

SUPREME COURT OF NIGERIA

24TH APRIL, 1998. SC. 131/97

**CORAM:- S. M. A. BELGORE, A. B. WALI, I. L. KUTIGI,
S. U. ONU, A. I. IGUH, JJSC.**

CLEMENT OGUONZEE APPELLANT
V.
THE STATE RESPONDENT

***APPEALS** - Concurrent findings of fact - Where supported by evidence - And are not perverse nor arrived at as a result of wrong application of any principle of law - Will not be interfered with.*

***APPEALS** - Evidence - Conjecture - The Appellate Court will not make a conjecture on a point - Where there is no evidence.*

***EVIDENCE** - Corroboration - Murder - Where the medical evidence of P.W.2 corroborated the evidence of P.W.4 - A case of deliberate shooting of the deceased has been established.*

***EVIDENCE** - Expert witness - Issue of competence - Will come into focus when challenged during cross-examination.*

***EVIDENCE** - Corroboration - Murder - The evidence of an eye witness requires no corroboration in Law - Thus the opinion evidence of P.W. 2 on the same point is a surplusage.*

***EVIDENCE** - Witnesses - Number of - A court can convict upon the evidence of one witness - In a case where no corroboration is prescribed and the witness is not an accomplice - If the court is satisfied with the cogency and quality of the evidence given.*

***EVIDENCE** - Witnesses - S. 149 (d) of the Evidence Act - Deals with the failure to call evidence and not the failure to call a particular witness - Thus it has no application to the facts of the present case.*

EVIDENCE - *Inconsistency* - Where there is no inconsistency between the evidence of P.W. 4 and his statement Exhibit B. - Submission that the witness was unreliable is misconceived.

EVIDENCE - *Witnesses - Tainted witness* - Where a witness does not fall within that classification - The mere fact that he was the brother of the deceased - Would not render his evidence unacceptable without corroboration - When he was clearly an eye witness.

EVIDENCE - *Evaluation and ascription of probative value* - Are the primary functions of trial court - Appellate court should not interfere with findings supported by evidence.

WORDS AND PHRASES - *"Tainted witness"* - How properly classified.

FACTS

The appellant was charged with the offence of murder contrary to s. 319 (1) of the Criminal Code. He pleaded not guilty to the charge. At the trial the prosecution called four witnesses while the appellant testified in his own defence but called no witnesses. On 18/3/94 the deceased one Remigius Mekoba and his brother, Vincent Mekoba P.W.4 were travelling from Lagos to Imo State in a Volvo car driven by Remigius. At a certain point between Ugbowo and Oluku junction along Benin/Lagos Express Road, some policemen including the appellant stopped them at a check point. The deceased and P.W.4 didn't see the policemen in time hence they drove past the check point. They had to reverse the car to the Police check point. One of the Policemen asked them why they failed to stop when stopped but the deceased replied that they had eventually stopped. At that stage, the appellant, an Asst. Superintendent of Police who was in charge of that checking point opened the front door of the car, drew the deceased out of the car and slapped him. As the deceased laid his head on the bonnet of his car in pains, the appellant moved backwards to a distance, pointed his gun at the deceased and shot him on the

left part of his chest. The deceased then shouted to his brother saying "Vincent, I am dying, I am dying, I am dying." As P.W 4 rushed to the aid of his brother, they both fell down. When P.W 4 got up the appellant pointed his gun to him but he was stopped by the shout of another policeman who said "No, no no." After the shooting, P. W. 4 and some Policemen carried the deceased in his Volvo Car to the University of Benin Teaching Hospital where a doctor confirmed him dead. This is the substance of the charge as presented by the prosecution. P.W. 2 a Medical Doctor attached to the Department of Pathology in the University of Benin Teaching Hospital who performed the postmortem examination on the body of the deceased testified as an expert witness. The case of the appellant was that during a scuffle with him by the deceased, his pistol exploded and the bullet hit the deceased accidentally.

At the conclusion of trial, the learned trial judge after a careful consideration of the evidence found the appellant guilty as charged and accordingly sentenced him to death. The appellant being dissatisfied appealed to the Court of Appeal, Benin-City Division which court dismissed the appeal and confirmed the conviction and sentence. The appellant has further appealed to the Supreme Court raising three issues.

ISSUES FOR DETERMINATION

"ISSUE 1

Whether the holding by the Learned Justices of the Appeal Court that "it is my candid view that the Learned Trial Judge's findings in this case can just not be faulted, and I do not intend to interfere with them" was perverse having regard to the evidence before the trial Court.

ISSUE II

Whether the Learned trial Judge and the Learned Justices of the court of Appeal were right in holding that the evidence of PW2 and PW4 corroborated each other.

ISSUE III

Whether the Learned Justices of the Court of appeal were right by holding that a case of accidental discharge was not made out by the Appellant."

HELD (Dismissing the appeal per lead judgment of **IGUH.JSC, BELGORE**

and WALI JJSC dissenting)

Evidence - Evaluation and ascription of probative value

1. It is a basic principle of law that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of a court of trial which saw, heard and assessed the witnesses while they testified before it. The trial court has the exclusive jurisdiction on matters of appraising evidence and ascribing probative value to the evidence of witnesses whom it had the opportunity of seeing, hearing and observing while in the witness box. Where a court of trial unquestionably evaluates the evidence and justifiably appraises the facts and arrives at a conclusion on the credible evidence, the appellate court will not interfere with such findings of fact nor is it the business of such appellate court to substitute its own views of the facts for those of the trial court. What the appellate court ought to do is to scrutinize the record carefully and find out whether there is evidence on which the trial court could have acted. Once there is such evidence on record from which the trial court arrived at its findings of fact, the appellate court cannot interfere with such findings. See Mafutau Bakare V. The State (1987) 1 N.W.L.R. (Part 52) 579, (p. 1049 E)

Concurrent findings of fact

2. I have closely examined the concurrent findings of fact by both the trial court as confirmed by the Court of Appeal in this case and it is clear to me that they are not only overwhelmingly supported by the evidence, they are neither perverse nor arrived at as a result of any wrong approach to the evidence or as a result of wrong application of any principle of substantive law or procedure. No special circumstance has been established to warrant the reversal of any of them by this court. In the result, I find myself unable to interfere with them. (p. 1055 F)

Evidence - Corroboration

3. It is crystal clear that the medical evidence of P.W. 2 amply corroborated the evidence of P.W. 4 on, at least, two vital areas. These are in respect of the cause of death and the approximate range from which the

gun was fired. In the first place, both witnesses were ad idem on the cause of the deceased's death. This, on their evidence, was a result of bullet injuries fired from a gun which hit and devastated the deceased's left chest and from which injuries he died moments later. In the second place it was the evidence of P.W. 4 that the appellant, after slapping the deceased, paced backwards to a distance of "about 7 feet", pointed his pistol at the deceased and shot him through the left chest. I find it of great importance to re-emphasize that this vital piece of evidence of P.W. 2 was specifically accepted and believed by the learned trial Judge who had the singular opportunity of watching and observing the witness as he testified before the court. The same finding of the trial court was affirmed by the Court of Appeal thus raising its status to that of a concurrent finding of fact by both the trial court and the Court of Appeal. On this finding alone, which has not been faulted in any way, it cannot be contended seriously that a case of deliberate and intentional shooting of the deceased by the appellant was not established by the prosecution or that the appellant made out a case of accidental discharge on the accepted evidence before the court. (p. 1056 C)

Expert witness

4. It ought to be stressed that at no time during the cross-examination of P.W. 2 was it suggested to him that he was not competent to testify on the issue. If he was so questioned, the issue of his knowledge on the subject would have come into focus. Without doubt, P.W. 2 testified before the court as an expert witness. He is a medical doctor attached to the Department of Pathology of the University of Benin Teaching Hospital and it is a matter of common knowledge that to qualify as a medical doctor, one must undergo a study in forensic medicine, the extent and scope of which the witness would have clarified were his competence challenged while he testified in the witness box. (p. 1058 B)

Evidence that requires no corroboration

5. It must however be stressed that the evidence of P.W. 4 on the issue of the range from which the fatal shot was fired clearly required no cor-

roboration in law. ²The result is that the evidence of P.W. 4, an eye witness to the incident, if believed, as indeed it was, firmly resolved the issue. In such circumstance, the opinion evidence of P.W. 2 on the same point, even if it were to be inadmissible, and I do not so hold, became unnecessary and a surplusage. It seems to me plain on the evidence of P.W. 4 which both courts below accepted as true that it was a case of premeditated and intentional shooting of the deceased by the appellant that was established by the prosecution and that a case of accidental discharge was not made out by the appellant. (p. 1059 B)

Number of witnesses.

