa & Ors v. The State* (supra).

It was further submitted that as far as P.W.5 was concerned, the rifle (Exh D) issued to the appellant was what he collected from him. But when we referred counsel to the evidence of P.W.10, he once again conceded that the rifle Exh D which was fired on the day was found on P.W.2 and not on the appellant. The mix up was therefore substantial.

The learned Director of Public Prosecutions also agreed with us and with the Court of Appeal too that the appellant raised the defense of accident or accidental discharge of the rifle gun in his statements to the police (Exhibits F& H) and which both the trial court and the Court of Appeal failed to consider. He said the lower courts were wrong to have failed to consider the defense of the appellant. But it was contended that the defense was not established. He referred to the case of *Nwuzoke v. The State* (1988) 1 NWLR (Pt.72) 529; (1988) NSCC Vol.19 361 at 362. He said although the discrepancies in the case are quite substantial, yet there is substantial evidence on record against the appellant to warrant his trial again for the same offence. The court was urged to dismiss the appeal.

I think the most important single issue to be considered is whether the mix up and contradictions or inconsistencies in the evidence adduced by the prosecution against the appellant are substantial and fundamental to the charge before the court and therefore fatal to the case. Mr. Ayodele

learned counsel for the appellant submitted that they were. Mr. Aikawa for the respondent agreed. He however proceeded to argue that the appellant should be tried again because the evidence as a whole disclosed a substantial case against the appellant. Now what were the mix up and contradictions that we are all talking about? I will first of all summarize the events as  
5 they occurred in sequence and then look for the mix-up and contradictions or inconsistencies.

1. *PWs 1, 2 & 3 who claimed to be eye witnesses to the shooting said after the incident, the appellant was disarmed by P.W.5 who collected the rifle  
10 and the ammunitions from him.*

2. *Before P.W.5 collected the rifle and ammunitions from the appellant he had checked the number of ten ammunitions issued to each member of the unit. All the men had complete number of ammunitions except the appel-  
15 lant who was short by two*

3. *P.W.5 gave the rifle and ammunition which he took from the appellant to P.W.6. P.W.5 identified rifle gun No K2- 301105 (Exhibit D) as the rifle he collected from the appellant.*  
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4. *P.W.6 said he took Exhibit D to the exhibit keeper (P.W.9) where it was registered for safe keeping.*

5. *P.C. Anthony Ado (DW.2) was the Station Writer at the Quarter Guard  
25 on the fateful day when the appellant was taken there by P.W.5 to be locked up. The appellant was brought to him by P.W.5 with a rifle gun No. K2 - 302006. He registered the rifle in the station diary (Exhibit K) as entry No.904 therein.*

6. *According to D.W.2, it was after the appellant had been locked up that P.W.5 and P.W.10 brought the rifle No. K2 - 301105 (Exh. D) to him. He also registered Exh D as entry No. 905 in the station diary (Exh K).*  
30

7. *P.W.10 who issued the arms and ammunitions to the men confirmed  
35 issuing K2 - 301105 (Exh .D) to the appellant. When he cross checked with the appellant, he discovered that the rifle K2-302006 with the appellant was not the one he issued to him. He then asked all men to check the number on their rifles, Exhibit D was found with P.W.2 (P.C. Akogwu.). P.W.10 personally examined Exh D and found one round of ammunition*

*inside it while one had been fired or used.*

8. *P.W.10 reported his discovery to P.W.5 and handed over the gun (Exh. D) To him.*

9. *Exh D. was later collected from P.W.9 by P.W.6 and sent to the Ballistician for report while rifle K2 - 302006 which accompanied the appellant to his cell simply vanished.*

10. *P.W.5 maintained in his evidence that he knew nothing about the rifle K2-302006. D.W.2n who also received and registered it said he had no idea of its whereabouts at the trial.*

*From the narrative of the events above, one is now in a position to see for himself clearly the mix up and contradictions in the episode thus -*

(i) *If according to P.Ws 1, 2, 3 & 5, the appellant was disarmed, is it not sensible that it was the rifle No. K2 - 302006 with the appellant that P.W.5 received from him and took with the appellant to DW.2 as evidenced by entry No. 904 in the register Exh. K? But P.W.5 said he knew nothing about this particular rifle gun.*

(ii) *If according to P.W.s. 1, 2, 3 & 5, the appellant fired the rifle and was therefore short of two ammunitions - one expended while one was still in the rifle chamber - is it not sensible also that the only rifle must have been rifle No. K2 - 302006 found on the appellant and registered in Exh. K? Unfortunately the rifle was never examined by anyone before it vanished.*

