

SUPREME COURT OF NIGERIA
24TH JANUARY, 1997. SC. 139/1993
CORAM:- S.M.A. BELGORE, A.B. WALI, I.L. KUTIGI,
M.E. OGUNDARE, E.O. OGWUEGBU JJSC.

EZE IBEH APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL LAW - Accident - Whether the defence avails the appellant -
Unto acquittal in a murder charge.

CRIMINAL PROCEDURE - Prosecution witnesses - Assessment of their
evidence - Whether it is proper - To divide them into official and non-
official witnesses.

CRIMINAL PROCEDURE - Prosecution witnesses - Certainty and unit
unanimity - Must be maintained to in order to eliminate contradictions.

CRIMINAL PROCEDURE - Statement to the Police - Contradiction
between it and the testimony in Court - Raises a doubt - The benefit of
which goes to the accused.

EVIDENCE - Contradictions - Prosecution evidence - Believed by the
trial Judge - Whether full of material contradictions.

MURDER - Conviction - Wrongful assessment of evidence - Whether in
the face of it - Concurrent conviction of appellant can stand.

FACTS

The appellant, a policeman attached to the Mobile Police Unit was charged before the Lagos State High Court with the murder of the Dawodu brothers. There was a case of a mob action against a traffic police warden at the Idumagbo Junction Lagos. The appellant was among the inadequate number of policemen that went to stop the mob action. At the scene of the mob attack, certain events took place that led to the death of the two Dawodu brothers.

While some prosecution witnesses testified that they saw the appellant when he deliberately shot dead the deceased brothers, appellant maintained that there was struggle by the mob for his gun which led to an

accidental discharge that killed the two brothers. The trial Court found the appellant guilty as charged and sentenced him to death. His appeal to the Court of Appeal was dismissed. Appellant has further appealed to the Supreme Court raising 4 issues.

ISSUES FOR DETERMINATION.

“1. Whether in the light of the serious contradictions and inconsistencies in the case of the Prosecution, the Court of Appeal was not in error to have affirmed the judgment of the trial judge bearing in mind that the prosecution had the duty to prove the guilt of the Appellant beyond reasonable doubt. (Ground I of Appeal) Etc, see p. 154

HELD (Allowing the appeal per lead judgment of **BELGORE JSC**, Ogundare JSC dissenting)

Evidence - Contradictions.

1. The evidence of the prosecution, that the learned trial judge believed, is full of contradictions, whereas the defence of the appellant has not only been consistent but also supported by the events leading to his being deployed to the scene to rescue the traffic warden from an irate crowd. The contradictions are so material that the case for prosecution is not without doubt. (p. 144 E)

Statement to the Police.

2. Learned trial judge found contradictions in the evidence of P.W.6 between his statement to the police and his testimony in Court but held that the P.W.6 in Court gave further evidence. With great respect, these contradictions have not been explained and remain as part of prosecution’s case. Once there is contradiction and it remains unexplained that will be doubt on the evidence of that witness; if the witness is for the prosecution and the contradiction happens to be material as in this case, a doubt then exists and the benefit of it must be given to the accused.(p. 144 G)

Prosecution witnesses - Assessment of their evidence.

3. It must however be clearly herein expressed that the learned judge made a fundamental error, contrary to our jurisprudential tradition, in the assessment of the evidence of prosecution witnesses and this unfortunately goes to the very basis of the conviction. He divided the prosecution witnesses into two: the “official witnesses” comprising the policemen, and the “non-official witnesses” comprising the civilians. There is nothing like this division of prosecution or defence witnesses in Evidence Act or the procedural law as to criminal prosecution; neither is there a

division like this in even civil matters. (p. 145 F)

Prosecution witnesses - Certainty and unanimity.

4. In our law, the prosecution, in calling all their witnesses as to substance of the offence must have certainty and unanimity in what they testify, if there are divergent testimonies in this regard by these witnesses such divergent testimonies will result in what is known as contradictions. Unless such contradictions are resolved they lead to doubt, the benefit of which must be given to the accused person. But in the instant case there are facts from both the two classes of witnesses as done by the trial judge that greatly supported the case for the defence and by rejecting even in some cases, partly the testimonies of some so called “official witnesses”, it did great injustice to the case for the accused who is now the appellant. (p. 145 H)

Murder - Conviction.

5. In the instant case, however, the trial Court made fundamental error as to the assessment of the evidence of the prosecution and the defence evidence that the conviction is not just. Unfortunately the Court of Appeal inadvertently ignored the gross defect in upholding the trial Court’s decision. In conclusion, I find great merit in this appeal. The conviction of the appellant for murder cannot be allowed to stand in the face of all the contradictions in the case for the prosecution, (p. 146 H)

Accident - Whether the defence avails.

6. This is a case of accidental discharge of the appellant’s gun when he was physically being attacked to seize his gun from him rather than a deliberate act to shoot. The conviction and sentence of death for murder passed by the trial court and upheld by the Court of Appeal are set aside. I enter a verdict of discharge and acquittal. (p. 147 A)

NOTABLE POINTS OF INTEREST

BELGORE JSC

1. Need to consider prosecution evidence in its totality.

In all prosecution cases, the evidence put in by the prosecution must be considered in its totality. The time honoured practice of deciding on hostile witness must be born in mind. Once the prosecution discovers a witness giving contrary evidence to what he already said in his depositions to the police, the options are as follows: one, if the witness intimates before he goes into witness box that he would change his story, the prosecution will apply to the court that he would be called only for cross-examina-

tion as hit evidence is contrary to his previous deposition. (p. 146 E)

OGUNDARE JSC (Dissenting)

2. When variation in evidence may not vitiate conviction.

It is trite law that where there are contradictions in the testimonies of witnesses on the material fact or facts and the contradictions are not explained by the Prosecution through any of its witnesses, the case for the prosecution is not proved beyond reasonable doubt. In such a case it is not for the court to pick and choose which witness to believe and which not to believe among such witnesses. But where variations in the evidence given by prosecution witnesses will not, without more, amount to such contradictions, it will not vitiate a conviction. (p. 156 H)

3. No material contradictions that would vitiate conviction.

I can find nothing in the submissions of learned leading counsel for the Appellant to persuade me to disturb the concurrent findings of the two courts below. I agree entirely with them that there were no such contradictions or inconsistencies in the evidence of prosecution witnesses that would, in law, vitiate the Appellant's conviction. (p. 164 G)

4. Defence of accident was adequately considered.

I have considered the submissions made by both sides. With profound respect to the learned Senior Advocate, for the Appellant, I do not share his view that the Appellant's defence of accident was not considered or adequately considered by the two courts below. All witnesses that testified on the issue agreed that where there was accidental discharge of a gun such as Exhibit 7, all the bullets would be discharged in very rapid succession and within seconds. (p. 174E)

5. Finding that appellant deliberately shot the deceased brothers.

The learned trial Judge, after evaluating all the evidence before him had no hesitation in rejecting the evidence of the Appellant and in finding that he (the Appellant) deliberately shot at the deceased brothers. This finding is supported by the overwhelming credible evidence before him. The Court below was in total agreement with this finding. And it is trite that where is sufficient evidence supporting concurrent findings of fact by the lower courts, such findings should not be disturbed by this Court unless there is a substantial error apparent on the record of proceedings. (p. 175 G)

OGWUEGBU JSC

6. Erroneous appraisal of the facts

There was erroneous appraisal of the facts by the learned trial judge and the fact that such finding is affirmed by the Court of Appeal does not necessarily mean that this court will not interfere with it. (p. 178 G)

B

REPRESENTATION

Senator N. N. Anah S.A.N. (with him P. Ediale) for the Appellant.
Respondent not represented.

C CASES REFERRED TO

Umeh v. The State (1973) 2 SC 9; S. 137 (1) Evidence Act.

Esangbedo v. The State (1974) 659 9 SC 1

Okonji v. The State (1987) 1 NWLR (Pt. 52)

Onubogu v. The State (1974) 9 SC 1

D Boy Muka v. The State (1976) 9 & 10 SC 305

Asuquo Williams v. The State (1975) 9 - 11 SC 139

Atoyebi v. Governor of Oyo State (1994) 9 KLR 1

Ijeoma v. The State (1990) 6 NWLR 567

Ibrahim v. The State (1991) 4 NWLR 413

E Igwe v. The State (1982) 9 SC 42

R. v. Lawrence (1932) 11 NLR 6.

Okagbue v. Commissioner of Police (1965) NMLR 232.

STATUTE REFERRED TO

F Criminal Procedure Law s. 207.

LEAD JUDGMENT BY BELGORE JSC

This is an appeal against decision of the Court of Appeal upholding the conviction of the appellant for the murder of two brothers called
G Dawodu brothers. He was sentenced to death by the trial High Court of Lagos State on 23rd February, 1989. The appellant, a policeman attached to Mobile Unit had, on 17th November, 1987, arrested a taxi driver, Clement Alumona, for some contravention and took him to Adeniji Adele Police Station on Lagos Island. The alleged offence by the taxi driver was at the Mainland. The appellant was accompanied by his colleague in the Mobile Unit P.W. 10, James Onabrakpeya. While reporting the case at Adeniji Adele Police Station, P.W.7, Sebastine Duru, who was a traffic warden, rushed in to alert the police that his colleague, with whom he was on duty at Idumagbo Road junction, was being beaten up by a mob. The traffic warden under attack is P.W.11, Omogo

Ogali. As the P.W.7 was reporting, another person, a civilian this time came to lodge a similar complaint - however, this civilian was never called as a witness and his name was never given; but it was on record that he urged the police to act with immediate dispatch. Michael Omochi, P.W.5, a non-commissioned officer detailed P.W.6, Cpl Ogunmola, to accompany P.W.7 to the scene. One wonders what prompted this inadequate reaction to a serious report of mob-action. However as P.W.6 was going to the scene, the appellant and P.W.10 joined him in the Mercedes Benz saloon brought by the civilian who came to lodge the report. They all got to the scene at Idumagbo Road junction.

At the scene, there was a large crowd in the middle of which were P.W.11, Omogo Ogali, and the driver of a Volvo Saloon. P.W.11 was held by the crowd and P.W.7 in company of two other policemen went to rescue P.W.11; the appellant went into a different direction. In the middle of the crowd and the attendant commotion, there were two or more rapid gun shots. At this, the crowd started dispersing as everybody ran for cover. The gun shots were from the rifle of the appellant. Another witness reported the gun shots differently: there was a first gun shot followed by two other gun shots, making three gun shots in all. Everybody ran for their life including P.W.6, P.W.10 and the traffic warden who went to the scene with the appellant. P.W.7. When everybody had deserted the scene the dead bodies of Saka and Sule Dawodu, two brothers, were on the ground. P.W.6 went to report at Adeniji Adele Police Station and in his trail a few minutes later was the appellant. Shortly after, a crowd arrived at the station with the corpses shouting that these were the people shot and killed by the appellant. P.W.6, P.W.7 and P.W.10 in their evidence said they heard the gun shots but that they never knew from which gun and who fired them. P.W.12 (Buari Liasu), P.W.14 (Karimu Alabi) and P.W.15 (Alhaji Yakubu Alao) said they saw the appellant shoot the two brothers. The summary of each of these three civilian witnesses is that on the fateful day they heard some commotion and saw these traffic wardens arguing with a man driving a Volvo car. A crowd gathered round the scene and after a while one of the two traffic wardens who had left the scene returned later with two mobile policemen, one of whom is the appellant, the two carried rifles. The appellant dragged Sule Dawodu (deceased) from where he stood and held him by the trousers. Later, Saka Dawodu, Sule's brother arrived and was pleading that Sule be released. The appellant warned Saka not to interfere and as Saka was moving away he was shot twice in the back. He fell. A moment later a shot rang out again from the appellant's rifle and hit Sule. The two brothers died. All these allegedly occurred with the crowd still in place. The three witnesses said the policemen and the traffic wardens pleaded with the appel-

lant to no avail. These three witnesses were prosecution witnesses. The evidence of the other prosecution witnesses at the scene is interesting. P.W.10, Cpl James Onabrakpeya, got to the scene in the Mercedes saloon of the civilian that went to alert the police station. On alighting at the scene, he saw a Volvo car “surrounded by a large crowd” and fighting B was going on. It was when he got to the Volvo car that he heard a shot ring out at which he took to his heels together with Cpl. Ogunmola (P.W.6). Similarly P.W.6 got to the scene with P.W.10 and saw a large crowd in the middle of which was a Volvo car. As he was asking the driver of the car some questions he heard a shot ring out. Looking back he saw the C appellant waving his gun and he went back to the police station. On his way to the station he heard two other gun shots; he however admitted in cross-examination that he never recorded in his statement at the station that he heard two other shots. P.W.6 and P.W.10 - ran away on hearing the shots from the gun. The scene, Anikantamo market, is just ten minutes walk to Adeniji Adele Police Station. He admitted that in his statement at the station he wrote that he “tried to calm the situation”, however by his evidence in chief he omitted this and presented an air of someone not running away from the scene. In cross-examination his so-called attempt to calm the situation was to talk to the Volvo driver and the traffic E warden.