6. It seems to me, therefore, well settled that there is no rule of law or practice which should make a court hesitate in convicting upon the evidence of one witness, in a case where no corroboration is prescribed by law and there is no suggestion that the witness is an accomplice, if the court is satisfied with the cogency and quality of the evidence given. See Anthony Igbo V. The State, supra and Christopher Arehia and Another V. The State (1982) N.S.C.C. 85 at 91 In the present case, the learned trial Judge thoroughly appraised and evaluated the evidence of all the witnesses who testified before him together with that of the appellant. At the end of this exercise, after he saw, heard and assessed them, he came to the conclusion that P.W. 4 was a witness of truth and believed him. This ought to dispose of the complaint on the failure of the prosecution to call further witnesses to repeat themselves. The learned trial Judge, however, further believed the testimony of P.W. 2 which in various areas corroborated the evidence of P.W. 4. No corroboration is prescribed by law in respect of the offence of murder for which the appellant stood trial. I think the prosecution, at the close of the evidence of P.W. 4 had the discretion and was perfectly entitled to rest its case on his testimony without calling further corroborative evidence. (p. 1061 G/ 1062 C)

² See other Supreme Court authorities on the issue of corroboration with regard to murder cases: Nwamba v. The State (1995) 3 KLR 619, Babuga v. The State (1996) 7 KLR (PT 43) 1437.

Witnesses - S. 149 (d) of the Evidence Act

7. In the present case, the issues of fact that the policemen in issue would have given evidence of had in fact been testified upon by P. W 4 and no question of withholding evidence on the part of the prosecution therefore arose. The prosecution called P.W. 4 as its witness and the witness testified before the court and narrated all that happened at the scene of crime. As I have already indicated, Section 149 (d) of the Evidence Act deals with the failure to call evidence and not the failure to call a particular witness. With respect to learned counsel, I find it difficult to accept that Section 149 (d) of the Evidence Act has any application to the facts of the present case. (p. 1063 H) C

Evidence - Inconsistency

8. There is clearly nothing, either in the evidence of P.W. 4 before the court or in his statement, Exhibit B which is inconsistent with each other. The evidence of P.W. 4 was so clear and straight forward that no conflict conceivably arose from his account of the incident whether from Exhibit B or from his viva voce evidence in court. This evidence of P.W. 4 was believed by the trial court and affirmed by the court below and I have no reason to interfere with these findings. I find no basis in counsel's submission that P. W. 4 was unreliable and hereby dismiss the same as entirely misconceived and totally unjustifiable. (p. 1064 E) D F

"Tainted witness" - Proper classification

9. P. W. 4, without doubt, was the brother of the deceased but that fact did not by itself connote that he was not competent to testify for the prosecution or that he was a tainted witness. A tainted witness has been classified as one who is either an accomplice or by the evidence he gives, whether as a witness for the prosecution or defence, may and could be regarded as having some purpose of his own to serve. See *Ishola V. The State* (1978) N.S.C.C. 499 at 509. (p. 1065 D) G H

Evidence - Tainted witness

10. P.W. 4 is neither an accomplice to the offence charged nor was it shown that he had any purpose of his own to serve or that he was in any way biased in his testimony before the court and I am unable to accept that the mere fact that he was the brother of the deceased without more rendered his evidence unacceptable without corroboration or weakened the same or rendered him incompetent as a witness in a case where he was clearly an eye witness. I think the credible evidence of P.W.4 was rightly accepted by both courts below in the present case and I can find no reason to disturb the same. (p. 1065 F)

Evidence - Conjecture

11. Learned counsel for the appellant finally submitted that when the deceased held his jaw in pain with his head on the bonnet, he must have been "backing his assailant", He therefore contended that it was not possible for him to have been shot through the upper left chest as testified to by P.W.2 and P.W. 4. I need only observe that learned counsel's conclusion was based entirely on speculation and conjecture as there was no evidence as to whether the deceased was facing or backing the appellant or as to the position of the appellant, namely whether he was standing in front or by the side of or behind the deceased the moment the deceased was shot. There was also no evidence as to the angle the fatal shot was fired from, having regard to the position of the appellant qua the deceased. I therefore find it difficult in the absence of evidence to conjecture whether the deceased backed, faced, half-backed or half-faced the appellant at the time the latter mowed him down with his pistol. It suffices to state that on the evidence, which both courts below accepted as true, the appellant shot the deceased through the upper left chest and the deceased died as a result of the injuries he sustained in this attack.(p.1066C)

H NOTABLE POINTS OF INTEREST

IGUHJSC

1. *Expert opinion regarding the range from which a gun shot was fired*
A close study of the evidence of P.W. 2 reveals that the expert opinion he

gave on the issue of distance or range from where the shot was fired was based entirely on deductions from the nature and extent of the injuries he found on the deceased in the course of his postmortem examination. In my view, a Medical Doctor does not need to be an eye witness or a ballistics expert to be able to give an expert opinion on the issue of the range or distance from which a particular missile, whether gun shot or otherwise, was launched, having regard to the resultant injuries to the victim, particularly where, as in the present case, he gave factual basis for the opinion he arrived at. Indeed it does not seem to me that a ballistics expert would be of any use on the particular facts of the present case. This is because a ballistics expert is apparently not trained in human anatomy, pathology, forensic medicine or to relate the nature, extent or quantum of injuries to the human body to a particular weapon or weapons likely to be responsible for such injuries. He may also not be in a position to give an expert evidence as to the amount of force used in the commission of an assault and whether or not the resultant injuries could be self inflicted or otherwise. These, in my opinion, are matters which concern Medical Doctors and not ballistics experts. (p. 1058 E)

BELGORE JSC (Dissenting)

2. Duty to call all material witnesses

The prosecution has a duty to call all material witnesses for its case, whether those witness support or are against its stand, because as an officer of the Court, a duty is owed to lead the Court to arrive at a just conclusion; this is more so in a criminal case where the onus probandi for the prosecution is to prove beyond reasonable doubt. (Opeyemi VS. The State (1985) 2 NWLR (Part 5) 101, 102, 103. The P.W.4, in giving new twist to his previous statement to the police when he testified on oath had perhaps reason to make sure the death of his brother is paid for by somebody; this possibility under the circumstance of this case, is always there and should not be treated lightly. (p. 1076 C)

3. Contradictions in evidence

In the instant case the evidence of P.W.4 is not cogent enough, it con-

B tains unexplained contradictions and it is the only eye-witness account
tendered before the trial court whereas other eye witnesses were there.
The prosecution chose not to call any other eye witness; the learned trial
judge sought for corroboration and the only evidence he found in that
regard is the opinion evidence of a medical practitioner on ballistics who
was never at the scene. Criminal responsibility is a serious thing and it
must not be treated with levity when it comes to burden of proof. Once
the Judge at the trial thought corroboration of the evidence of P.W.4 of
how the bullet was fired was necessary, it stands to reason that only an
C eye-witness account was required. Prosecution decided not to bring any
other eye witness leaving the Court to rely only on the evidence of P.W.4
which I earlier explained; whereas there was a glut of eye-witnesses
whose evidence were necessary. The very fact that the trial judge sought
D refuge in the evidence of P.W.2, the medical practitioner, to resolve P.W.4's
evidence on how the pistol was fired, manifest doubt in his mind.
(p. 1077 E)