(iii) *Exh D which was found on P.W.2 was examined by P.W.10 and it was discovered to have had one ammunition inside its chamber and the other spent. Does it not follow that Exh D must have been fired by P.W.2 himself on whom it was found? The prosecution witnesses said it was the appellant who was holding a different gun altogether.*

(iv) *How did Exh. D which the appellant originally signed for from P.W.10 get to the possession of P.W.2 and to whom was the rifle K2 - 302006 originally issued before it got to the appellant? There was no evidence about these on record.*

(v) *Why were both Exh D and the other rifle K2-302006 registered both against the appellant and in respect of the same offence in Exh.K when according to PWs. 1, 2 & 3 the appellant had only one rifle gun with him which was fired at time of the incident? It was never explained.*

5 (vi) *Why was it that only Exh.D was sent to the Ballistician, while the rifle gun K2-302006 which was first registered before Exh.D simply vanished? There was no explanation by anyone.*

(vii) *Was it not possible that the rifle gun K2-302006 might have been used as well if PW s. 1& 2 actually saw the appellant shoot? There was no evidence. As I said the 'rifle gun vanished soon after.*

(viii) *Were both Exh.D and rifle gun K2-302006 used on the day? And if so by who?*

(ix) *If Exh.D was the only weapon used as alleged, who then shot and killed the deceased? Was it the appellant who did not hold the gun or was it P.W.2 on whom the gun was found?*

*These are just a few matters that would in my view require some explanations from the prosecution. They all irresistibly point at the inconsistencies and contradictions in the case. I can only pose the questions but I cannot answer them myself unless the witnesses in the case had provided the answers. They did not do so. I cannot do so now. The learned trial Judge tried to provide an answer to question*

(iv) *above when he said on page 75 of the record that-*

"The defense of the appellant was that his rifle which fired was not found with him at the time of disembarkation at the barracks at Hotoro after the incident but with P.C. Isaac Akogwu and that the accused had the rifle of P.c. Isaac Akogwu with him. I do not believe this defense of the accused. Assuming it is true, the only explanation possible for the mix-up of the rifle would be that the accused after firing the shot at the deceased, dropped his rifle and picked that of P.C. Isaac Akogwu, who was sitting next to him to the left."

He had earlier on page 74 stated that -

"I am satisfied from the totality of the evidence before me that the accused shot the deceased with Exhibit D and Exhibit E is the expended ammunition that killed the deceased. The Court of Appeal in the lead judgment of Mohammed J.C.A. treated the issue on page 120 thus-

*"Undoubtedly the mix-up has affected the conclusion of the learned trial Judge in this case. As pointed in several authorities by this Court and the Supreme Court, in a criminal trial, it is the duty of the prosecution to prove its case beyond all reasonable doubts. I hasten to say that the mix-up concerning the rifle used in shooting P.C. Miri Timkat is enough to establish doubt in the mind of the learned trial Judge to convict the appellant. In Onubogu v. The State (1974) 9 SC. 1 at 2 the Supreme Court held as follows -*

*"We also think that even if the inconsistencies in the testimony can be explained, it is not the function of the trial Judge, as was the case here to provide the explanation.*

*" The learned Senior Counsel, Mr. M.L. Shuaibu, submitted that the discrepancies in the testimonies of the prosecution witnesses were not substantial and that the inability of the prosecution to proffer explanation did not materially affect the considered finding of the trial Judge (see Patrick Ikemson & Ors v. The State (1989) 3 NWLR (Pt. 110) 459. The learned counsel also referred to the case of Bakare v. The State (1987) 1 NWLR (Pt.52) 579. I however do not agree that the facts of these cases are similar to the situation in the case in hand. The discrepancies in the prosecution's evidence are very substantial in this case and it is not safe to convict the appellant over such evidence.*

I entirely agree.

Achike J.C.A. in his concurring judgment said on page 127-

*"The mix-up which is an aspect of the discrepancies in the case of the prosecution, is of a substantial nature that it should have been explained away. Failure to do so left a visible and serious dent in the case for the prosecution which would have warranted the learned trial Judge to resolve the doubt so created in favour of the appellant in so far as the mix up is concerned see Onubogu v. The State (1974) 9 S.C 1 at 2."*

I again completely agree.

With due respect to the learned Justices of the Court of Appeal it is really baffling how having arrived at the conclusions above, they could then turn round to say that-

*"Now looking back at these two issues, it is clear that the investigation and trial of this case has left a lot to be desired. It is quite clear from the facts and evidence that a substantial case against the appellant has been raised."*

The other issue being referred to in the quotation above and which was considered by the Court of Appeal was the issue of the defense raised by the appellant in his statement Exh. F. They held the view that Exh.F raised the defense of accident or accidental discharge which the learned trial Judge failed to consider as he was bound to have done. (See *Takida v. The State* (1969) 1 All NLR 270). But the Court of Appeal itself fell into the same error because the learned Justices too did not consider the defense with all the available evidence on record. They ought to have considered it on its merit. But their position is understandable. This is possibly due to the fact that they had made up their minds to send the appellant back for a retrial in which case there was no need to have considered the defense in isolation. In view of the order I propose to make finally there will be no need for me too to consider the defense in this judgment.