The P.W.11, Omogo Ogali, the traffic warden at the centre of the incident leading to the appellant and others running to the scene, had this to say among others:

“I remember 17th November 1987. I was attached to Central F Police Station Adeniji Adele Road, Lagos on that day. My hours of duty were 6 a.m. to 2. p.m. On 17/11/87 I was posted on duty at Idumagbo junction Lagos with another Traffic Warden named Sebastian Duru.

On that day i.e. 17/11/87 at about 12.45 p.m. I contravened a Volvo car registration number LA 16 AN for flouting the Lagos State G Edict on odd and even number arrangements.

I told the driver of the Volvo car to follow me to the station. He refused to do so. He then drove his car dangerously towards me wanting to knock me down. I jumped on the car’s bonnet and the driver drove the car with me on the bonnet to Anikantamo Street, Lagos. The distance between H where I contravened the car and from where he drove with me on the bonnet to Anikantamo Street is about the distance between the road at the back of this court to the road in front of it (i.e. between Tafawa Balewa Square and Igbosere Road, Lagos - Court puts this distance at about 100 metres).

At Anikantamo Street the driver stopped the car, came out of the

car started shouting “Ole, Ole” (thief, thief), and he started beating me. Some people came round and joined the driver in beating me. They tore my uniform. Sebastian Duru who was on duty with me came along and when he saw what was happening to me he quickly ran to the Police Station to lodge a report. He brought along some policemen whom I do not know. Shortly after this, I heard the sound of gun shot. I then became B unconscious and I did not know what was happening. After a while, I recovered and I went to the police station.

The people had stopped beating me when the policemen came. I was unconscious hence I did not know what was happening after a while. I do not know whether or not the people molested the policemen when C they came.

I did not know the accused person until after the incident when I was told certain things at the police station.

From the Police Station I was taken to the Police Clinic at Falomo where I was admitted for one night. I was brought from Falomo to go and write a statement at Adeniji Adele. **Cross-Examined by Mrs. Ofulue:** D

I did not see Sebastian Duru when he came back to the scene at Anikantamo Street. I did not see him when he came back with the policemen. I sustained injury in my mouth when the people were beating me. Apart from the driver of the Volvo car, I cannot recognise any of the members of the E public who joined the driver in beating me.

I cannot estimate the number of persons in the crowd that gathered while I was being beaten up. I am unable to say for how long I was unconscious. I now say I had recovered from my unconscious state when heard the gunshot.” (sic) F

This evidence represents graphically what led to the reinforcement of the appellant and two others to the scene an obviously inadequate action. The evidence of P.W.11 remains uncontradicted. He was not only attacked by the mob after the Volvo car driver almost ran him over with the car, but he was beaten to unconsciousness whereby he never knew much of what happened G during the shooting incident. The only person this witness could remember is the driver of the volvo car who almost killed him. This driver of the Volvo car has disappeared completely from this case as if he was irrelevant. The Volvo car to this day has not been claimed where it was towed to. i.e. the Adeniji Adele Police Station. Has the car no registration number? Could the owner not be found? These are the mysteries of this case. Could it be silence of conspiracy? All these have not been explained by the prosecution. Why was the driver of the Volvo car attempting to run over the P.W.11 having driven the vehicle so recklessly towards him? H

The appellant, like his colleague, held a rifle of K-2 make. But it is pertinent to find out how many shots were fired from the appellant's gun. There is no doubt whatsoever that shots from the appellant's gun killed the Dawodu brothers. The uncontradicted story of P.W.11 graphically indicates the scene arrived at by the appellant and other policemen from Adeniji Adele B Central Police Station. It was a scene of a large crowd that had beaten the P.W.II to state of unconsciousness. The reinforcement of three policemen and a traffic warden sent by an inspector was certainly inadequate. The evidence of Yakubu Alao (P.W.15) where he said:

"The traffic warden returned to the scene with two mobile policemen. The three of them joined the traffic warden at the scene. I saw the four of them running on the street and around the market."

Could not be true as the centre of activity was at the place where the Volvo car was with the P.W.11 on the ground lying unconscious. Also untrue is the evidence of this witness that the other policemen pleaded D with the appellant not to shoot and that he shot and that he then ran away from the scene. It was four days later he (P.W.15) showed up at the Police Station to volunteer as a witness.

In his defence the appellant, a private with 23 Mobile Police Force, Keffi Street, Lagos, gave evidence, remaining uncontradicted. It E was the manner that a taxi driver drove past him and the others at the road block that led him to suspect that he might have armed robbers in the car; this led to the pursuit of the taxi in another car. The taxi was finally arrested at Ijora but its passengers were no longer inside. The taxi then headed back to the Island to the Central Police Station. It was while F the complaint was being lodged that the incident leading to this case was reported as explained earlier in this judgment. As Cpl. Ogunmola was instructed by Inspector Omachi to go to the scene, Ogunmola said as the complaint was about a mob action he could not go alone and the appellant and his mate volunteered to follow him. At the scene, he saw a large mob G with one of them holding a traffic warden (P.W.11) by the shirt; when the man holding the traffic warden saw them, he let go his shirt at which P.W.11 fell to the ground. As his colleagues were trying to lift up the P.W.11, he, the appellant, arrested the man who he saw holding the P.W.11.

The mob then became hostile saying in pidgin English "who carry Mobile H Policemen come here?" "Is that a matter for Mobile Policemen?" "These thieves have come here again". With these hostile remarks from the mob he felt something at the back of his neck, and turning round he found he had been hit with a stick; others rushed at him; some gripped him and tried to disarm him. A struggle then ensued, and the mob attempted to

take his gun, it accidentally fired and a bullet hit his left ear. He was issued four bullets and all went out at once. At this, everybody ran away including his colleagues. He was attacked during the struggle to snatch his gun to the extent that his uniform was in complete tatters. This evidence remains totally uncontradicted. It took two days before he was taken to police clinic where he was treated. The evidence of his injured ear is not contradicted. As the crowd B dispersed from the scene he went back to Central Police Station where he was told the two brothers had died.

The defence in the cross-examination of P.W. 12, Buari Liasu, indicated that the evidence of this witness was in contradiction with his statement to the police and wanted to tender his statement. Learned trial Judge, C rightly in my opinion, held there were indeed contradictions and admitted the statement as Exhibit 10. The principle of our legal system in respect of criminal prosecution is that the prosecution must prove its case beyond reasonable doubt on all material facts. The story that the appellant first took aim, in a crowd, at Saka Dawodu and shot him, then took aim at his brother, Sule Dawodu D and also shot him is not supported beyond reasonable doubt. The appellant claimed he held the man who held P.W.11 by the shirt, that being the case it was Sule Dawodu that he held; this is supported by evidence of P.W.12, (Liasu Buari). The appellant in his evidence said of the gun he had with him with four bullets inside as follows: E

"I have seen exhibit 7. It is the type of gun that was issued to me on 17th November 1987. "It is not difficult to remove the safety catch when the riffle is cocked. If two or three persons are struggling for possession of the gun, the position of the safety catch can be shifted to rapid firing and riffle will explode (fire) rapidly". F

This testimony is backed by that of D.W. 3 (Akpan Uwemedimo Umo) an Assistant Superintendent of Police with the unit of the appellant. He testified to the fact that appellant was always a calm, intelligent person who neither drank nor smoked. He said of the gun issued to the appellant on that day as follows. G

"I have seen Exhibit 7. It is a K. 2 Rifle. I am familiar with K. 2 Rifles. The K.2 Rifle has a magazine. When the Magazine is in place and the Rifle is cocked, it can be fired. But if whoever is handling the gun is not ready to fire it, the safety catch can be put in position so that the Rifle cannot fire. Any slight touch can release the safety catch." H

Again, under cross-examination this witness said -

"RE-EXAMINATION: *All the bullets in a gun when the gun is on rapid firing will come out in a split second with a dragging sound but each bullet making its own sound in very rapid succession. In a rowdy*

situation the rapid firing may not be distinct. The person in whose possession a gun is, decides in his discretion when to cock it."

The learned trial Judge seemed to have divided the evidence of prosecution witnesses into "two -the official witnesses" made up of policemen, and "non-official witnesses" made up of civilians. He was ready to believe the evidence of prosecution as to how the Dawodu brothers were killed. He however was ready to believe the evidence of civilians who testified that the appellant deliberately shot the deceased persons and those who testified that they only heard the gun shots and ran for cover. What is not disputed is that there was a commotion at the scene involving a Volvo car driver and a traffic warden. All civilian witnesses, especially those who worked at the scene deliberately omitted the confrontation between this mysterious Volvo car driver and the traffic warden that led to the unfortunate visit to the scene by the appellant. The ballistic expert, who was a prosecution witness testified about the riffle used but failed to advert to the number of bullets inside the gun and the effect if accidentally the control was on automatic. The appellant in his evidence said on getting to the scene he saw a traffic warden resting on the Volvo car held by somebody. He rescued the traffic warden who happened to be P.W.11 who claimed he was beaten to unconsciousness. This evidence is not contradicted - P.W. 11 was taken to hospital for treatment and he got to police station with his uniform torn. **The evidence of the prosecution, that the learned trial Judge believed, is full of contradictions, whereas the defence of the appellant has not only been consistent but also supported by the events leading to his being deployed to the scene to rescue the traffic warden from an irate crowd.**

The contradictions are so material that the case for prosecution is not without doubt. (Umeh v. The State (1973) 2 SC 9; S. 137(1) Evidence Act). The proper role of the court in a criminal trial is to evaluate all the evidence before it and be sure that the case for prosecution has been proved beyond reasonable doubt and convicted; but if there is doubt, whether based on material contradictions or lack of sufficient evidence, the benefit of that doubt must be given to the accused person. **Learned trial Judge found contradictions in the evidence of P.W.6 between his statement to the police and his testimony in court but held that the P.W.6 in court gave further evidence.** With great respect, these contradictions have not been explained and remain as part of prosecution 's case. Once there is contradiction and it remains unexplained that will be doubt on the evidence of that witness; if the witness is for the prosecution and the contradiction happens to be material as in this case, a doubt then exists and the benefit of it must be given to the accused. The

learned trial Judge devoted much of his judgment justifying the evidence of prosecution despite the contradictions and outrightly rejected the evidence of the defence. It is not the practice of an appellate court to disturb the trial court's findings of fact except where the findings are at variance with the evidence and are therefore perverse. The impression the trial court had was that the appellant got to the scene, cocked his gun, aimed first at Saka dawodu and shot at him, then with Sule dawodu still around he aimed his gun at him and shot him, all in a large crowd that was hostile with nobody else being injured and with nobody then running away. Whereas the appellant, who never knew the brothers before that very time of the incident said he was attacked and attempt was made to snatch the gun from him in the process of which the safety catch went off and the gun rapidly released the only four bullets issued to him. He was injured in the ear by one of the bullets. This story of the appellant remains uncontradicted. The appellant reported back at the Adeniji Adele Police Station bleeding and his uniform was torn to tatters. The proceedings are replete with the state of the appellant after the incident and his state was consistent with the attack on him by the crowd that first attacked P.W.11 which necessitated reinforcement from the Police Station. On the whole evidence, the Court of Appeal also overlooked the contradictions and failed to see that the evidential burden of proof beyond reasonable doubt cannot be found in prosecution's case (*Esanghedo v. The State* (1974) 9 SC 1; (1989) 4 NWLR (Pt.113) 57; *Okonji v. The State* (1987) 1 NWLR (Pt. 52) 659.