E **WALI JSC (Dissenting)**

4. Tainted witness - Description

A tainted witness has been described in several decided cases as a wit-
ness who has his own purpose to serve in his evidence. The term tainted
witness is not part of the Evidence Act, nor has its description or inter-
F pretation been given in any statutory provision. It has however been
recognized as accepted by practice. See R. V. Omisade & Ors. {1964} 1
All N.L.R 133 where Mbanefo Ag. JSC {and Chief Justice of Eastern
Nigeria} in his dissenting view on the issue stated thus: a tainted witness,
G "even if he could not be regarded as an accomplice in the strict sense
..... he is one on whose evidence it would be unsafe to act without
corroboration." The conduct by the learned trial judge in looking for cor-
roboration of the evidence of P.W.4 which he said he found in the evi-
H dence of P.W.2 have left me in no doubt to conclude that he regarded
P.W.4 as a tainted witness and on whose evidence alone he found he
could not or ought not rely to convict the appellant. So the issue that
P.W.4. is a tainted witness was settled in the affirmative by the learned

trial judge himself and requires no further comment by me. (p. 1086 B)

5. *Biased witness - Need for corroboration*

For a witness to be perfectly credible, he must not be in the slightest degree partial or biased in his evidence to one party or the other. Although a brother is a competent witness for his other brother, the interest arising from the relationship detracts proportionately from the credit of such a witness. And when Exhibit B is read along with Viva Voce evidence of P.W.4, partiality or bias towards his deceased's brother is easily discernible. Such evidence needs to be corroborated by rule of practice. See Adekunle v. The State {1989} All NLR 754 and Doka & Ors. v. The State {1967} All NLR 355. (p. 1089 C)

6. *Defence of accidental discharge*

Where a defence of accidental discharge is raised by the defence, the prosecution has a duty to disprove it. See Sholuade v. The Republic {1966} All NLR 134. The test under s. 24 of the criminal code is whether the prohibited act was or was not done accidentally or independently of the exercise of the will of the accused person. See Wedgee Shire Council v. Bonney {1907} 4 CLR 977 in which similar provision with S. 24 CC was interpreted. Also in Sweet v. Parsley {1970} AC 132; {1969} 1 All ER 347; {1969} Cr. App. R. 221 at 225 226 Lord Reed made the following exposition on the law-

"To make a man liable to imprisonment for an offence which he does not know he is committing and is unable to prevent is repugnant to the ordinary man's conception of justice and brings the law to contempt ."

It was held by this court in Iromantu .v. The State {1964} 1 All NLR 311 that-

" Where a person discharges a firearm unintentionally and without attendant Criminal malice or negligence he will be exempt from criminal responsibility both for , the firing and for its consequences." (p.1090 B)

KUTIGIJSC

7. Prosecution was not bound to call non material witness

It must also be stated that the fact that PW.4 saw the deceased shot with a gun by the appellant and the fact that the deceased was pronounced
 B dead on arriving at the hospital, all go to show that there was no need to have called PW.2, the medical doctor, to give any evidence of the cause of death of the deceased. The court was in a position to have inferred the cause of death from the facts and circumstances of the case without any medical evidence (see KUMO v. THE STATE (1968) NMLR 227; LORI C v. THE STATE (1980) 8-11 SC. 81; KATO DAN ADAMU v. POLICE (1956) 1 FSC. 25) Under the circumstances also, I fail to see what effect or relevance if any, the evidence of a ballisticsian or other policemen allegedly present at the scene could have had on the case particularly when
 D the shooting itself was not denied, the contention being that it was an accidental discharge only. My view therefore is that the prosecution was not bound to have called a ballisticsian or other policemen who were not in any way material witnesses for the prosecution, (see NWAMBE v. THE E STATE (1995) 3 NWLR (Part 384) 385; OKONOFUA v. THE STATE (1981) 6-7 SC. 1. (p. 1095 D)

ONUJSC

8. Attack with lethal weapon causing death

F As the appellant in his extra-judicial statement (Exhibit A) stated:
"The next thing he did was to grip my pistol. As he was struggling (sic) the pistol with me, the pistol exploded and he was hit."
 and furthermore, that:
 G *"If there is a struggle for possession or control of a pistol, even though when nobody touched the trigger, the pistol may fire."*
 no argument, plausible or tendentious can be proffered in favour of calling a ballistics expert to testify on a matter which I consider a non-issue.
 H The death of a human being (i.e. the deceased) had been caused through the direct act of the appellant by the use of his pistol i.e that the prosecution which had the onus to establish the same had done so. See R. v. Oledima 6 WACA 202 and Onyenankeya v. R. (1964) 1 ALL NLR 15.

Where a person, as in the instant case, attacked the deceased with a lethal weapon (here a pistol) and the victim dies on the spot, it is hardly necessary to prove the cause of death by medical evidence (like in the instant case calling P.W.2). See Bakari v. The State (1965) NMLR (Part 50) 464 at 469. (p. 1103 E)

B

REPRESENTATION

Chief E. L. Akpofure for the appellant

Mrs. D. Ojo, D.P.P., Edo State, for the Respondent

C

CASES REFERRED TO

Bakare v. The State (1987) 1 N.W.L.R. (Part 52) 579,

Ogundiyan v. The State (1991) 3 N.W.L.R. (Part 181) 519

Akpagbue v. Ogu (1976) 6 SC 63

Odofin v. Ayoola (1984) II S. C. 72

Amadi v. Nwosu (1992) 5 N.W.L.R. (Part 241) 273 at 280

Enang v. Adu (1981) 11- 12 SC 25 at 42

Nwadike v. Ibekwe (1987) 4 N.W.L.R. (Part 67) 718

Iwego v. Ezeugo (1992) 6 N.W.L.R. (Part 249) 561

Sobakin v. The State (1981) 5 S.C. 75

Ige v. Olunloya (1984) 1 S.C.N.L.R. 158

Eholor v. Osayande (1992) 5 N.W.L.R. (Part 249) at 548.

Emiator v. The State (1975) 9 - 11 S.C. 107 at 112

Igbo v. The State (1975) 9 11 S. C. 129 at 134

Alonge v. Inspector-General Police (1959) 4 F. S.C. 203

Arehia v. The State (1982) N.S.C.C. 85 at 91

R. v. Oledima 6 WACA 202

Onyenankeya v. R. (1964) 1 ALL NLR 15

D

E

F

G

STATUTES REFERRED TO

Criminal Code Cap. 48 vol 11. Laws of Bendel State of Nigeria, 1976 s. H 319(1)

Evidence Act ss. 57, 149 (d) 177, 178 and 179 (1) - (5)

LEAD JUDGMENT BY IGUH JSC

The appellant, Clement Oguonzee, an Assistant Superintendent of Police, was arraigned before the High Court of Justice, Edo State, holden at Benin City, charged with the offence of murder punishable under Section 319(1) of the Criminal Code, Cap. 48, Vol. 11, Laws of Bendel State of Nigeria, 1976 applicable in Edo State. The particulars of the offence charged are as follows-

"Clement Oguonzee (m) on or about the 18th August, 1994 at Oluku Junction, along Benin Lagos Expressway within the Benin Judicial Division shot and murdered one Remigious Mekoba."

The accused pleaded not guilty to the charge and the prosecution called four witnesses at the trial. The accused also testified in his own defence but called no witnesses.