15             In his supporting judgment Achike, J.C.A also said-  
              *"Despite this error on the part of the learned trial Judge, evidence adduced at the trial, if considered as a whole unquestionably discloses a substantial case against the appellant."*

20 As I have stated earlier in this judgment it was for the above reasons that the Court of Appeal sent the appellant back for a retrial before another Judge. It is settled law that for any conflict, contradiction or mix-up in the evidence of the prosecution witnesses to be fatal to the case, the conflict or mix-up must be substantial and fundamental to the issues in question before the court (see for example *Onubogu & Anor v. The State* (supra) *Nasamu v. The State* (1979) 6-9 SC. 153 and *Enahoro v. The Queen* (1965) 1 All NLR 125. I have no doubt in my mind at all that where a group of men, 16 in this case, were all armed with rifle guns and issued with ammunicions and all were assembled or put in one vehicle, if a sound of a rifle was heard from the vehicle, it would be necessary to check each and every rifle in order to determine whose rifle had fired. Any of the men could have fired the rifle and the possibility of mistaken identity could not be totally ruled out. In this case although P.W s. 1, 2 & 3 said it was the appellant who fired his rifle this same evidence was in my view completely destroyed by the evidence of P.W s. 5 & 10 and D.W.2 as well. It was the P.W.5 who first of all took the appellant with the rifle K2. 302006 to D.W.2. It was the same PW.5 who later took rifle No. K2 - 301105 (Exh.D) to D.W.2 to be substituted for K2-302006. Certainly if the appellant was charged with killing the deceased with a

rifle gun, it is a vital issue to establish beyond doubt that the appellant actually fired or used the rifle gun he held in his hands and nothing else. That evidence is lacking in this case. It is fatal to the entire case.

I am therefore clearly of the view that the Court of Appeal erred 5  
when it ordered the appellant to be tried again for the same offence. Having come to the conclusion that the mix-up was substantial and that it was not safe to convict the appellant over such evidence; or that the dent in the prosecution case created a doubt which should have been resolved in favour 10  
of the appellant the Court of Appeal had no choice but to discharge and acquit the appellant for the offence charged. The case of Abodundu & ors v. The Queen (supra) relied upon by the Court of Appeal in ordering a retrial in this case cannot apply when there are fundamental lapses and inadequacies both at the level of police investigations and at the trial. 15  
A retrial in this case is tantamount to aiding the prosecution to correct its Fundamental and serious mistakes. That will be unjust to the appellant (see Akinfe v. The State (supra) The State v. Lopez (1968) 1 All NLR 356; and Okoduwa v. The State (supra)).

In view of all these there is no further need to consider the third 20  
issue raised by counsel for the appellant in the appeal.

However before I conclude I would like to make some observations 25  
on the statement Exhibit. This statement unlike the other statement Exhibit F which was recorded or written by the appellant himself, was recorded by one policeman Sgt. Titus Kwakiya (P.W.7). Both P.W.7 and the appellant in their testimonies made it abundantly clear that Exhibit H was a product of a question and answer session between the two of them. The 30  
police recorder (P.W.7) was putting questions already prepared by his superiors on a sheet of paper to the appellant, while he (P.W.7) also recorded the answers. This procedure is clearly wrong. Once a police officer decides to make a complaint against an accused person, he must first of all caution the accused person in a prescribed form. If the accused decides to volunteer 35  
a statement, he may write it himself or the police officer may write it for him. I cannot see how a statement such as Exh. H herein would be regarded as free and voluntary when it is evident that the so called statement was a result of questions selected by and put to the accused by the police officer himself. That procedure is against the provision of Order 6 of

the Criminal Procedure (Statement to Police Officers) Rules, 1960, Cap 30 of the Laws of Northern Nigeria, 1963 (Judges Rules) wherein it is provided as follows

"6. A person against whom a police officer has decided to make a complaint and who makes a voluntary statement shall not be cross examined and no question shall be put to him about such statement except for the purpose of removing ambiguity in what he has actually said.