It must be pointed out also that the burden remains the same for the prosecution to prove the guilt of an accused person beyond reasonable doubt whether the accused is a civilian or a person in one of the disciplined uniformed forces.

It must however be clearly herein expressed that the learned Judge made a fundamental error, contrary to our jurisprudential tradition, in the assessment of the evidence of prosecution witnesses and this unfortunately goes to the very basis of the conviction. He divided the prosecution witnesses into two: the "official witnesses" comprising the policemen, and the "non-official witnesses" comprising the civilians. There is nothing like this division of prosecution or defence witnesses in Evidence Act or the procedural law as to criminal prosecution; neither is there a division like this in even civil matters. Learned trial judge then went ahead to disbelieve the "official witnesses" and believed the "non-official witnesses". In our law, the prosecution, in calling all their witnesses as to substance of the offence must have certainty and unanimity in what they testify, if there are divergent testimonies in this regard by these witnesses such divergent testimonies will

result in what is known as contradictions. Unless such contradictions are resolved they lead to doubt, the benefit of which must be given to the accused person. But in the instant case there are facts from both the two classes of witnesses as done by the trial judge that greatly supported the case for the defence and by rejecting even in some cases partly the testimonies of some B so-called “official witnesses”, it did great injustice to the case for the accused who is now the appellant. For example, the appellant said he was attacked by some members of the large crowd, just as the traffic warden who was beaten unconscious but in his case the attempt was to snatch his rifle from him. In the process the only four bullets inside C accidentally discharged, wounding him in the ear and killing the dawodu brothers. At that stage, he had no more ammunition in the rifle and to frighten everybody off he had to threaten with the empty gun by waving it from right to left. Of course everybody ran away and he was able to escape. Without considering the depth of this evidence by the appellant D and the so-called “official prosecution witnesses”, the point was totally missed as to the crux of the defence. Looked at as a whole, this failure of the trial judge to dispassionately look at all evidence in accordance with the law robbed him the opportunity to prevent his decision leading to injustice.

E In all prosecution cases, the evidence put in by the prosecution must be considered in its totality. The time honoured practice of deciding on hostile witness must be borne in mind. Once the prosecution discovers a witness is giving contrary evidence to what he already said in his depositions to the police, the options are as follows: one, if the witness F intimates before he goes into witness box that he would change his story, the prosecution will apply to the court that he would be called only for cross-examination as his evidence is contrary to his previous deposition. The court will accede to this and the evidence of this witness will be of no value to either side. Secondly, if the witness resiles on getting into the G witness box on his previous deposition on the same case, the prosecution applies to treat him as a hostile witness. In such cases the witness will be declared a hostile witness if the court rules so. But before ruling, the court must be satisfied as to the discrepancy in his previous deposition and evidence on oath. Once satisfied the court will rule the witness a H hostile witness to be cross-examined by the prosecution. Without availing itself of this procedure the prosecution that dumps all contradictory testimonies before the court cannot have verdict of conviction. **In the instant case, however, the trial court made fundamental error as to the assessment of the evidence of the prosecution and the defence evidence that the**

conviction is not just. Unfortunately the Court of Appeal inadvertently ignored the gross defect in upholding the trial court's decision.

In conclusion, I find great merit in this appeal. The conviction of the appellant for murder cannot be allowed to stand in the face of all the contradictions in the case for the prosecution. This is a case of accidental discharge of the appellant's gun when he was physically being attacked to seize his gun from him rather than a deliberate act to shoot. The conviction and sentence of death for murder passed by the trial court and upheld by the Court of Appeal are set aside. I enter a verdict of discharge and acquittal.

WALI JSC

I have had the privilege of reading in advance, the lead judgment of my learned brother Belgore JSC and I entirely agree with his reasoning and conclusion for allowing the appeal.

The facts involved in this case have been adequately set out in the lead judgment and therefore need no further repetition by me.

It is not in dispute that the prosecution witnesses contradicted themselves in their evidence. On the evidence of P.W.s 6, 7, 10 and 11 who were all at the scene when the incident happened, the learned trial judge had this to say:-

"It is strange enough that these three witnesses and Omogeo Ogali [P.W.11] did not see when or how the gun went off. Each of them only heard the sound of gun shot".

The learned Judge then proceeded to consider the evidence of P.Ws 12, 14 and 15 and concluded:-

"However, the evidence of Buari Liasu [P.W. 12] Karimu Alabi [P.W. 14] and Yakubu Alao [P.W.15] who were also at the scene when the accused person and the other arrived, graphically tell how Sule dawodu and Saka dawodu met their death. There are a number of contradictions or inconsistencies in their evidence. But all said and told are minor inconsistencies,"

The material issue here is not as the learned trial Judge tried to portray it that:

"Even though P.W. 6, P.W.7, P.W.10 and P.W.11, did not see the two brothers being shot by the accused person, each of them saw the accused person waving his gun menacingly from side to side following the shot heard by each witness who felt unsafe in that situation and consequently made for the police station as fast as possible;"

But whether, having regard to the evidence of other prosecution wit-

nesses who also claimed to be at the scene at the same time with P.Ws 6, 7, 10 and 11 coupled with the evidence put up by the defence, the learned judge ought to have a lingering doubt as regards the guilt of the appellant.

The appellant's story was that there was a fight at the scene during which the mob tried to dispossess him of his gun, (which was then loaded but on safety catch) in the process of which it exploded and caused the death of the deceased persons and he thereafter immediately managed to escape from the scene and went straight to Adeniji Adele Road Police Station wearing only his tea shirt as the mob had torn his shirt. He said:

"When we arrived at the scene, the place was crowded and noisy. I saw one man holding a Traffic Warden by his shirt. The Traffic Warden was leaning on the booth of a Volvo car. When the man saw us, he released (sic) the Traffic Warden who then fell on the ground. I cannot remember the name of the Warden but I saw that he gave evidence in this case earlier on. I moved closer to the man who was holding the Traffic Warden while the others were trying to lift up the Traffic Warden from the ground, I arrested the man and then I heard people shouting and asking "who carry Mobile Policemen come here? "Is that a matter for mobile policemen? "These thieves have come here again", As these things were being said I do felt something hit the back of my neck. When I looked round, I saw that somebody had hit me with a stick. As I turned round other persons rushed at me and started beating me. My beret cap was removed. Others gripped me and some tried to remove my rifle from my shoulder. As I tried to remove the rifle from my shoulder, the crowd got hold of it and I started to struggle with them for the rifle. The people who were struggling with me were many. As the struggle was going on, the rifle exploded and part of the bullets hit the left side of my neck and injured me. The sound of the rifle exploding blocked my left ear. When the rifle exploded, everybody ran away. The policemen who came with me to the scene also ran away. I then ran to Adeniji Adele Police Station to report what had happened to me. I did not know that anyone was injured by the explosion of my rifle. It was at the police station I learnt that people died at the scene. Inspector Omochi told me I had gone to the scene to kill people. Not long after I got to the police station a crowd came to the police station. They started throwing stones and bottles at the Police Station.

I was kept at the Police Station until 9th November 1987 when I was taken to the Police Clinic at Falomo for the treatment of my neck. The police had said they could not take me earlier because of the riot that was then happening in town. They said it was risky to take me out to the Clinic at that time.

On 20th November, 1987 I was taken to the Magistrate Court at Igboere in Lagos.

I was treated at the Police Clinic. I was given an injection and some tablets. I was later taken to the X-Ray Department where my ear was Ex-Rayed. I made a statement to the Police in the evening of 17th November 1987. B

I was dressed in my full mobile police uniform with my green beret cap on which was the police crest. My police shirt had my number and name tags on it. My squadron flag was also on my police shirt. I also had on me my police trousers and my jungle boots.

The mob at the scene tore my shirt and I was in only my T-shirt when C I returned to the Police Station.

It is not correct that I got hold of Sule Dawodu and dragged him unto the street. It is not correct that Saka Dawodu begged me and I shot him at the back. It is not true that a Traffic Warden and a Mobile Police- D men were holding Sule Dawodu and I told them to leave him. It is not true that when they left Sule Dawodu, I shot him.

I did not shoot Saka Dawodu and kill him with my Rifle. I also did not shoot Sule Dawodu and kill him. My Rifle exploded during the struggle for its possession from me by the crowd. It was at the Police Station that I learnt that these two persons were killed. E

I have seen Exhibit 7. It is the type of gun that was issued to me on 17th November 1987.

It is not difficult to remove the safety catch when the rifle is cocked. If two or three persons are struggling for possession of the gun, the position of the safety catch can be shifted to rapid firing and the rifle F will explode rapidly."

Despite vigorous cross examination, the appellant maintained his stance unshaken. The medical doctor, D.W. 2, who examined the appel-
lant said:-

"I observed some bruises on the left hand side of his neck and G there was one bruise also in the middle of his chest. This was a superficial bruise of about 2 cm long. The accused complained of pain on the right ear. I now say that he complained of pain on the left ear and not the right ear. On examination, there was no abnormality. I saw multiple pin-pointed bum around the bruises on the left side of the neck." H

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

"I do not know whether the bums were sustained as a result of bullet injury."

P.W.3, the ballisticsian who examined Exhibit 7, the rifle the ap-

pellant was carrying on the day of incident said:-

“The SLR Rifle has a capacity for thirty rounds of ammunition. The thirty rounds will be exhausted in 10 seconds if the Rifle is put on burst shots operation. **Cross-examined by Ofulue:** It is not easy for the safety catch to be released even if persons are struggling for the Rifle. The B Control lever is rather stiff and it does not move easily. When the Rifle is put burst shot operation, the bullets are released one after the other at very rapid intervals. With only one shot operation, It is the sound of only the shot released from the Rifle that is heard when the Rifle is fired”.

D.W.3, testifying on the same issue said as follows:-

C “I have seen Exhibit 7, It is a K.2 Rifle. I am familiar with K.2 Rifles. The K.2 Rifle has a magazine. When the Magazine is in place and the Rifle is cocked, it can be fired. But, if whoever is handling the gun is not ready to fire it, the safety catch can be put in position so that the Rifle cannot fire. Any slight touch can release the safety catch.”

D These are pieces of evidence which the learned trial judge ought to have critically examined as against the back ground and circumstances involved in this case.

There was no rebutting evidence that what the appellant said about the injuries he sustained around his ear on the left side was not E caused by a bullet. P.W.2 said nothing as regards the wounds sustained by the appellant. The appellant’s evidence on the Issue and that of D.W. 2 remained unchallenged and uncontradicted.

Even P.W.3 did not say that Exhibit 7 even if put on safety catch could not have fired itself as a result of a pressure from the struggle. What he F said is “The control lever is rather stiff and does not move easily.”

As this court observed in *Boy Muka v. The State* (1976) 9 & 10 SC 305 particularly at 325, the court is duty bound to evaluate the whole evidence adduced by the prosecution in order to come to the conclusion that the prosecution’s case has been proved. It is not for the judge to pick G and choose which set of the prosecution’s witnesses to believe and which to reject, but must evaluate the G totality of the evidence adduced by the prosecution. The Judge cannot simply accredit one set of witnesses and discredit the other without cogent reason; Explaining the discrepancy in the testimonies by the witnesses. See: *Onuhogu v. The State* (1974) 9 SC H 1; *Ateji v. The State* (1976) 2 SC 79 and *Asuqou Williams v. The State* (1975) 9-11 SC 139.

With these inconsistencies and lack of proper consideration of the defence put up by appellant, I am not prepared to say that the prosecution has proved its case beyond reasonable doubt as required under S.

137(1) of the Evidence Act.

It is for these and the more elaborate reasons contained in the lead judgment of Belgore JSC that I also hereby allow the appeal. The conviction and sentence are set aside and a verdict of acquittal and discharge is substituted.

B

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother Belgore. J.S.C. I agree with him that the appeal has merit and ought to succeed for the reasons ably stated in the judgment.