The substance of the charge as presented by the prosecution was that on the 18th day of August, 1994, the deceased one Remigious Mekoba, and P.W. 4, his junior brother, were travelling from Lagos to Awomama in Imo State in a Volvo car driven by the deceased. According to P.W.4, the principal witness for the prosecution, at a road check-point between Ugbowo and Oluku, near Benin City, along the Benin - Lagos road, a team of policemen signalled to them to stop. This was at about 9.a.m in the morning. As they were on speed, the deceased did not see the police men in time. The deceased, after he had slightly driven past the police men, stopped his car, engaged his reverse gear and drove backwards to the check-point. In answer to question by one of the police men as to why he failed to stop, the deceased replied that he had eventually stopped.

At that state, the appellant who was heading the team of policemen walked to the car, flung the driver's door open, dragged the deceased out of the car and slapped him. When the deceased received the slap, he held his jaw and laid his head in pains on the bonnet of their car. The appellant, next asked the deceased a question which P.W.4 did not hear as P.W. 4 was still inside the car. As the deceased was about to answer the question, the appellant drew backwards to a distance of about seven feet, pointed his gun at the deceased and shot him on the left side of his chest. The deceased immediately held his chest with both hands and

shouted saying "Vincent, I am dying, I am dying, I am dying." At that stage, P.W. 4 rushed out of the car to assist his injured brother but they both fell on the ground. When P.W.4 got up, the appellant faced him by pointing the same gun at him but one of the policemen in the team stopped him by shouting "No, no no" where-upon the appellant abandoned his aim. B

P.W. 4 and about four policemen at the scene conveyed the deceased into a waiting Police Pick-up Van but after about three minutes, transferred him into the Volvo car. One of the Policemen in company of some of his mates drove the deceased with P.W. 4 to the University Teaching Hospital, Benin City where the deceased, on arrival, was certified dead. It was at this stage that the policemen melted away and P.W. 4 had to travel back to Lagos to report the incident. C

The evidence of P.W.2, the Medical Doctor attached to the Department of Pathology in the University of Benin Teaching Hospital who performed the postmortem examination on the body of the deceased deserves attention. According to the witness, there was a penetrating wound measuring 0.7 cm on the nipple of the left chest. There was a corresponding exit on the left upper back of the chest about 6 cm from the mid line, measuring 1 cm in diameter., He gave detailed evidence of various internal injuries sustained by the deceased and came to the conclusion that he died of cardiac tamponade with corresponding cardio respiratory failure from a penetrating high velocity missile injury affecting the heart, the lungs and bones. These were consistent with gun shot injury. F
He went on-

"No other missile other than a gun could have caused the wounds I found on the corpse ... The gun would have been fired within the range of 7 and 10 feet from the deceased ..." G

Earlier on in his evidence, the witness had stressed thus-

"The gun would have been shot between 7 to 10 feet from the person of the deceased and the injury could not have been self inflicted. The holes and wounds were caused by one and the same shot even though the wounds differed in diameter due to resisting forces of penetration of the bullet. There was no close encounter between the deceased and the gun

man because there was no other external marks of injury and there no vital reactions around the entrance wound of the bullet to suggest any struggle. The heart is on the left side of the chest. The shot wounded the heart and the lungs."

B The case for the appellant was that he and his men were on anti-crime patrol when he received an information that robbers were operating along the Benin - Lagos Road. They proceeded to the scene of crime where he ordered his men to stop and search all private cars. Presently, a
C volvo car drove in from Lagos direction. The deceased was its driver. He drove past the check point but eventually stopped. A policeman then went to him and demanded for the particulars of his vehicle. The appellant stated that there was argument between the deceased and the policeman as a result of which he personally went to the deceased and asked
D for his ignition key and particulars. The deceased refused and the appellant insisted on taking the ignition key from him. The deceased at this stage gripped the appellant's pistol. The appellant claimed that he struggled to recover possession of his pistol from the deceased. It was in this
E exercise that the pistol exploded and the bullet hit the deceased accidentally. He claimed that the incident was one of accidental discharge.

At the conclusion of hearing, the learned trial Judge, Edokpayi, J. after an exhaustive review of the evidence on the 1st day of March, 1996
F found the appellant guilty as charged and accordingly sentenced him to death. Dissatisfied with this decision of the trial court, the appellant lodged an appeal against his conviction and sentence to the Court of Appeal, Benin City Division. The Court of Appeal; in a unanimous judgement dismissed the appeal on the 11th day of July 1997 and affirmed the decision of the learned trial Judge. It is against this judgement of the court
G below that the appellant has further appealed to this court

Both the appellant and the respondent filed and exchanged their respective written briefs of argument. In the appellant's brief, the under-
H mentioned three issues were formulated for resolution, namely-

"ISSUE 1

Whether the holding by the Learned Justices of the Appeal Court that "it is my candid view that the Learned Trial Judge's findings in this

case can just not be faulted, and I do not intend to interfere with them" was perverse having regard to the evidence before the trial Court.

ISSUE II

Whether the Learned Trial Judge and the Learned Justices of the court of Appeal were right in holding that the evidence of PW2 and PW4 corroborated each other.

ISSUE III

Whether the Learned Justices of the Court of Appeal were right by holding that a case of accidental discharge was not made out by the Appellant."

The respondent, for its own, also identified three issues in its brief of argument for the determination of this court. These issues are as follows.

"ISSUES FOR DETERMINATION

1. Whether the defence of accident avails the Appellant, having regard to the evidence before the Court?

2. Whether the evidence of P.W. 2, the Medical Doctor, corroborated the evidence of P.W. 4, deceased's brother?

3. Whether P. W. 2, the Medical Doctor was competent to give expert opinion on the distance between the deceased and his assailant."

I have examined the two sets of issues formulated by the parties in their briefs of argument for the determination of this court and I find the questions identified on behalf of the appellant more consistent with the complaints raised in his grounds of appeal. Accordingly, I shall in this judgment, confine myself to the issues raised in the appellant's brief of argument.

At the hearing of the appeal before us on the 30th day of January, 1988, learned counsel for the appellant, Chief E. L Akpofure, adopted the appellant's brief of argument and proffered oral argument in elucidation of the submissions therein contained. The main contention of learned counsel on issue I is that the Court of Appeal was in error by failing to disturb the findings of fact of the learned trial Judge when these findings were perverse, having regard to the evidence before the court. He argued, in particular, that it was beyond the competence of P.W 2, the

Medical Doctor who conducted the post mortem examination on the body of the deceased, to testify that the nature of the injury he saw on the deceased's left chest did not reveal a close encounter between the deceased and the gunman. He submitted that in all probability, the deceased must have been backing his assailant at the time of the incident. It was therefore practically impossible for the deceased to have been shot through the left chest as suggested by P. W. 2, and P.W. 4. He attacked P. W. 4 as a tainted witness, being the brother of the deceased, and contended that his evidence required corroboration to ground the appellant's conviction.

On issues 2 and 3, learned counsel argued that both courts below were in error by holding that the death of the deceased was not as a result of accidental discharge of the appellant's pistol. It was finally submitted that failure to call the policemen who were with the appellant at the time of the incident was fatal to the case of the prosecution by virtue of the provision's of Section 149 (d) of the Evidence Act. He urged this court to allow this appeal, set aside the conviction and sentence of both courts below against the appellant and to enter a verdict of acquittal and discharge in favour of the appellant.