10 The appellant herein had earlier on made and written his statement (Exhibit F) by himself. Any ambiguities should have been raised and explained there before it was countersigned by PW.6. There was no such evidence from PW.6. To all intents and purposes therefore Exhibit H was not legal evidence and was clearly inadmissible. (See R. v. Kwaghbo (1962)  
15 NNLR 4. It should never have been admitted at all in evidence. But since it was wrongly admitted the proper thing would be to discountenance it completely when writing judgment. The appeal therefore succeeds. It is hereby allowed. The order of the Court of Appeal, Kaduna ordering the retrial of the appellant before another Judge is set aside. In its place an order of  
20 acquittal and discharge of the appellant is substituted. For the avoidance of doubt the appellant is discharged and acquitted.

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**UWAIS JSC**

I have had the opportunity of reading in draft the judgment read by my learned brother Kutigi, J.S.C. I agree that the appeal be allowed and it is hereby allowed. The decision of the Court of Appeal that the appellant  
30 should be retried is set aside. Instead the appellant is hereby acquitted and discharged.

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**BELGORE JSC**

I have read in advance the judgment of my learned brother Kutigi, J.S.C. with which I am in agreement. Having found that it was another gun other than that given or issued to the appellant that fired the fatal shot



a serious doubt arose as to whether the appellant was responsible for the death of the deceased. That was the state of the evidence for the prosecution. A retrial cannot improve upon the standard of proof attained in the prosecution's case and it will be futile exercise if not an unnecessary punishment on the appellant. Similarly to punish the appellant by substituting a lesser offence will be unjust as the question of who fired the fatal shot cannot thereby be resolved. This case had its defects right from the trial Court and that defect cannot be cured by a retrial. I agree therefore with the judgment of my learned brother. Kutigi, J.S.C. that the appeal must succeed. I also allow this appeal and set aside the decision of the Court of Appeal ordering a retrial. In its stead, I enter a verdict of discharge and acquittal of the appellant.

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**WALI JSC**

I have had a preview of the lead judgment of my learned brother Kutigi, J.S.C. I entirely agree with his reasoning and conclusion that this appeal has merit and must succeed.

It is unfortunate that the investigation and prosecution had been handled in this manner. Had care and caution been taken particularly in the investigation of this case, the mix-up of the gun used in the killing of the policeman and the culprit that committed the heinous act could have been easily identified.

But with the situation as it is in this case, it will be oppressive to put the appellant on another trial. The prosecution could not improve upon the case it had already presented.

Both the mix-up of the gun used in the commission of the offence and the glaring damaging contradiction in the evidence presented by the prosecution are such that it would tantamount to a mockery of justice to order a retrial. The appellant is entitled to benefit from the doubt created in the prosecution's case. See *Onubogu & Anor. v. The State* (1974) 9S.C. 1 and *Duru v. Nwosu* (1989) 4 NWLR (Pt.113)24.

The appeal succeeds and it is allowed. The order of retrial by the Court of Appeal is set aside and the appellant is acquitted and discharged.

**OLATAWURA JSC**

I had a preview of the judgment just delivered by my learned brother  
 5 Kutigi, J.S.C. I agree with his reasoning and conclusions.

I only need to point out that the issue on concurrent finding by the  
 trial court and the Court of Appeal cannot avail the respondent once the  
 finding of the trial Judge is perverse. The mere fact that the Court of Ap-  
 10 peal confirms that finding and which makes it a concurrent finding does  
 not necessarily mean that this Court will not interfere with the findings: See  
 Bakin v. The State (1981) 5 S.C. 75. Once it was established that the gun  
 from which the bullet was fired was found in the possession of P.W.2, it is  
 not for the accused to give reasons how P.W.2 came to be in possession.  
 Similarly it is outside the province of the Judge to speculate how P.W.2  
 15 came by the gun allegedly used by the appellant.

There cannot be an order for a retrial where the Court of Appeal  
 came to the conclusion that the mix-up concerning the rifle used in shoot-  
 ing P.c. Miri Timkat is enough to establish doubt in the mind of the learned  
 20 trial Judge to convict the appellant' (my emphasis). Once there is doubt  
 about the guilt of the accused, it is a fundamental principle of our criminal  
 law that the doubt should be resolved in favour of the accused. As a result  
 of the conclusion reached by the lower court, its duty was to have dis-  
 charged and acquitted the appellant. The case relied upon by the  
 25 respondent's counsel: Abodundu and Ors v. The Queen (1959) 1 N.S.C.C.  
 56; (1959) SCNLR 162 is of no avail where a doubt of the guilt of the  
 accused has been established. It does not support a retrial where the guilt  
 of the accused is in doubt. A doubt in the mind of the court presupposes  
 that the case against the accused has not been proved beyond reasonable  
 30 doubt.

It is for these reasons and the well articulated reasons in the lead  
 judgment of my learned brother Kutigi, J.S.C. that I will also allow the  
 appeal, set aside the order of retrial made by the lower court and in its  
 35 place enter a verdict of acquittal.