C

The record shows that a total of 15 witnesses testified for the prosecution at the trial. Of these P.W.s 6, 7, 10, 11, 12, 14 & 15 were present at the scene of the crime. But while P.W.s. 6, 7, 10 & 11 (2 Policemen and 2 Traffic Wardens) said they did not see when or how the gun went off, P.W.s. 12, 14 & 15 said they saw the appellant shot the two Dawodu brothers separately one after the other. On the evidence of P.W.s 6, 7 & 10 the learned trial Judge observed on pages 147-148 of the record as follows -

D

“The testimonies of the two policemen (i.e. Bruce Onabrakpeya (P.W.10) and Nelson Ogunmola (P.W. 6). and the Traffic Warden Sebastine Duru (P.W.7) who were at the scene with the accused person fell short of eye-witness accounts of the shooting that took place at the scene. Each of them only heard the sound of gunshot. None of them saw who fired the shot or shots. I must say that after listening to the testimonies of the Policemen and the Traffic Warden (P.W.s. 6, 7, and 10) I was left and I am still left with the impression that they had not told the court all they saw at the scene. They had kept back a lot that ought to have been disclosed.”

F

Further down on page 150 of the record, he continued thus –

“According to each of these witnesses (meaning P.W.s. 6, 7, 10 & 11) there was no fighting when Cpl. Nelson Ogunmola (P.W.6) Sebastian Duru (P.W.7), Bruce Onabrakpeya (P.W.10) and the accused person arrived at the scene. They were also emphatic that no one attacked them or threw any missile at them. Sebastian Duru (P.W.7) even went further to say that the crowd scattered and people started running away when they arrived at the scene. It is strange then that these three witnesses and Omogo Ogali (P.W. 11) did not see when or how the gun went off. Each of them only heard the sound of gunshot.

G

H

However, the evidence of Buari Liasu (P.W.12), Karimu Alabi (P.W.14) and Alhaji Yakubu Alao (P.W. 15) who were also at the scene when the accused person and the others arrived graphically tell how Sule

Dawodu and Saka Dawodu met their death. There are a number of contractions or inconsistencies in their evidence. but all told. they are minor inconsistencies.”

I think therefore that Senator Anah SAN for the appellant must be right when he said in his brief that the question which remained unanswered throughout the hearing was - which of the two sets of witnesses. P.Ws. 6, 7, & 10 on one hand. And P.Ws.12, 14 & 15 on the other hand had lied? And why did that set lie?

On page 217 of the record. the Court of Appeal per Ubaezonu J.C.A who read the lead judgment said -

“The crucial evidence in this case as to the manner in which the Dawodu brothers met their untimely death was given by P.Ws. 6, 7, & 10 and particularly P.Ws. 12, 14 & 15. These witnesses were present at the scene of crime. Each gave evidence of what he saw or heard. P.Ws. 6, 7 & 10 gave evidence to the effect that they heard a gun shot but did not see who fired same P.Ws. 12, 14 & 15 who were in the vicinity of the shooting by the appellant gave evidence of what they saw. P.Ws. 6, 7 & 10 who were at a different spot in the crowd and engaged in something else did not see who fired the shot. They said so. The fact that they heard the shot but did not see who fired it does not contradict the evidence of P.Ws 12, 14 & 15 who saw who fired the shots and said so. I am unable to see any material conflict or contradiction in the evidence of prosecution witnesses. The question of picking and choosing does not arise.”

Earlier on page 215 he had observed as follows -

“The remark of the learned trial judge that it was strange that P.Ws. 6, 7 & 10 did not see the person who shot the gun or that they did not tell the court everything is not justified. In the light of the setting, P.Ws 6, 7 & 10 need not see who shot the gun. That notwithstanding, the learned trial judge did not say or hold the view that they were unreliable witnesses. He would have been wrong if he did hold that view as there was no evidence to justify such a view.”

I agree that in a crowd as it happened in this case, it is not every person in the crowd that will hear or see everything that goes on in the crowd, depending on its size and location of an individual at any given time within the crowd itself. In this case there was no evidence of the size of the crowd nor the locations of the principal characters within the crowd-that is, P.Ws. 6, 7, 10, 11, 12, 14 & 15, the Dawodu brothers and the appellant himself. But it is quite significant that the learned trial judge did in fact visit the scene of crime later and was shown certain things - the gutter, shops, etc. so that when the learned trial judge said in his

judgment that after listening to the testimonies of P.Ws. 6,7 & 10 he was left with the impression that they had not told the court all they saw at the scene and that they had kept back a lot that ought to have been disclosed, he must be right. The learned trial judge was the only judge who saw and heard all the witnesses, and watched their demeanour in the witness-box.

It is therefore reasonable to conclude that while P.Ws 6,7 & 10 might not have told the court all they knew about the case as found by the learned trial judge, P.Ws 12, 14 & 15 could as well have told more than they knew! Admittedly there was a crowd of people and clearly from the facts and setting of the case the two sets of witnesses referred to above could not be said to be referring to the same incident. As the onus is on the prosecution to prove its case beyond reasonable doubt if the judge has any doubt at all as in this case, he must give to the accused the benefit of that doubt. I am clearly of the view that the prosecution had not proved beyond all reasonable doubt its case that the appellant committed the offences charged.

I accordingly allow the appeal and set aside the judgments of the lower courts. The appellant is discharged and acquitted.

OGUNDARE JSC

The appellant was, at all times material to this case, a police officer attached to the Mobile Police Force. Sometime, in 1988 he was arraigned before the High Court of Lagos State on a two count information charging him with the murder of Sule Dawodu and Saka Dawodu to which charges he pleaded 'not guilty'.

Fifteen witnesses testified for the prosecution while four (inclusive of the appellant) testified for the defence. At the close of the case for the prosecution and on the application of defence counsel made under Section 207 of the Criminal Procedure Law, the learned trial Judge visited the scene of crime in the presence of the appellant, his counsel, the prosecuting counsel, court officials and 6th, 7th, 12th, 14th & 15th prosecution witnesses. At the end of the trial and after addresses by learned counsel for both the defence and the prosecution, the learned trial Judge in a reserved judgment, found the appellant guilty as charged and convicted him of murder of both Sule and Saka Dawodu; he was sentenced to death by hanging.

Being dissatisfied with the judgment the appellant appealed unsuccessfully to the Court of Appeal. He has now further appealed to this Court upon 5 grounds of appeal Pursuant to the rules of this Court the parties filed and exchanged their respective briefs of argument. The following four issues are formulated in the appellant's brief as arising for

determination in this appeal, to wit:

“1 . *Whether in the light of the serious contradictions and inconsistencies in the case of the prosecution, the Court of Appeal was not in error to have affirmed the judgment of the trial judge bearing in mind that the prosecution had the duty to prove the guilt of the appellant beyond reasonable doubt. (Ground 1 of Appeal)*

2. *Whether their Lordships of the Court of Appeal were not in error to have affirmed the decisions of the trial judge on the defence of accident by the appellant, and whether on the whole it could be said that the lower court satisfactorily considered the defence of accident raised by the appellant. (Ground 2 of Appeal)*

3. *Whether the learned Justices of the Court of Appeal were right in holding that the P.W.12, P.W.14 and P.W.15 were not tainted witnesses.*

4. *Whether the Court of Appeal was right in holding that the trial court did not pick and choose evidence of the prosecution witnesses it would believe and those it would not believe on material facts.”*

The issues set out in the respondent’s brief are not too dissimilar. However, Issues (3) & (4) are not argued in the appellant’s brief. They are therefore deemed to have been abandoned - See: *Atoyebi v. Governor of Oyo State* (1994) 5 NWLR (Pt.344) 290 and grounds of appeal based on them are hereby struck out by me. As there is no issue formulated on ground 3, it too is struck out. This appeal, therefore, revolves on two issues, namely, contradictions and defence of accident. Before proceeding to consider and determine these issues I need first to set out the facts, how-be-it in a nutshell, put forward by both parties.

On 17/11/87 following a report made at Adeniji Adele Road police station by a traffic warden (PW7), Inspector Michael Omachi (PW5) instructed Corporal Nelson Ogunmola (PW6) to accompany PW7 to the Idumagbo Junction where another traffic warden was being beaten by some motorists. A civilian had also come to the station in a Mercedes-Benz car to lodge a similar complaint. As PW6 and PW7 were about to move to the scene in the Mercedes-Benz car brought by the civilian, the appellant and another mobile police constable joined them in the car and were all driven by the civilian to the scene at Anikantomo area of Idumagbo; the appellant was armed with a rifle. When they arrived at the scene they saw a crowd and went into the crowd. PW6 saw the traffic warden - Ogali (PW.11) who was beaten up. The appellant went into a direction of the crowd different to that of PW6 and PW7. He went over to where Sule Dawodu was standing, got hold of him and started to drag him to

the road. Saka Dawodu, (Sule's brother) came along to plead with the appellant to let off his brother, Sule. The appellant would not yield to any plea. Rather, he warned Saka to leave his sight or get shot. As Saka turned to walk away, the appellant fired a shot at Saka or (him) from the back. Saka ran a short distance and fell down. The appellant walked back to where Sule Dawodu was standing. Meanwhile PW 14 who had hid himself near the shop next to his went over to where Saka had fallen to assist the latter; PW 14 suddenly heard the sound of another gun shot. He then saw the appellant waving his gun from side to side. People around, including the other policemen and traffic wardens took to their heels. Sule Dawodu and Saka Dawodu, both brothers, were killed as a result of the gun shots. Corporal Ogunmola (PW.6) went in a taxi cab to the police station to report his experience. As PW.6 was doing so, the appellant arrived at the station and PW.6 immediately pointed him out as the policeman who fired the gun at the scene. Appellant was thereupon disarmed by the policemen around and arrested. Shortly after, two corpses were brought to the station. A crowd followed chanting that the corpses were the bodies of the persons shot at and killed by the appellant. PW.6, PW.7 and PW.10 (James Onabrakpeya, the other mobile policeman who went with the appellant to the scene) heard the gun shots but did not see who fired the gun. PW12, PW14 and PW15 (civilian eye witnesses) however saw the appellant shoot the two Dawodu brothers. There was no fighting when the policemen and PW7 arrived at the scene. PW6, PW7, PW8, PW 14 and PW 15 testified that nobody struggled with appellant to dispossess him of his gun.

The main defence was one of accidental discharge. The shots were as a result of explosion from his gun when the appellant was struggling with some people in the crowd for the possession of his rifle. Appellant did not realise that anybody was killed as a result of the explosion.

Contradictions:

Learned leading counsel for the appellant, N.N. Anah Esqr. SAN, both in his brief and in oral submissions contends that there were serious contradictions and major inconsistencies in the case of the prosecution which were left unresolved by the trial court and which vitiated the judgment of that court as it could not be said that, with these contradictions and inconsistencies, the prosecution had discharged the burden on it to prove the guilt of the appellant beyond reasonable doubt. Learned Senior Advocate submits that on the question of contradiction, the issue is not whether a prosecution witness has departed from his earlier statement to the police which is only relevant in determining whether or not the witness concerned ought to be accorded credence, but whether the case

made by the prosecution at the end of the day formed a consistent and harmonious whole. He submits that both the trial court and the court below failed to apply the correct approach to the issue of contradictions raised by the appellant. He adds that contradiction arises “where the evidence of one or more prosecution witnesses differs materially or appreciably from the evidence of another or other witness/witnesses.” Learned counsel lists a number of alleged contradictions (particularly in the evidence of PW 12, PW 14 & PW 15 vis-a-vis the evidence of PW6, PW7, PW 10 and PW 11) which I shall refer to later in this judgment and submits that these contradictions were of a material nature which should have raised a reasonable doubt as to the guilt of the appellant. He submits that the learned trial Judge was wrong in picking and choosing which aspect of the contradictory evidence for the prosecution to accept by stating that PW6, PW7, PW 10 and PW 11 had not told all they saw at the scene. Learned Senior Advocate finally submitted that the circumstances of this case raised a reasonable doubt which ought to have been resolved in favour of the appellant.