Learned counsel for the respondent, Mrs.. D. Ojo, D.P.P, Edo State in her reply similarly adopted the respondent's brief and presented oral submissions in amplification thereof. On issue I learned counsel stressed that the question of credibility of witnesses was a matter solely within the province of the trial court who saw and observed them. She submitted that it was not the duty of appellate courts to reverse the findings of fact of a trial court unless they were shown to be perverse. She maintained that none of those findings in the present case was shown to be perverse. She urged the court not to interfere with the concurrent findings of facts of both the trial court and the Court of Appeal in this case. On issues 2 and 3, learned counsel submitted that the defence of accidental discharge did not avail the appellant in view of the overwhelming evidence by the prosecution to the contrary which was accepted by both courts below. She submitted that there was no doubt whatever from the findings of fact of the learned trial Judge as affirmed by the court below that the shooting of the deceased by the appellant was willed, deliberate and in-

tentional. The appellant's defence of accidental discharge was carefully considered by both courts below and rejected on very clear evidence before the court. Learned counsel submitted that the testimony of P. W. 2 was amply corroborated by that of P. W. 4 in all material particulars, especially as to the cause of death and the approximate distance from B where the pistol was fired, having regard to the nature and extent of the injuries. She stressed that there was no duty on the prosecution to call any police witness, a ballistics expert or tender the appellants's pistol with which the offence was committed unless the prosecution were unable to establish its case without them. This was not the position in the C present case. She urged the court to dismiss this appeal.

I will now turn to issue 1. This poses the question whether the decision of the Court of Appeal to the effect that the findings of fact of the trial court in this case could not be faulted or interfered with was not D perverse, having regard to the evidence before the court. In this regard, it is, perhaps, desirable to summarise briefly the applicable principles of law that govern the assessment and credibility of the evidence of witness and making of findings of facts on such evidence. E

It is a basic principle of law that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of a court of trial which saw, heard and assessed the witnesses while they testified before it. The trial court has the exclusive F jurisdiction on matters of appraising evidence and ascribing probative value to the evidence of witnesses whom it had the opportunity of seeing, hearing and observing while in the witness box. Where a court of trial unquestionably evaluates the evidence and justifiably appraises the facts and arrives at a conclusion on the G credible evidence, the appellate court will not interfere with such findings of fact nor is it the business of such appellate court to substitute its own views of the facts for those of the trial court. What the appellate court ought to do is to scrutinize the record H carefully and find out whether there is evidence on which the trial court could have acted. Once there is such evidence on record from which the trial court arrived at its findings of fact, the appellate

court cannot interfere with such findings. See Mafutau Bakare V. The State (1987) 1 N.W.L.R. (Part 52) 579, Ogundiyan V. The State (1991) 3 N.W.L.R. (Part 181) 519, Akpagbue V. Ogu (1976) 6 SC 63, Odofin V. Ayoola (1984) II S. C. 72, Amadi V. Nwosu (1992) 5 N.W.L.R. (Part 241) 273 at 280 etc. I will now examine the findings of fact of the learned trial Judge as affirmed by the court below which findings are now under attack.

In this regard the learned trial Judge after a most careful evaluation of the evidence found as follows-

"From the evidence of the prosecution and the defence, it is established beyond reasonable doubt that Remigious Mekoba died on the 18th of August, 1994 along the Benin/Lagos express road Benin City and that he died of gunshot wounds. It is established that he did not die a natural death but that he died a violent death. It is also established that the missile which killed him came from the gun (pistol) which the Accused person took to the road on official assignment that day. The only difference between the case of the prosecution and that of the defence is that while the defence contends that gun exploded and hit the deceased accidentally as the Accused person and the deceased were struggling for the possession of the pistol, the prosecution's case is that the Accused person who had opened the front door of the deceased's car and dragged the deceased out of the car and slapped him, moved backwards from the deceased at whom he aimed with his pistol and fired and thereby intentionally killed him."

A little latter in his judgment, the learned trial Judge went on-

"From the evidence of the 2nd and 4th prosecution witnesses which I believe, I hold that gun (pistol) which the Accused person held on 18th April, 1994 did not accidentally explode or discharge. I do not believe the Accused person when he testified that the pistol exploded while the deceased and himself were struggling for the possession of the pistol. I believe the 2nd (sic) prosecution witness when he testified that the Accused person moved backwards for a distance of about seven feet before he took his aim with the pistol and fired at the deceased There is no evidence that the deceased or any one in his car on that day

was armed. Even if I was to believe that the deceased had any scuffle with the Accused, which fact and piece of evidence I do not believe, the Accused will not be entitled, either under the defence of self defence or provocation, to use a deadly weapon like the pistol in gunning down the deceased who was not shown to be armed or shown to be on the run as a criminal. B

Even if the deceased has attacked the Accused person with bear hands or has a scuffle with the accused person, which evidence of attack or scuffle I do not believe, the mode of resentment as instanced by the weapon used, did not bear reasonable proportion to the alleged provocation C
.....

From the evidence of the 4th Prosecution witness which I believe, and which evidence as to distance and cause of death is corroborated by the evidence of the 2nd prosecution witness, the shooting of the deceased was premeditated and therefore not sudden or accidental. D

The Accused person has not testified that he was in any danger of his life or that he had to shoot the deceased down to save his (Accused's) life. The defence of self defence therefore does not avail him. I have said earlier that I do not believe that the deceased had any scuffle with the Accused person. I do not believe that the deceased gripped the pistol of the accused person or that the pistol accidentally fired or accidentally exploded during any struggle for the possession or repossession of the pistol. I do not believe that the deceased attacked the accused person. F
(Underlining supplied for emphasis)

He continued-

I believe the 4th prosecution witness when he testified that when himself and his brother fell down and he got up, the Accused person faced him and pointed the pistol at him and that one of the Policemen around had to shout no, no, no, before the accused person lowered his aim and kept the pistol. The immediate subsequent behaviour of the accused person, after shooting of the deceased, in facing the 4th prosecution witness to whom he pointed the pistol as the 4th prosecution witness got up from the ground further points to the fact that the shooting of the deceased to death was intentional. There is no evidence upon which I can G
H

hold in favour of the Accused person that he was insane or mentally deluded or that he had uncontrollable impulse at the time of the killing of the deceased." (underlining supplied)

He Concluded-

B "I accept the evidence adduced by the prosecution in support of this case as true and reject the evidence of accidental discharge put up by the Accused person as untrue.

C *On the whole I come to the conclusion that the prosecution has proved its case of murder against the Accused person beyond reasonable doubt. Consequently, I find the Accused person guilty of the murder of Remigious Mekoba as charged."* (Underlining supplied for emphasis)

Before I turn to the treatment of the above findings of fact by the Court of Appeal, I think I need re-emphasize that where facts in issue, D whether in a criminal or civil proceedings are accepted or believed by the trial court and no question of misdirection arises, an appellate court, will not ordinarily interfere with such findings of fact made by a trial Judge which are supported by evidence simply because there is some other E evidence in contradiction of the finding or that if the same facts were before the appellate court, it would not have come to the same decision as the trial Judge. See Ike V. Ugboaja (1993) 6 N.W.L.R. (Part 301) 539, Odofin V. Ayoola, Supra, Ogbero Egiri V. Uperi (1974) 1 N.M.L.R. 22, Ogundulu and others (1973) N.M.L.R. 267 etc. This, as already stated, F is because findings of fact made by a trial court are matters peculiarly within its exclusive jurisdiction and they are presumed to be correct unless and until an appellant satisfactorily proves that they are wrong. Such trial courts saw the witnesses and heard them testify and unless the G findings are perverse or unsupported by credible evidence, the Court of Appeal will not interfere with them. See Adelumola V. The State (1988) 1 N.W.L.R. (Part 73) 683. An appellate court may however interfere with such findings in circumstances such as where the trial court did not H make a proper use of the opportunity of seeing and hearing the witnesses at the trial or where it drew wrong conclusions from accepted credible evidence or took an erroneous view of the evidence adduced before it or its findings of fact are perverse in the sense that they did not flow from

the evidence accepted by it. See Okpiri V. Jonah (1961) AII N.L.R. 102 at 104 - 5, Maja V. Stocco (1968) 1 AII N.L.R. 141 at 149, Woluchem V. Gudi (1981) 5 S.C. 291 at 295 - 6 and 326 - 9