Learned counsel for the respondent in respondent’s brief classified the witnesses for the prosecution into three categories. PW2 (pathologist) and PW3 (the ballisticsian) are grouped in the category of independent witnesses. PW6, PW7, PW 10 and PW 11 that is the 2 other policemen and the two traffic wardens are classified as official witnesses while PW 12, PW 14 and PW 15 are classified as eye witnesses. It is pointed out that on the evidence, PW6 and PW 10 were at one location of the scene of crime while PW12, PW14 and PW15 were at another location where the deceased brothers were killed. The latter set of witnesses, it is submitted, were at a vantage position to see how the deceased brothers were killed. The respondent submits that minor contradictions or variances in the evidence of the prosecution witnesses or expatiations of statement to the police by a prosecution witness do not go to the root of the case to affect the credibility of a witness and cannot vitiate a conviction. It is further submitted that there are neither fundamental nor material contradictions or inconsistencies in the matter on hand. It is contended that it is irrelevant whether the appellant fired two or three shots; what is important is that it was the unlawful act of the appellant which resulted in the death of the Dawodu brothers. It is further contended that this is not a case where the learned trial Judge could be said to pick and choose which evidence to believe.

It is trite law that where there are contradictions in the testimonies of witnesses on the material fact or facts and the contradictions are not explained by the prosecution through any of its witnesses, the case for the prosecution is not proved beyond reasonable doubt. In such a

case it is not for the court to pick and choose which witness to believe and which not to believe among such witnesses - See: Onubogu v. The State (1974) 9 SC 1; Muka v. The State (1976) 9-10 SC. 305; Arehia v. The State (1982) 4 SC. 78. But where variations in the evidence given by prosecution witnesses will not, without more, amount to such contradictions, it will not vitiate a conviction - See Kpaa v. The State (1972) 3 SC. 155. This court has laid it down B in a long line of cases that the contradictions that will weigh on the mind of the court must be such as are fundamental to the real question before the court; they must be material and go to the root of the case to create a reasonable doubt in the mind of the court - See: Onubogu v. The State (supra); Nwosisi v. The State (1976) 6 SC 109; Akpan Anye v. The State 11 SC 269, Nasamu v. The C State (1979) 6-9 SC 153; Ibrahim v. The State (1991) 4 NWLR (Pt. 186) 399; Ijeoma v. The State (1990) 6 NWLR (Pt. 158) 567.

What is "contradiction" is defined by this Court in Gabriel v. The State (1989) 5 NWLR (Pt. 122) 457, 468, per Nnaemeka-Agu JSC as follows:

"Two pieces of evidence contradict one another when they are D by themselves inconsistent"

The learned Justice of the Supreme Court went on on pages 468 - 469 of the report to define what a discrepancy is and its effect. He said:

..... a discrepancy may occur when a piece of evidence stops E short of, or contains a little more than, what the other piece of evidence says or contains some minor differences in details. I think the law also looks at the two different situations differently. If a witness gives oral evidence which contradicts his previous statement in writing, his evidence should be treated as unreliable: See Onubogu v. The State (1974) 9 SC I. On the other hand, minor discrepancies between a previous writ- F ten statement and subsequent oral testimony expected do not destroy the credibility of the witness."

See also: Onubogu v. The State (supra); William v. The State (1975) 9-11 SC 139, 148 where Nasir, JSC (as he then was) delivering the judgment of this court observed: G

".... where a witness, such as the complainant (PW4) in the case in hand, has made a statement before trial which is inconsistent with the evidence he gives in court, the court, provided that no cogent reasons are given for the inconsistency, should regard his evidence as unreliable."

Where there are contradictions in the evidence of witness or witnesses, H the trial judge must make a finding in relation to the contradictions and his failure to do so may vitiate a conviction. In Ateji v. The State (1976) 2 SC 79, 83-84 Nasir JSC (as he then was) delivering the judgment of this court had this to say:

“There are at least three material contradictions in the evidence of these two principal witnesses. Firstly, PW 1 denied being dragged by the appellant. PW2 said she was dragged. Secondly, PW 1 said Exhibit ‘B’ was not in their house and did not belong to their father but PW2 said it belonged to their father and explained how it came to be in the house.

B Thirdly, PW 1 said that the appellant had a cut “wound” on the forehead but PW2 said he saw no wound at all. In his assessment of the facts of this case, the learned trial judge made no mention of these contradictions. As a result he made no finding on these relevant contradictions. The learned trial judge simply said:

C “I have no doubt in my mind about the evidence of all the prosecution witnesses and I believe them.

At no time in the judgment was there any assessment of the reliability of the evidence of these two witnesses (PW 1 and PW2) in the light of the contradictions in their evidence. (See: Christopher Onubogu & Another

D v. The State (1974) 9 Sc. 1) The evidence of the appellant that it was the deceased who threw Exhibit B at him should have been considered in the light of the evidence of PW2 at least in assessing who had the best opportunity to use Exhibit “B” first. “

I now turn to the case on hand. The first complaint of the appellant is that the statement of PW 14 to the Police (Exh.10) is contradictory and inconsistent with his evidence in court in that (i) in Exh. 10 PW 12 said he was in his shop at the time of the incident whereas in his evidence he said he was standing with late Sule Dawodu outside the shop and (ii) in Exhibit 10 he said late Saka Dawodu struggled with the appellant whereas
F all the witnesses said there was no struggle.

PW 12, Buari Liasu in his statement to the Police, Exhibit 10 gave the following account of the incident that resulted in the death of the two brothers:-

I was in my shop when I saw a traffic warden with a driver of
G vehicle Registration No. LA 16 AN make Volvo car colour red, the driver and the traffic warden were fighting with each other. Later I saw about four mobile police men who came to the scene, one of the mobile police men went to one Sule Dawodu now deceased and held him by the trouser they asked him what was he doing at the scene, two of the mobile police
H men continue to beat the deceased. It was then the junior brother to the deceased one Saka Dawodu came to the rescue of his senior brother, it was then the mobile police men pushed Saka Dawodu. To my surprise the mobile police man pointed his gun to Saka Dawodu and junior brother started to struggle; the mobile police man also pointed his gun to

him and shot him he also fell down in his pool of blood; I came out from my shop to rescue the two brothers but it was late as they lied down speechless, the mobile police, started to point his gun to everybody that attempted to near him, and he started to run while we ran after him until he arrived at Adeniji Adele police station. We also arranged for a vehicle in which we put the two dead bodies and we brought them to Adeniji Adele police station. B
In his evidence at the trial he testified thus:

“I remember 17th November, 1987. On that day, I was at my shop at Anikantamo market.

*At between 11:30 a.m. and 12 noon on 17/11/87, I saw a traffic warden and the driver of a Volvo car arguing not far from my shop. I did C
not know what caused their argument or what they were arguing about. I did not go near them or interfere. Shortly after this I saw that some Mobile Police men arrived at the scene. I was standing with Sule Dawodu behind a big gutter separating the road from the market watching all that was going on.* D

*As soon as the mobile policemen arrived, one of them jumped over the gutter to our side. got hold of Sule Dawodu by his trousers and dragged him unto the road. I and some others started asking them what Sule Dawodu had done to deserve being dragged out like that. The policeman did not answer the question. The mobile policeman started beating Sule Dawodu. E
The mobile policeman was armed so I was afraid to go near him. Saka Dawodu who is Sule’s brother then started begging the mobile policeman to release Sule Dawodu because Sule is his brother and they were at work together. The mobile policeman told Saka Dawodu to shut up and get away and that if he refused to leave the place he would be shot. At this time, F
two traffic wardens and two mobile policemen were at the scene but originally three mobile policemen arrived at the scene by a car.*

*Following the mobile policeman’s warning that if Saka Dawodu did not leave the place he would be shot, I and some others told Saka to do as he was told. Saka Dawodu then turned round to walk away. As he G
turned round, Saka Dawodu was shot at the back by the mobile policeman. The bullet came out from his chest. Seeing that Saka Dawodu has been shot I quickly went down flat in a frustrating (sic) position.*

*I can identify the mobile policeman who shot Saka Dawodu at the back (witness identifies the accused person as the mobile policeman H
who shot Saka Dawodu). It was the accused person who also jumped over the gutter and held Sule Dawodu by his trousers.*

After the accused person had shot Saka Dawodu, the two traffic wardens got hold of Sule Dawodu saying that they were taking him to the

- police station. At this, the accused person shouted at them to leave him alone and to get away from him. The accused person had cocked his gun and was pointing it towards them. The next thing I saw was that the accused person shot Sule Dawodu two times, once at the back. I do not know where the second shot hit Sule Dawodu. The traffic warden had left
- B Sule Dawodu when the accused warned them. The second mobile policeman also ran away after he had fruitlessly pleaded with the accused person not to shoot Sule Dawodu. I cannot recognise this other mobile policemen because he did not stay too long after warning the accused not to shoot Sule Dawodu.
- C I am able to recognise the accused because he crossed the gutter to meet us where I was standing with Sule Dawodu. After shooting Saka Dawodu who fell down, the accused framed his gun on him menacingly as if he would shoot again if Saka Dawodu ever got up. I was very much afraid as I remained in my prostrating position.
- D After the accused person had shot Saka Dawodu and Sule Dawodu he ran away from the scene. I got up and went to pick up Saka Dawodu who appeared to want to speak to me but he could not. I also went to see Sule Dawodu who had died instantly. At this point I arranged with others to put the two dead men in van. They were taken to the police station.”
- E Cross examined, he deposed:-

- “I made a statement to the police in respect of this incident It is true I said in my statement that I was in my shop on the day in question. My shop faces the road and the gutter is closely in front of it. I was standing in front of the shop by the gutter. Sule’s shop is not my own.
- F I said in my statement that I went to the aid of the two brothers but it was too late. It is true that I said in my statement that the accused was waving his gun at people around after he had shot Saka. This was what he did and no one was able to go near him. May be I did not say so in my evidence today. I did not say in my statement to the police that after he
- G had shot the two brothers, I and others pursued the accused person when he was running away. We could not have done that because everyone was afraid to go near the accused or to pursue him. It is not true that I said in my statement that Sule Dawodu started to struggle with the accused before he was shot by the accused person. I did not say in my statement that
- H the traffic warden and the driver of the Volvo car were fighting on the day in question when I saw them. What I told the police was that the two were arguing. I did not know what they were arguing about. I told the policeman who recorded my statement that Sule and I were standing behind the gutter when the accused crossed over to get hold of Sule by his

trousers. I did not tell him that Sule was at the scene and that he was asked what he was doing at the scene. I told the police in my statement that the policeman beat Sule Dawodu. This was why we were begging him. I was present when the accused person held Sule Dawodu. I was among those who begged the accused to leave him alone. Saka Dawodu's attention was called and when he came he pleaded with the accused to leave Sule Dawodu alone but the accused pushed him away with his gun and I told the police so. I may not have told the police in my statement that Sule Dawodu was shot twice. All I know is that he was shot dead by the accused person. What I have said in court today is what happened on the day in question and what I told the police in my statement".

He concluded his evidence thus:

"It is not true that the accused did not cross the gutter to meet me and Sule Dawodu. It is also not true that I was inside my shop when the accused shot the two brothers. I was standing in front of my shop before the gutter and I saw everything that happened. I did not tell the police that I came out of my shop when I heard the gunshot."

With respect to learned Senior Advocate, I cannot see such inconsistencies on material issues in the accounts given by this witness as to raise any reasonable doubt as to the fact that the appellant shot at the Dawodu brothers. The learned trial Judge visited the scene and, as recorded in the proceedings, this witness showed the trial judge his shop and where he stood when he came out of his shop. The Judge saw the gutter. PW6 and PW7 also showed the court their positions when they heard the gun shot. The evidence of all the witnesses present at the scene was that calm had returned by the time the policemen arrived. This piece of evidence cannot be said to be inconsistent with the account given by PW1 in Exhibit 10.

The next attack was on the evidence of PW 14, Karimu Alabi wherein he testified thus:

"Later two mobile policemen arrived at the scene. Sule Dawodu was also around there. He was standing about six feet away from the crowd also watching. When the two mobile policemen arrived, one of them and a traffic warden got hold of Sule Dawodu by his trousers and started dragging him on to the street from where he was standing. Some people quickly alerted Saka Dawodu in his shop as to the plight of Sule Dawodu. The people told Saka Dawodu that his brother Sule Dawodu was being beaten up. Saka came along and started begging the mobile policeman to release Sule Dawodu as he was not in the crowd. On hearing this the mobile policemen shouted at Saka Dawodu to go back. They shouted this order at Saka Dawodu three times. Saka Dawodu turned back and started walking away when one of the

mobile policemen shot Saka Dawodu at the back.”

and, in cross-examination, he deposed:

“The Traffic Wardens were still holding Sule Dawodu on the road when Saka Dawodu was shot. I cannot recognise the traffic wardens who were holding Sule Dawodu when Saka was shot.”

B It is submitted that-

“The import of the evidence-in-chief and under cross examination of PW 14 is that the traffic wardens and the appellant had been holding Sule Dawodu when Saka Dawodu went to plead that Sule Dawodu be released. The appellant ordered Saka Dawodu to go away and as he walked away, the appellant shot at him from the back. This was clear evidence that the two traffic wardens had seen the appellant shoot at Saka Dawodu. However the two traffic wardens - Sebastine Duru and Omogo Ogali who testified as PW7 and PW11 respectively both denied seeing the appellant shoot at Saka Dawodu. So who had lied?”

D True enough, it would appear that there was a contradiction in the evidence of this witness vis-a-vis that of PW7 and PW11 but having regard to the impression the latter witnesses made on the learned trial Judge who had the singular advantage of seeing and hearing the witnesses, I cannot say that the seeming contradiction was fatal to the case for the prosecution. The learned trial Judge had said:

“The testimonies of the two policemen (i.e. Bruce Onabrakpeya (PW.10) and Nelson Ogunmola (PW.6), and the traffic warden Sebastine Duru (PW.7) who were at the scene with the accused person, fell short of eye-witness accounts of the shooting that took place at the scene. Each of them only heard the sound of gunshot. None of them saw who fired the shot or shots. I must say that after listening to the testimonies of the policemen and the traffic warden (P.Ws. 6, 7 and 10) I was left and I am still left with the impression that they had not told the court all they saw at the scene. They had kept back a lot that ought to have been disclosed.”

G The reasonable inference that can be drawn from the above observation is that PW6, PW7 and PW 10 did not tell the court the whole truth. When one remembers that these witnesses are uniformed men like the appellant, their keeping away from the court part of what happened, though regrettable, is not to be totally unexpected in the circumstances of this case.

H The third witness that came under attack was PW15, Alhaji Yakubu Alao. His account of how the Dawodu brothers met their death runs thus:

“The next thing I saw was that the mobile policeman got hold of Sule by his trousers and dragged him into the street and starting kicking

him on the back and hitting him with the butt of his gun. At this point, Saka was sent for to come and see what was happening to his brother. Saka came and started to plead with the mobile policeman to release Sule. The mobile policeman shouted at Saka to go back. I can identify the mobile policeman who asked Saka to go back. It is the accused standing now in the dock in this court. (Witness identifies the accused person). As Saka turned to go away, the accused person fired a shot at him from his gun. Saka ran a short distance and fell. The accused ran after him and kicked him there on the ground. After this, the accused person returned to where Sule was in the street. The other mobile policeman pleaded with the accused not to shoot but he refused and he shot Sule twice. After Sule had been shot, the accused started waving his gun here and there. When we saw that the other policeman took to his heels at this, I and the others also ran away.”

The complaint against the evidence of this witness runs thus:

“It is to be observed here that whereas PW 15 said a mobile policeman pleaded with the appellant not to shoot Sule and that the appellant did not heed the pleading and still shot Sule, the two mobile policemen, PW6 and PW.10, who were with the appellant both said that they did not see the appellant shoot the brothers. Who was lying?”

This complaint is similar to the complaint against the evidence of PW 14 and my remark on that complaint applies equally here. It is indeed a strange coincidence that none of PW6, PW.10 and PW.11, the policeman and traffic wardens - saw what happened; they only heard gun shots. I think the observation of the learned trial Judge on these witnesses is very apt indeed.

The learned trial Judge examined closely the complaint of contradictions in the evidence for the prosecution. He concluded thus:

“According to each of these witnesses, there was no fighting when Cpl. Nelson Ogunmola (PW.6), Sebastine Duru (PW.7), Bruce Onabrakpeya (PW.10) and the accused person arrived at the scene. They were also emphatic that no one attacked them or threw any missile at them. Sebastine Duru (PW.7) even went further to say that the crowd scattered and people started running away when they arrived at the scene. It is strange then that these three witnesses and Omogo Ogali (PW.11) did not see when or how the gun went off. Each of them only heard the sound of gun shot.

However, the evidence of Buari Liasu (PW.12), Karimu Alabi (PW.14) and Alhaji Yakubu Alao (PW.15) who were also at the scene when the accused person and the others arrived, graphically tell how Sule Dawodu and Saka Dawodu met their death. There are a number of contradictions or inconsistencies in their evidence, but all told, they are minor inconsistencies. For an inconsistency to affect the credibility of a

witness, or to disparage him, the inconsistency must be on material issues - See *Ikem v. The state* (1985) 1 NWLR (Pt.2) page 378; *Enahoro v. The State* (1965) NMLR 265 at page 268. The first inconsistency highlighted by learned defence counsel concerns the two subsequent shots which Nelson Ogunmola (PW6) said he heard on his way to the police station in a taxi.

B He did not mention this in his statement to the police. The witness said he heard a shot after which he decided to run away from the scene. He boarded a taxi and on his way to the station, he heard two more shots. It seems to me that there is no contradiction here. The witness had only added to, or expanded his evidence. He did not turn round to deny that he
C did not hear any gun shot while he was at the scene. In any case, the statement of the witness (PW.6) was not put in evidence. Another contradiction pointed out by learned counsel is in the evidence of Buari Liasu (PW.12) whose statement to the police was received in evidence as Exhibit 10. In the statement the witness had said he came out from his shop
D to rescue the two brothers but that it was too late, and also that when the accused ran away, they ran after him until he arrived at Adeniji Adele Police Station. The witness testified in court that he was standing with Sule Dawodu (one of the deceased brothers) behind a gutter when the accused arrived at the scene and came to where he and Sule were stand-
E ing. The accused got hold of Sule Dawodu and dragged him to the road. Saka Dawodu came along and begged the accused to let Sule go. The accused warned Saka Dawodu to go away. As Saka Dawodu turned to walk away, the accused shot him at the back. It is my view this contradiction is a minor one. It is not denied that Saka Dawodu was shot and that
F he is dead. The defence of the accused is the defence of accident. I shall come to this later. For now, the undisputed material fact is that there was some contact between the accused person and Sule Dawodu before he was shot. To my mind therefore, this is an immaterial inconsistency."

The Court below, per Ubaezonu JCA, found:

G "I do not find important or material contradictions or inconsistencies in the evidence of the prosecution witnesses in this case."

I can find nothing in the submissions of learned leading counsel for the appellant to persuade me to disturb the concurrent findings of the two courts below. I agree entirely with them that there were no such
H contradictions or inconsistencies in the evidence of prosecution witnesses that would, in law, vitiate the appellant's conviction.

Much fuss has been made of the learned trial Judge's observation that PW6, PW7, PW.10 and PW.11 did not tell the court the whole truth. Obviously, the learned trial Judge was not impressed with that part

of the evidence of PW6, PW7, PW.10 and PW.11 where they claimed they did not see the shooting but only heard gun shots. His apparent rejection of that part of their evidence would not preclude him from accepting the truth of what they deposed happened at the scene - Obiode & Ors. v. The State (1970) 1 All NLR 35; (1970) ANLR 36 where this Court held that a trial judge could, under certain circumstances, accept part of the testimony of a witness and reject the rest. I, therefore, have no hesitation in rejecting the submission of learned counsel for the appellant, in his brief, wherein he argued:

"It is humbly submitted that the above finding of the trial judge is grossly perverse and unsupportable; and that their Lordships of the Court of Appeal should have intervened to disturb the perverse finding. If, as the trial court found, the PW.12, PW 14, PW 15 had spoken the truth in their testimony, it follows logically that PW6, PW7, PW.10 and PW.11 had lied when they said that they did not at the scene see what led to the shooting of the Dawodu brothers which PW.12, PW.14 and PW.15 had alleged that they saw. It is clear that both sets of witnesses could not have spoken the truth and did not see what happened. They were fixed to lie. If on the other hand, the trial judge was correct to have found that PW6, PW7, PW.10 and PW.11 were credible in their testimony it would mean that PW. 12, PW.14 and PW.15 had lied in their account as to the shooting of the Dawodu brothers. This was a clear case of picking and choosing whom to believe and whom not to believe and in what respect. In one breath believing the official witnesses were lying and in another breath believing they were not lying.

I answer Question 1 in the affirmative.

Defence of accident:

The appellant, both in his statement to the police (Exhibit 8) and at the trial, raised the defence of accident. In Exhibit 8 he said:

"On getting there I saw a certain traffic warden being gripped by the mob, then all of us came down from the Mercedes car and we started questing (sic) the men and they were resisting arrest which later resulted to fight and one of the men hit me with a log of wood on my back, then as I want to remove my rifle from my shoulder because I hang (sic) it on my shoulder with the boat, bent, then another man gripped me from 'the back as a result of that struggle the rifle exploded and hit me by the neck and hit other two men. The person who gripped me was among the two persons hit by the bullet. My rifle was already cocked during the time I was pursuing the taxi cab. When my rifle exploded the mob ran away living (sic) the two men hit by the bullet, later the mob started

pursuing me and I ran down to the station before the PC James and the (sic) Cpl have already ran away from the scene. I did not fire my rifle deliberately. It exploded by itself due to the struggle. I never knew the two people killed before. I did not intend to murder anybody.”

In his evidence at the trial, he testified thus:

- B “When we arrived at the scene, the place was crowded and noisy. We alighted from the car and I moved towards the crowd. I saw one man holding a traffic warden by his shirt. The traffic warden was leaning on the booth of a Volvo car. When the man saw us, he released the traffic warden who then fell on the ground. I cannot remember the name of the
- C Warden but I saw that he gave evidence in this case earlier on. I moved closer to the man who was holding the traffic Warden while the others were trying to lift up the traffic warden from the ground. I arrested the man and then I heard people shouting and asking “who carry mobile policemen come here? Is that a matter for mobile policemen? These thieves
- D have come here again.” As these things were being said I do feel something hit the hack of my neck; When/looked round, I saw that somebody had hit me with a stick. As I turned round other persons rushed at me and started heating me. My beret cap was removed. Others gripped me and some tried to remove my rifle from my shoulder. As / tried to remove the rifle from my
- E shoulder, the crowd got hold of it and / started to struggle with them for the rifle. The people who were struggling with me were many. As the struggle was going on, the rifle exploded and part of the bullets hit the left side of my neck and injured me. The sound of the rifle exploding blocked my left ear. When the rifle exploded, everybody ran away. The policemen who came with
- F me to the scene also ran away. I then ran to Adeniji Adele Police Station to report what had happened to me. I did not know that anyone was injured by the explosion of my rifle. It was at the Police Station I learnt that people died at the scene.” (italics are mine)

As to the treatment he had for the injury to his neck, he deposed:

- G “I was treated at the Police Clinic. I was given an injection and some tablets. I was later taken to the X-Ray Department where my ear was X-rayed.”

Concluding his evidence-in-chief, the appellant testified thus:

- H “It is not correct that I got hold of Sule Dawodu and dragged him unto the street. It is not correct that Saka Dawodu begged me and I shot him at the back. It is not true that a Traffic Warden and a Mobile Policeman were holding Sule Dawodu and I told them to leave him. It is not true that when they left Sule Dawodu, I shot him.

I did not shoot Saka Dawodu and kill him with rifle. I also did

not shoot Sule Dawodu and kill him. My rifle exploded during the struggle for its possession from me by the crowd. It was at the Police Station that I learnt that two persons were killed.

I have seen Exhibit 7. It is the type of gun that was issued to me on 17th November 1987.