Now, dealing with the evidence of the prosecution witness in the present case and the findings of the learned trial court thereon, the Court of Appeal per the leading judgement of Ige, J.C.A. with which Akpobio and Nsofor, JJ. C. A. agreed stated thus-

"The 4th P.W's evidence is that of an eye-witness and the learned trial Judge had the opportunity of watching his demeanour in the witness box and he believed him. The appellant made a heavy weather of the fact that P.W. 4 didn't include in his Statement Exhibit 'B' to the police - the question of the accused stepping backwards for 7 - 10 feet before firing the pistol at the deceased. The appellant referred to it as a contradiction in the evidence of the prosecution. I seem to agree with the view of the learned trial Judge that the issue of 7 feet distance before shooting is only an enlargement of P.W.'s previous statement to the police and not a contradiction. What is important in this case is who fired the gun that caused the wounds found on the deceased by 2nd P.W and the wounds that resulted in the death of the deceased." Underlining supplied)

Again, on the evidence of the of the said P.W. 4 and the Medical Doctor, P.W.2, the Court of Appeal after an extensive review of their testimony observed-

"These 2 witnesses gave evidence before the trial Judge. He believed their evidence The 4th P.W. was consistent, categorical and forthright in his evidence and in my view the learned trial Judge was right in accepting his testimony as true. In Exhibit 'B' he did not mince words about the action of the appellant. He said and I quote the relevant portion of his statement:

"..... As my brother was about to answer the question, one of them fired him on the chest and my brother called me two times before he fell down.... I can identify the Policeman that fired my brother. My brother did not struggle with any Policeman."

When giving his evidence in court this witness identified the appellant as the person who slapped and shot his brother with a gun in the chest.

From the day he made statement to the Police, this witness knew the person who fired the shot that killed the deceased and the circumstances of the firing. In Exhibit 'B' he was sure and very certain that the deceased did not struggle with any Policeman. In court he refuted the suggestion by the defence Counsel that the deceased engaged the Policeman in a scuffle. He denied that it was during the scuffle that the gun exploded and hit his brother.

This credible evidence coupled with the nature of injuries found on the deceased during a post mortem examination in my view has reinforced the case of the prosecution and rendered the story of the accused appellant that his gun accidentally exploded on that day as incredible and untenable. The learned trial Judge was right in rejecting this evidence of the accused/appellant that the pistol exploded while the deceased and himself were struggling for the possession of the pistol."

It went on-

"It is my candid view that the learned trial Judge's findings in this case can just not be faulted, and I do not intend to intend to interfere with them."

It Concluded

"In this case the prosecution led credible evidence that the deceased Remegious Mekoba has died. They have also satisfied the court that the death of the deceased Remigios Mekoba has resulted from the gun shot by the accused/appellant.

The learned trial Judge has considered all the defence of provocation, self defence, insanity and negligence through accident. He has rightly come to the conclusion that the prosecution has proved its case of Murder against the accused beyond all reasonable doubt

It is my candid view that the learned trial Judge considered meticulously a case of possible negligence in favour of the appellant in order to reduce the charge of Murder to manslaughter. He could not but reject the accused's defence of accidental discharge, amidst glaring evidence of intentional shooting of the deceased by the appellant. A person is taken to intend the natural and probable consequences of his acts. In this case the accused shot the deceased on 18th day of August along Benin/Lagos

Express Road and from the facts of the case the only possible inference which the court can draw and has drawn is that he intended to kill the deceased. This he did and the learned trial Judge has rightly convicted the appellant on a charge of Murder and sentenced him to death accordingly."

It is clear from the above findings of the Court of Appeal that this is a clear case of concurrent findings of fact by both the trial court and the Court of Appeal. In this regard, the law is well settled that where there are concurrent findings of fact by both the trial court and the Court of Appeal, again whether in a civil or criminal proceedings, then unless those findings are-

- (1) Found to be perverse; or
- (2) not supported by the evidence; or
- (3) reaches as a result of a wrong approach to a wrong application of principle of substantive law or procedure, this court, even if disposed to come to a different conclusion upon the printed evidence, cannot do so. See Enang V. Adu (1981) 11- 12 SC 25 at 42, Nwadike V. Ibekwe (1987) 4 N.W.L.R. (Part 67) 718, Igwego V. Ezeugo (1992) 6 N.W.L.R. (Part 249) 561 etc. Accordingly, this court will not disturb concurrent findings of fact of both the High Court and the Court of Appeal unless a substantial error apparent on the face of the record of proceedings is shown or warrant the reversal of such concurrent findings. See too Sobakin v. The State (1981) 5 S.C. 75 Ige V. Olunloyo (1984) 1 SC.N.L.R. 158. Eholor V. Osayande (1992) 5 N.W.L.R. (Part 249) at 548.

I have closely examined the concurrent findings of fact by both the trial court as confirmed by the Court of Appeal in this case and it is clear to me that they are not only overwhelmingly supported by the evidence, they are neither perverse nor arrived at as a result of any wrong approach to the evidence or as a result of wrong application of any principle of substantive law or procedure. No special circumstance has been established to warrant the reversal of any of them by this court. In the result, I find myself unable to interfere with them. Issue 1 is accordingly resolved against the appellant.

Issue 2 poses the question whether both courts below were right in holding that the evidence of P.W.2 and P.W. 4 in any way corroborated each other. This issue is closely interrelated with issue 3 which deals with whether both courts below were right by holding that a case of accidental discharge was not made out by the appellant. In my view, these two issues can be considered together and I will now proceed to do so.

On the concurrent findings of both courts below which, as I have already observed, are fully supported by the evidence on record and have not been faulted in any manner, **it is crystal clear that the medical evidence of P.W. 2 amply corroborated the evidence of P.W. 4 on, at least, two vital areas. These are in respect of the cause of death and the approximate range from which the gun was fired. In the first place both witnesses were ad idem on the cause of the deceased's death. This, on their evidence, was a result of bullet injuries fired from gun which hit and devastated the deceased's left chest and from which injuries he died moments later. In the second place it was the evidence of P.W. 4 that the appellant, after slapping the deceased, paced backwards to a distance of "about 7 feet", pointed his pistol at the deceased and shot him through the left chest. I find it of great importance to re-emphasize that this vital piece of evidence of P.W 2 was specifically accepted and believed by the learned trial Judge who had the singular opportunity of watching and observing the witness as he testified before the court. The same finding of the trial court was affirmed by the Court of Appeal thus raising its status to that of a concurrent finding of fact by both the trial court and the Court of Appeal. On this finding alone, which has not been faulted in any way, it cannot be contended seriously that a case of deliberate and intentional shooting of the deceased by the appellant was not established by the prosecution or that the appellant made out a case of accidental discharge on the accepted evidence before the court.**

There is one more vital point on this issue of whether or not the prosecution established a case of deliberate and intentional shooting against

the appellant. This revolves on yet another material evidence of P.W. 4 to the effect that as soon as the appellant shot the deceased, he, P.W. 4, rushed out from their car and held his wounded brother. Both the deceased and P.W. 4 then fell down but P.W. 4 got up and the appellant next faced him, pointed the same pistol at him but one of the policemen around B had to shout "no, no, no," before the appellant lowered his aim and kept the pistol. This vital piece of evidence was accepted and believed by both courts below. I agree entirely that this immediate subsequent behaviour of the appellant in facing P.W. 4 with same pistol immediately after he had shot down the deceased pointed to the fact that the shooting of the C deceased was intentional and not accidental.

Finally, on the same issue, is the fact that the learned trial Judge who saw and heard the witnesses after a thorough evaluation of the evidence found that the deceased never gripped the appellant's pistol, that D there was no struggle whatever between the deceased and the appellant for the possession or repossession of the pistol and that the pistol did not accidentally explode as claimed by the appellant. These findings were affirmed by the Court of Appeal and so long as there was not established E any miscarriage of justice or a violation of some principles of law or procedure, this court finds itself unable to interfere with them. In my view, therefore, issue 3 must be resolved against the appellant.