It is not difficult to remove the safety catch when the rifle is cocked. If two or three persons are struggling for possession of the gun, the position of the safety catch can be shifted to rapid firing and the rifle will explode rapidly. B

I joined the police force on 1st April 1984 and I have been a beat constable since then. I joined the Mobile Force in 1987. I was trained in the use of K.2 Rifle. C

I have been handling K.2 Rifle since 1984. It was not the first time that I have handled K.2 Rifle in November, 1987.” (Italics are mine) To questions by learned counsel for the prosecution, he answered:

“I cocked my gun and put at safety. I loaded the five ammunition in my magazine one by one. If I did not put it at safety it can explode if it hits the ground or if there is a struggle for it. D

It is true that when a gun is cocked, a bullet goes into the barrel of the gun ready for firing. When the gund is uncocked, the bullet comes out. If the gun is cocked and put at safety, it cannot shoot. If it is not put at safety then it will shoot at the slightest hang of the gun or a struggle for it.” (Italics are mine) E

To further questions he answered:

“I arrested only one man who was holding the Traffic Warden. I arrested him by holding him by his trousers.” (Italics are mine) F

He added: *“It is not true that there was no fighting at the scene. The other witnesses were lying that there was no fighting at the scene. My rifle was on my shoulder with the muzzle pointing upwards. There were many hands on the rifle when the struggle was on. I did not know if those killed were among those who wanted to take the rifle from me.* G

It is true I said in my statement that one of those killed was among those who were struggling to take the rifle from me. This was an answer to a question put to me by the police officer who was recording my statement. He had asked if I knew whether one of those killed was among those who struggled with me. I told him that it may be so. H

The muzzle of the gun was facing me at a stage during the struggle because I had succeeded in taking it away from my shoulder and the people were still trying to dispossess me of the gun. When the rifle ex-

ploded all the bullets were discharged. As the explosion took place the people left me and the gun and I staggered and almost fell with it.

There were many people, some were in front and some were behind me and around me. I do not know where the two people who died were as I did not know them before the incident.

B *It is not true that Cpl. Ogunmola heard only one shot and that he heard two other shots when he was in a taxi on his way to the Police Station. By the time the struggling was going on, I had left the man I was holding. I do not know if the man I was holding by the trousers was one of the Dawodu brothers."*

C *Dr. Ejiro Happy Akpowowo who treated him on 19/11/87 gave evidence for the defence. He testified thus:*

"The accused person was brought by two policemen to the police Hospital, Falomo on 19/11/87 at about 5:30 p.m. I examined him and treated him. I observed some bruises on the left hand side of his neck and D there was one bruise also in the middle of his chest. This was a superficial bruise of about 2cm long. The accused complained of pain on the right ear. I now say that he complained of pain on the left ear and not the right ear. On examination, there was no abnormality. I saw multiple pin-pointed burns around the bruises on the left side of the neck.

E *We cleaned the wound and applied some iodine. I then placed him on antibiotics. The accused was discharged after treatment. I was of the opinion that the wound I saw was not serious enough to warrant admitting him in the Hospital. I wrote out a medical report on our case history note after I had examined the accused person.*

F *The accused person did not tell me how he sustained the injuries. I asked him and he told me he was struggling with some people or a mob. He did not elaborate. I do not know whether the burns were sustained as a result of bullet injury."* (Italics are mine)

Cross-examined, he deposed:

G *"I found no injury in the accused's ear. There was no fluid collection in the burns which I saw on the accused's neck. It is possible that the pin-pointed burns could have been caused by accused. This cannot be ruled out. It can also be matches burns or cigarette burns.*

I have examined people shot at short range. The pin-pointed H burns cannot be tattoo marks.

I also looked at the accused's psychological make-up. I found nothing abnormal about him.

The 2 cm long bruise I saw on the chest of the accused could not have been caused by a sharp instrument. It was not a laceration. It is

possible that the bruise was caused during a fall.

The bruises that I saw on the Traffic Warden were also superficial. They were not consistent with fist to fist fighting. (Italics are mine).

Akpan Uwemedimo Umo, the police officer in charge of appellant's mobile police unit also testified for the defence. He described the appellant as

".....a quiet intelligent person who does not smoke or drink."

On appellant's rifle, he said:

"I have seen Exhibit 7. It is a K.2 rifle. I am familiar with K.2 rifles. The K.2 rifle has a magazine. When the magazine is in place and the rifle is cocked, it can be fired. But if whoever is handling the gun is not ready to fire it, the safety catch can be put in position so that the rifle cannot fire. Any slight touch can release the safety catch."

Cross-examined, he testified:

"When the rifle is cocked, a bullet gains access into the barrel or chamber of the rifle ready for firing. If the magazine is removed, the bullet remains in the chamber. It is released when the lever is moved to release it. When the lever is moved the bullet flies back."

I will not cock a rifle and carry it around like that. I am a forgetful person. If the rifle is cocked and the safety catch is on and anything moves it however lightly, the gun may fire."

He added:

"When the gun is put on rapid firing, the sound of the bullets firing is very rapid. It does not sound like single bullets firing."

Re-examined, he deposed thus:

"All the bullets in a gun when the gun is on rapid firing will come out in a split second with a dragging sound but each bullet making its own sound in very rapid succession. In a rowdy situation the rapid firing may not be distinct. The person in whose possession a gun is, decides in his discretion when to cock it."

Clement Alumona testified as the last witness for the defence. He is the taxi driver who was arrested by the appellant and PW.10, James Onabrakpeya at Western Avenue earlier that day and taken to the Adeniji Adele police station. Narrating what happened after he was stopped by the policemen that day, he said:

"As I stopped, the accused said if I moved he would shoot me. I was surprised at his action."

The general tenor of the evidence of this witness revealed the irrational behaviour of the appellant on the fateful day. Why he was called by the defence, I would not know. His evidence cannot be described as helpful

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to the defence.

That was all the evidence on which the appellant based his defence of accident.

Earlier, the prosecution had called

(i) Dr. Chitta Ranjain Koley (PW2) who performed autopsy on the corpses
B of the deceased Dawodu brothers. On Sule Dawodu, he found:

“(1) 6.5 cm x 3.0 cm penetrating wound on the left side of neck above the clavicle. This is the exit wound of the bullet.

(2) 1.3cm diameter entry wound on left side of buttocks. The bullet would still be somewhere in the body.

C *(3) 1.2cm diameter entry wound on back middle near scapula upper part.”*

He opined that

“the shots that killed the deceased must have been fired from more than six or tell feet away. This is so because there are no black or
D *tattoo marks around the entry wounds.*
(italics are mine)

On Saka Oawodu, he found:

“(1) No abrasions detected on the body.

(2) There were the following lacerations:

E *(i) 4 cm x 6 cm penetrating gaping wound on the left chest just below clavicle. This is the exit wound of a bullet.*

(ii) 1.3 cm diameter entry wound on left shoulder blade.”

He testified:

“Without hesitation, the two Dawodus i.e. Dawodu Sule and
F *Dawodu Saka were shot from the back. I did not also observe any tattoo marks around the entry points of the bullet on Oawodu Saka. This suggest that he was shot more than six feet away.”*

Cross-examined, he said:

“I did not see any tattoo marks on the bodies. They had their
G *clothes on. Absence of abrasions on the bodies suggest that there was no fighting, or accident on the road or struggling or fall from a height ..”*
(italics are mine)

(ii) Asp. Anthony Aneasaba Okushi (PW3) a ballistics examiner examined the appellant's rifle (Exhibit 7) he carried on the fateful day. His
H examination showed that the rifle was fired. He testified:

“The SLR rifle has a capacity for thirty rounds of ammunition. The thirty rounds will be exhausted ‘in 10 seconds if the rifle is put on burst shots operation.”

Cross-examined, he said:

"It is not easy for the safety catch to be released even if persons are struggling for the rifle. The control lever is rather stiff and it does not move easily. When the rifle is put (sic) burst shot operation, the bullets are released one after the other at very rapid intervals. With only one shot operation, it is the sound of only the shot released from the rifle that is heard when the rifle is fired."

PW6, PW7, PW.10, PW.11, PW.12, PW.14 and PW.15 who were all at the scene on the fateful day testified to the effect that there was no fighting among the crowd when the policemen arrived at the scene nor did the crowd fight with or attack the policemen. PW6, Cpl. Ogunmola testified thus:

"As I was about to tell the owner of the Volvo car that he was wanted at the Police Station with the Traffic Warden, I heard sound of gun shot behind me. I turned back to see what was happening. I saw the accused person in the middle of some people waving his rifle from side to side. As I saw that I could not handle the situation, I quickly left the scene. On my way to the police station in a taxi, I heard the sound of two gun shots. There was an interval of about two minutes between the first shot and the other shots that I heard." (italics are mine)

He added:

"When I saw the accused waving his gun from side to side I felt it was not safe to approach him. This was why I left for the station. I alone got into a taxi and left for the station. I left the others behind."

Cross-examined, he deposed:

"There was no fighting when we got to the scene. All fighting if there was any had stopped when we got there."

PW7, Sebastine Duru, the traffic warden who first reported at the Adeniji Adele Police Station the incident at Apongbon area between the driver of a Volvo car and his fellow traffic warden Omogo Ogali, in his testimony, said:

"When we got to the scene, the crowd that was there scattered; people started running away. I saw Omogo Ogali lying down on the ground. I went to him and picked him up and handed him over to Cpl. Ogunmola. While I was doing this I heard a gunshot. I did not know where it came from. I looked behind me but I did not see who fired the shot but I saw Cpl. Ogunmola running. I then ran to the Police Station where Cpl. Nelson Ogunmola and I made a report of what was happening to the charge room office, Michael Omachi. I was not attacked by the crowd and there was no fighting or rioting when we got to the scene." (italics are mine)

PW.10, Police Constable James Onabrakpeya, a mobile police-

man with whom the appellant was at checkpoint and later went from Adeniji Adele Police Station to the Apongbon scene, testified thus:

“My gun was not cocked when the accused and I were chasing the taxi. My magazine was at rifle when I was on sentry guard. If I cocked it, it might accidentally explode if my finger should inadvertently touch the trigger.

My magazine was in my pocket when I and the accused and the others left the police station. I did not put the magazine in my rifle. It is mobile police regulation that the magazine must remain in our pockets until there is a situation that warrants putting the magazine in the rifle. I did not consider the situation at the scene one that warrants putting the magazine in the rifle.

After I heard the sound of gunshot, I saw Cpl Ogunmola running. I too ran. I did not see any reason then why I should put my magazine in the rifle and fire. There was no fighting or throwing of stones at us.” (italics are mine)

Cross-examined, he agreed that -

“If there is a struggle and the selector of the gun is in rapid position, the gun will fire rapidly and kill anyone in its range if a finger should touch and actuate the trigger.”

PW.11 Omogo Ogali, was the other traffic warden. He testified: *“The people had stopped beating me when the policemen came.”*

PW.12, PW.14 and PW.15 gave vivid account of how the Dawodu brothers met their death. After the close of the case for the prosecution, the court visited the locus in quo. In his judgment the learned trial Judge observed:

“The court inspected the scene and saw that the plank shops or stalls are not detached shops. They are demarcated stalls in long rows of open-ended sheds. The incident took place in the street that cuts the market into two halves, one half on either side of road, and within a radius of about 50 or 60 metres. The shops of PW.12, PW.14 which are on the same side of the road, and that of PW.15 which is on the other side are within this radius. From my observation, I am satisfied that PW.12, PW.14 and PW.15 could see all that was going on at the time of the incident from where they said they were standing, a piece of evidence which I accept.”

The learned Judge in considering the defence of the appellant reviewed the evidence for the defence. He observed as follows:

“Now in establishing a case of murder the prosecution must prove (i) that the deceased died (ii) that his death was not natural (iii) that the accused person did something or omitted to do something he had a duty

to do by law (iv) that the said act or omission resulted in harm to the deceased and (v) that the deceased died as a result of the said injury or harm - See *The State v. Aihanghee and another* (1988) 3 NWLR (Pt.84) page 548.