Turning once more to the accepted evidence of P. W. 4 to the effect F that the appellant paced backwards to a distance of about 7 feet before he shot the deceased dead, there is additionally the evidence of the medical practitioner, P.W. 2 to the effect that-

"The range of the gun shot to the deceased, in my opinion, was G between 7 to 10 feet if two persons were struggling for possession of the gun and it exploded, it cannot inflict the type of injuries I found on the corpse of the deceased and which I have just described to the court. If the gunman fired the gun about 2 feet from the deceased, it cannot cause the type of wounds I have described and which I found on the corpse in H this case. If the gun is fired one foot from the victim, the injury will no longer be the same as I have described."

Clearly, in certain respects already mentioned, the evidence of P.W. 2

was corroborative of the testimony of P.W. 4. Both the trial court and the Court of Appeal were therefore right when they held that the evidence of P.W. 2 corroborated that of P.W. 4 in some material particulars. But learned counsel for the appellant did submit that P.W. 2, not being an eye witness
B to the shooting incident, was not competent to give evidence relating to the distance or range from where the gun was fired.

With the greatest respect to the learned counsel, **it ought to be stressed that at no time during the cross-examination of P.W. 2 was it suggested to him that he was not competent to testify on the
C issue. If he was so questioned, the issue of his knowledge on the subject would have come into focus. Without doubt, P.W. 2 testified before the court as an expert witness. He is a medical doctor attached to the department of Pathology of the University of Benin
D Teaching Hospital and it is a matter of common knowledge that to qualify as a medical doctor, one must undergo a study in forensic medicine, the extent and scope of which the witness would have clarified were his competence challenged while he testified in the
E witness box.**

A close study of the evidence of P.W. 2 reveals that the expert opinion he gave on the issue of distance or range from where the shot was fired was based entirely on deductions from the nature and extent of
F the injuries he found on the deceased in the course of his post mortem examination. In my view, a Medical Doctor does not need to be an eye witness or a ballistics expert to be able to give an expert opinion on the issue of the range or distance from which a particular missile, whether
G gun shot or otherwise, was launched, having regard to the resultant injuries to the victim, particularly where, as in the present case, he gave factual basis for the opinion he arrived at. Indeed it does not seem to me that a ballistics expert would be of any use on the particular facts of the present case. This is because a ballistics expert is apparently not trained
H in human anatomy, pathology, forensic medicine or to relate the nature, extent or quantum of injuries to the human body to a particular weapon or weapons likely to be responsible for such injuries. He may also not be in a position to give an expert evidence as to the amount of force used in

the commission of an assault and whether or not the resultant injuries could be self inflicted or otherwise. These, in my opinion, are matters which concern Medical Doctors and not ballistics experts. I think both courts below were right in accepting the corroborative evidence of P.W. 2 to the effect that the gun which produced the injuries he saw on the body of the deceased would have been shot from about 7 to 10 feet from the person of the deceased and that the injuries could not have been self inflicted.

It must however be stressed that the evidence of P.W 4 on the issue of the range from which the fatal shot was fired clearly required no corroboration in law. The result is that the evidence of P.W 4, an eye witness to the incident, if believed, as indeed it was, firmly resolved the issue. In such circumstance, the opinion evidence of P.W. 2 on the same point, even if it were to be inadmissible, and I do not so hold, became unnecessary and a surplusage. It seems to me plain on the evidence of P.W. 4 which both courts below accepted as true that it was a case of premeditated and intentional shooting of the deceased by the appellant that was established by the prosecution and that a case of accidental discharge was not made out by the appellant.

Learned counsel for the appellant next submitted that P.W.4 was infact a tainted or biased witness being the brother of the deceased. He submitted that his evidence therefore required corroboration. He also referred to Section 149 (d) of the Evidence Act and contented that failure by the prosecution to call any of the Policemen on duty with the appellant at all material times was fatal to its case. It was suggested that the prosecution ought to have called the said Policemen to testify to ensure that its case was established beyond reasonable doubt.

The first point that must be made is that a court of law needs not take into account the number of witnesses for each side to succeed. What is primarily relevant is the quality of the evidence adduced before the court. In this regard, Section 179 (1) of the Evidence Act provides as follows-

"179 (1) Except as provided in this Section, no particular number

of witnesses shall in any case be required for the proof of one fact."

Accordingly, the general rule is that except in cases, whether civil or criminal, where the evidence of a witness by law needs to be corroborated by some other evidence, no particular number of witnesses is required for the proof of any fact in issue and a person may be convicted of an offence on the evidence on oath of a single adult witness where no corroboration is prescribed.

Secondly, it is a well established principle of law that it is not necessary for a person on whom the onus of proof lies, even in criminal cases, to call every available piece of evidence in order to discharge that burden. It is enough if evidence is tendered sufficient to discharge the onus which the law lays upon the prosecution. See Francis Odili V. The State (1977) 4 S.C 1 or (1977) 11 N.S.C.C. 154 at 158 and Joshua Alonge V. I. G. of Police (1959) 4 F. S. C. 203 or (1959) 1 N.S.C.C. 169. In the Francis Odili case, the appellant was convicted and sentenced to death. Following his arrest, the appellant was identified at an identification parade by one of the two Rev. Sisters they violently robbed with arms. At the trial, he pleaded alibi. The learned counsel contended inter alia that the evidence of identification was unreliable and that the prosecution failed to call two other eye witnesses to the incident. On appeal, this court, per Alexander C. J. N. stated as follows-

"Counsel's last submission was that the 2 night guards should have been called as witnesses as they were present throughout The tribunal, in its judgement, pointed out that the defence had an equal opportunity to call the night guards if they considered that the evidence of the night guards would be favourable to them. The tribunal found no merit in this submission and we unhesitatingly agree. The prosecution is not required to call every available piece of evidence to prove its case, it is enough if sufficient evidence is called to discharge the onus of prove beyond reasonable doubt."

Accordingly, in arriving at a conviction in criminal cases, the court is concerned with whether or not there is sufficient credible evidence of probative value and not the number of witnesses called on an issue. See Commissioner of Police V. Baniel Kwashie (1953) 14 W.A.C.A. 319.

Where a single witness called by the prosecution is neither an accomplice nor a tainted witness, a court of law is entitled to convict mainly on his credible evidence where his testimony did not by law requires corroboration. Once the court is satisfied with the cogency, high quality and credibility of the evidence of a witness and accepts it, conviction based on such evidence should not be interfered with unless such evidence by law requires corroboration. So, in the Daniel Kwashie case, the learned magistrate convicted the appellant on the evidence of one witness. On appeal to the High Court, the learned Judge found that although, corroboration was not required by law, a court was generally reluctant to convict on the evidence of a single witness and proceeded to allow the appeal. On further appeal to the West African Court of Appeal, the appellant Judge was reversed and his decision was set aside on the ground that there was sufficient evidence before the learned Magistrate on which he based his conviction. It was further held that since the learned Magistrate believed the witness and there was no imputation that the sole witness was an accomplice or a tainted witness, it was an error to reverse his decision and the conviction was restored.