In this case, the fact of death of Saka and Sule Dawodu is not in dispute. It is also not in dispute that the deceased persons died as a result of the harm done to them by the shot from the gun in possession of the accused person at the time of the incident. What is in dispute is whether the accused deliberately shot the deceased brothers, or whether the gun accidentally went off during a struggle as alleged by the accused. If I accept that the gun accidentally went off during a struggle, this would be the end of the matter and the accused would be entitled to an acquittal - See Section 24 of the Criminal Code and *Adelumola v. The State* (1988) 1 NWLR (Pt.73) page 683. On the other hand, if the defence of accident is rejected, then we are left with the evidence of the prosecution witnesses, particularly the eye-witnesses. I have had the opportunity of closely watching the demeanour of all the witnesses who testified in this case and I am satisfied that the three eye-witnesses i.e. PW12, PW14 and PW15 are truthful and reliable witnesses. I believe and accept their evidence. I prefer their evidence to that of the accused person. Even though I have said earlier in this judgment that the two policemen, Nelson Ogunmola (PW6) and James Onabrakpeya (PW10) and the two traffic wardens Sebastine Ouru (PW7) and Omogo Ogali (PW11) did not tell the court everything they saw at the scene. I believe and accept their evidence, and I prefer their evidence to that of the accused person, particularly the fact that there was no fighting at the scene when they arrived there and that no one attacked or stoned them or struggled with them at the scene. The accused is an unreliable witness."

He specifically found:

"The two deceased brothers had bullet entries on their bodies from behind. There is expert opinion that the shots that hit (sic) them were fired from more than six or ten feet away. All these go to support the eye-witness accounts of PW12, PW14 and PW15. I am satisfied and I find as a fact that the accused deliberately fired the rifle Exhibit 7 containing live bullets at Saka Dawodu and Sule Dawodu and unlawfully killed the two of them. Even if he did not intend to kill them, it is clear that he intended to cause them grievous harm, and as death resulted from the harm, he is guilty of murder- See Section 316(2) of the Criminal Code. It is well established that a man intends the probable and natural consequences of his own act - See R. ". *Maye Nungu* 14WACA 379.

I am satisfied that the prosecution has proved its case as required

by Section 137(1) of the Evidence Act, that is, beyond all reasonable doubts.”

The court below considered the defence of accident raised by the appellant and concluded that it was rightly rejected by the learned trial judge.

It is now contended in this court that the trial judge did not

B “thoroughly and dispassionately consider the defence of accident put up by the appellant.” It is argued thus:

“From the evidence before the trial Judge, it was clear:

1. that the appellant had come back from the scene of the incident to Adeniji Adele Police Station without his police shirt;

C 2. that the appellant had sustained injuries in form of burns on his neck;

3. that the appellant had reported that it was the mob action that caused him the injuries arising from his rifle which exploded or accidentally discharged. The appellant had also attributed the loss of his police

D shirt to the mob action;

4. that the medical doctor who treated the appellant also saw these injuries.”

It is submitted that the trial judge did not give any consideration to the evidence of the appellant which might support the fact that there

E had been a struggle at the scene.

The respondent has argued strenuously to the contrary. It is submitted that the trial judge considered the totality of the evidence before the court and rightly, in respondent’s view, rejected the appellant’s defence.

I have considered the submissions made by both sides. With
F profound respect to the learned Senior Advocate for the appellant, I do not share his view that the appellant’s defence of accident was not considered or adequately considered by the two courts below. All witnesses that testified on the issue agreed that where there was accidental discharge of a gun such as Exhibit 7, all the bullets would be discharged in
G very rapid succession and within second. Indeed PW3, the ballisticsian did say that a gun of the type of Exhibit 7, that is SLR Rifle, has a capacity for 30 rounds of ammunition and that the 30 rounds will be exhausted in 10 seconds if the Rifle is put on “burst shots operations”. It is also the evidence of this witness, which the learned trial Judge ac-
H cepted, that it is not easy for the safety catch to be released even if persons are struggling for the Rifle. The appellant, in his evidence, stated that he “cocked his gun and put it at safety.” He went on to say:

“If I did not put it at safety it can explode if it hits the ground or if there is a struggle for it.”

He admitted - and on this he corroborated the evidence of the ballistics (PW3) - that

"If the gun is cocked and put at safety, it cannot shoot. If it is not put at safety and then it will shoot at the slightest bang of the gun or a struggle for it." (italics are mine)

He did not deny that it was the firing of his gun that killed the deceased B brothers. He talked of a struggle by the mob for possession of the gun. The overwhelming evidence accepted by the learned trial Judge debunked this tale. He said he cocked his gun and put it at safety. How then did it come to discharge accidentally? PW6, Cpl. Ogunmola said there was an interval of about two minutes between the first shot and the other two C shots that he heard. If this evidence was true (and the trial judge accepted the evidence of this witness) the story of accidental discharge would be untrue for the 5 bullets in the magazine carried by the appellant would all have been discharged in well under 5 seconds.

The appellant further testified that the rifle was on his shoulder D with the muzzle pointing upwards but that during the alleged struggle the muzzle of the gun was facing him (the appellant) because he had taken it from his shoulder. And yet the accidental discharge did not hit him but the deceased brothers! And at the back too!

Again, the appellant said in evidence:

"As the struggle was going on, the rifle exploded and part of the bullets hit the left side of my neck and injured me. The sound of the rifle exploding blocked my left ear."

The evidence of his witness, Dr. Akpowowo who treated him, debunked this piece of evidence. Dr. Akpowowo said:

"I found no injury in the accused's ear. There was no fluid collection in the burns which I saw on the accused's neck. It is possible that the pin-pointed burns could have been caused by accused. This cannot be ruled out. It can also be matches burns (sic) or cigarette burns."

I have examined people shot at short range. The pin-pointed G burns cannot be tattoo marks." (Italics are mine)

The learned trial judge, after evaluating all the evidence before him had no hesitation in rejecting the evidence of the appellant and in finding that he (the appellant) deliberately shot at the deceased brothers. This finding is supported by the overwhelming credible evidence before H him. The court below was in total agreement with this finding. And it is trite that where there is sufficient evidence supporting concurrent findings of fact by the lower courts, such findings should not be disturbed by this court unless there is a substantial error apparent on the record of

proceedings - See: Njoku v. Eme (1973) 5 SC.293, Chinwendu v. Mbamali (1980) 3-4 SC.31 ;Ibodo v. Enarofia (1980) 5-7 SC.42; Sobakin v. The State (1981) 5 SC.75; Igwe v. The State (1982) 9 SC. 174. I can find no substantial error on the record of proceedings in this appeal to justify my disturbing the concurrent findings of the two courts below. The learned
B trial Judge saw and heard the appellant and all the other witnesses, watched their demean our in the witness-box, visited the locus in quo, evaluated the evidence before him in a manner that cannot be impugned and made certain findings of fact eminently supported by the credible evidence before him. The Court of Appeal affirmed those findings. It will be wrong,
C in my respectful view, for this court that has not the benefit of such trial atmosphere but only the cold sullen print of the records before it, to now decide to set aside those findings. I, therefore, answer Question 2 equally in the affirmative.

For the reasons I have given above I have no hesitation whatsoever in dismissing this appeal as totally lacking in merit. The judgments
D of the two courts below are affirmed.

OGWUEGBU JSC

The lead judgment just delivered by my learned brother Belgore, J.S.C., was made available to me in draft and I agree with his reasoning and conclusion. From the totality of the evidence adduced at the trial, there is a lingering doubt in the prosecution's case and the accused ought to have been given the benefit of it. It is a cardinal principle of the criminal law that in
F all cases, the burden of proving that any person has been guilty of a crime or wrongful act subject to certain exceptions not applicable in the instant case is on the prosecution. See R. v. Lawrence (1932) 11 NLR 6.

The appellant's case was not adequately considered by the courts below. He testified that when they arrived at the scene, the place was
G crowded and noisy. A Traffic Warden was being held by a man. When the man saw them, he released the Traffic Warden who fell on the ground. He arrested the man and the crowd started to shout:

"Who carry Mobile Policemen come here? Is that a matter for mobile policemen? These thieves have come here again?"

H *He was hit at the neck with a stick. As he turned round, other people rushed and started beating him and his beret was removed. Continuing his evidence, he said:*

"Others gripped me and some tried to remove my rifle from my shoulder, the crowd got hold of it and I started to struggle with them for

the rifle. The people who were struggling with me were many. As the struggle was going on, the rifle exploded and part of the bullets hit the left side of my neck and injured me When the rifle exploded, every body ran away It is not difficult to remove the safety catch when the rifle is cocked. If two or three persons are struggling for possession of the gun, the position of the safety catch can be shifted to rapid firing and the rifle will explode rapidly..... I cocked my gun and put it at safety. If I did not put it at safety it can explode if it hits the ground or if there is a struggle for it."

D.W.3, an Assistant Superintendent of Police and the accused's superior officer testified in part:

"K.2 Rifle has a magazine. When the Magazine is in place and the Rifle is cocked, it can be fired. But if whoever is handling the gun is not ready to fire it, the safety catch can be put in position so that the Rifle cannot fire. Any slight touch can release the safety catch."

P.W.3 (Anthony Aneasaba Okushi) also an Assistant Superintendent of Police testified under cross examination that:

"It is not easy for safety catch to be released even if persons are struggling for the Rifle."

As to what happened when the accused, PW.6, PW.7 and P.W.10 arrives at the scene in relation to the shooting, P.W. 6 (Police Corporal Ogunmola) testified that they met a large crowd at the scene. He asked for the owner of a Volvo car parked in the middle of the road and when he came before him, witness heard sound of gunshot behind him as he was about to talk to the owner. He continued:

"I turned back to see what was happening. I saw the accused person in the middle of some people waiving his rifle from side to side. I saw that I could not handle the situation, I quickly left the scene. On my way to the police station in a taxi. I heard the sound of two gunshots. There was an interval of two minutes between the first shot and the other two shots that I heard. There was no fighting when I got to the scene I do not know whether the accused was being attacked or not when he fired the shots." (the italics are for emphasis only).

PW.7. (Sebastine Duru) a traffic warden testified that when they arrived at the scene, the crowd scattered and people started running away. He saw Omogo Ogali lying on the ground. He picked him up and handed him to Police Corporal Ogunmola (P.W. 6). While he was doing this, he heard a gun-shot. He did not know where it came from.

P.W.10 (Police Constable Onabrakpeya) went to the scene with the accused, PW.6 and PW.7. He testified that when they arrived at the

scene he saw that a Volvo car was surrounded by a large crowd. that there was fighting and that they were not attacked. He could not say if the accused was attacked.

DW.2 (Dr. Akpowowo) examined and treated the accused about three days after the incident. He observed bruises on the left hand side of his neck. He stated that the accused complained of pain in the right ear and he saw multiple burns around the bruises on the left side of the neck. He examined and treated the accused.

PW.7 and PW.10 confirmed the evidence of the accused that there was a large crowd at the scene and that there was a fight. PW.6 testified that there was a crowd but no fight took place. PW.6, PW.7 and PW.10 could not say whether the accused was attacked or not because they did not see him before they heard the gunshots.

P.W.6 testified that he saw the accused wave his rifle from side to side. The reasonable inference would have been that the accused was attacked by the hostile crowd who was struggling to take his rifle from him when the safety catch shifted and it exploded.

The evidence of the accused was substantially the same as that of DW.3. (Assistant Superintendent of Police) on the behaviour of that make of rifle when cocked and left in safety catch position. PW.3 in his evidence took a contrary view. The accused had bruises resulting from the beating and the struggle for the rifle. The bruises were confirmed by DW.2 (Dr. Akpowowo).

From the above excerpts and the totality of the evidence, enough doubt was created in the prosecution's case which should have been resolved in favour of the accused. See *Abodundu & Ors. v. The Queen* (1959) SCNLR 162; *Onubogu v. The State* (1974) 9 SC 1 and *Duru v. Nwosu* (1989) 4 NWLR (Pt.113) 24. The learned trial judge did not give a dispassionate consideration to the defence case and the onus placed on the prosecution in a capital offence is a very heavy one which it failed to discharge. See *Okagbue v. Commissioner of Police* (1965) NMLR 232.

There was erroneous appraisal of the facts by the learned trial judge and the fact that such finding is affirmed by the Court of Appeal does not necessarily mean that this court will not interfere with it.

The appeal is accordingly allowed. The conviction and sentence of murder passed by the trial court and affirmed by the court below are set aside and in their place is substituted, a verdict of not guilty. He is discharged and acquitted.

Appeal allowed.