More recently in *Oteki V. Attorney-general of Bendel State* (1986) 2 N.W.L.R. (Part 24) 648 at 664 this court laid it down as follows-

"I think the learned trial Judge applied the correct principles in determining whether or not to rely on the evidence of P.W .1 for the conviction of the appellant. It is now established that a court can convict upon the evidence of one witness without more, if the witness is not accomplice in the commission of the offence and his evidence is sufficiently probative of the offence with which the accused has been charged." See too Sunday Emiator V. The State (1975) 9 - 11 S.C. 107 at 112, Anthony Igbo V. The State (1975) 9- 11 S. C. 129 at 134, Joshua Alonge V. Inspector-General of Police (1959) 4 F. S.C. 203. **It seems to me, therefore, well settled that there is no rule of law or practice which should make a court hesitate in convicting upon the evidence of one witness, in a case where no corroboration is prescribed by law and there is no suggestion that the witness is an accomplice, if the court is satisfied with the cogency and quality of the evidence given.**

See **Anthony Igbo V. The State**, *supra* and **Christopher Arehia and Another V. The State (1982) N.S.C.C. 85 at 91**. See too **Okonofua and Another V. The State (1981) 6-7 S. C 1 at 18** where this court per Bello, J.S.C., as he then was, dealing with the same subject put the matter thus-

B *"The correct state of the law relating to the duty of the prosecution to call witnesses, whether their names appear on the back of the information or not, has been recently stated by this court in these terms:*

C *"The law imposes no obligation on the prosecution to call a host of witnesses. All the prosecution need do is to call enough material witnesses in order to prove its case; and in so doing, it has a discretion in the matter."*

See also **Samuel Adaje V. The State (1979) 6 - 9 S. C. 18 at 28**.

D **In the present case, the learned trial Judge thoroughly ap-
praised and evaluated the evidence of all the witnesses who testi-
fied before him together with that of the appellant. At the end of
this exercise, after he saw, heard and assessed them, he came to
the conclusion that P.W. 4 was a witness of truth and believed him.**
E **This ought to dispose of the complaint on the failure of the pro-
secution to call further witnesses to repeat themselves. The learned
trial Judge, however, further believed the testimony of P.W. 2 which
in various areas corroborated the evidence of P.W. 4. No corrobor-
ation is prescribed by law in respect of the offence of murder for**
F **which the appellant stood trial. I think the prosecution, at the close
of the evidence of P.W 4 had the discretion and was perfectly en-
titled to rest its case on his testimony without calling further cor-
roborative evidence.**

G Learned Counsel for the appellant next sought refuge under Sec-
tion 149 (d) of the Evidence Act to call any of the Policemen in the team
led by the appellant on the date of the incident. He submitted that the only
possible presumption under Section 149 (d) of the Evidence Act must be
H that those policemen if they had been called as witnesses would have
testified against the prosecution.

Section 149 (d) of the Evidence Act provides as follows-

"149, The Court may presume the existence of any fact which it

thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case, and in particular the court may presume-

- (a); B
- (b).....; C
- (c).....,
- (d) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it,
- (e)"

The first point that needs be emphasized is that the presumption under section 149(d) of the Evidence Act will only apply against whom it is sought that it should operate where that party has infact withheld the particular piece of evidence in issue and if he did not call any evidence on the point. It only applies when the party does not call any evidence on the issue in controversy and not because he fails to call a particular witness. See Bello V. Kassim (1969) N.S.C.C. 288 at 233, Okunzua V. Amosu (1992) 6 N.W.L.R. (Part 248) 416 at 435. The section deals with the failure to call evidence and not the failure to call a particular witness as a party is not bound to call a particular witness if he thinks he can prove his case otherwise. See Francis Odili V. The State (1977) 4 S.C.1 at 8, Alonge V. Inspector - General of Police (1959) 4 F.S.C. 203 etc. Mere failure to produce the evidence in issue would not necessarily amount to withholding such evidence. See Ganiyu Tewogbade V. Arasi Akande (1968) N.M.L.R. 404 at 408. So in Francis Odili V. The state, supra, learned defence counsel's submission was that only one of the two Rev Sisters robbed with violence was called to identify and to testify against the appellant and that the second Rev. Sister and the two night guards who were present during the robbery should have been called as witnesses particularly as the appellant's defence was that of alibi. This court as already pointed out dismissed this contention as misconceived as the prosecution was not required to call a host of witnesses to prove a particular issue.

In the present case, the issues of fact that the policemen in

issue would have given evidence of had infact been testified upon by P. W 4 and no question of withholding evidence on the part of the prosecution therefore arose. The prosecution called P.W. 4 as its witness and the witness testified before the court and narrated
 B all that happened at the scene of crime. As I have already indicated, Section 149 (d) of the Evidence Act deals with the failure to call evidence and not the failure to call a particular witness. With respect to learned counsel, I find it difficult to accept that section
 C 149 (d) of the Evidence Act has any application to the facts of the present case.

Learned appellant's counsel further tried to discredit P.W.4 . He submitted that in his statement, Exhibit B, P.W. 4 stated that he did not hear the question the appellant asked the deceased after the appellant
 D pulled the deceased out of his car. This was because P.W. 4 was inside their car at the time. He claimed that P.W. 4 in his evidence would appear to have heard all that transpired at the scene contrary to what he stated in Exhibit B. He considered P.W. 4 as an untruthful witness.

E Again, with profound respect to learned counsel, **there is clearly nothing, either in the evidence of P.W. 4 before the court or in his statement, Exhibit B which is inconsistent with each other.** According to the witness, he was with the deceased in the car when they were
 F stopped. This was after they overshot the check point by a few yards and had to reverse the car back. The appellant then came to them and asked the deceased, with whom he was in the car, why he did not stop in time. There was no evidence that P. W. 4 was deaf. He was therefore
 G bound to hear the question particularly when he was inside the car at the same time with the deceased at the material time.

The appellant text opened the driver's door, pulled the deceased out of the car and slapped him At this stage, only P.W. 4 remained inside the car as the deceased had been pulled out. There was no evidence as to
 H whether the opened door subsequently closed or whether the glasses were or were not wounded up. P.W. 4 however, stated that after the deceased had been pulled out of the car and slapped, the appellant asked the deceased some question which P. W. 4 did not hear. He gave a reason

for not hearing this second question. This P.W. 4 said, was because he was then inside the car. At no other time did he claim that he heard what this second question was. **The evidence of P.W. 4 was so clear and straight forward that no conflict conceivably arose from his account of the incident whether from Exhibit B or from his viva voce evidence in court. This evidence of P.W. 4 was believed by the trial court and affirmed by the court below and I have no reason to interfere with these findings. I find no basis in counsel's submission that P. W. 4 was unreliable and hereby dismiss the same as entirely misconceived and totally unjustifiable.**

Learned counsel for the appellant made further attempt to discredit the evidence of P.W. 4 by reason of the fact that he was the brother or blood relation of the deceased and that therefore he must be regarded as a tainted or biased witness whose evidence would require corroboration. Again, I cannot, with respect, subscribe to this aspect of counsel's submissions. **P. W. 4, without doubt, was the brother of the deceased but that fact did not by itself connote that he was not competent to testify for the prosecution or that he was a tainted witness. A tainted witness has been classified as one who is either an accomplice or by the evidence he gives, whether as a witness for the prosecution or defence, may and could be regarded as having some purpose of his own to serve. See Ishola V. The State (1978) N.S.C.C. 499 at 509. P.W. 4 is neither an accomplice to the offence charged nor was it shown that he had any purpose of his own to serve or that he was in any way biased in his testimony before the court and I am unable to accept that the mere fact that he was the brother of the deceased without more rendered his evidence unacceptable without corroboration or weakened the same or rendered him incompetent as a witness in a case where he was clearly an eye witness. So in Christopher Arehia and Another V. The State (1982) N.S.C.S. 91, the learned defence counsel contended that the prosecution witnesses who gave evidence as eye witnesses were blood relations of the deceased's family and that the learned Justices of the Court of Appeal should have warned themselves against the danger of relying on the evidence of the relations**

of the deceased before convicting the appellant. He argued that this they failed to do. He therefore urged that the appellant's conviction and sentence be set aside. This court in answer to these submissions observed as follows-

B *"It is true that the prosecution witnesses in question were related in one way or the other to the deceased and the learned Justices of the Federal Court of Appeal did not advert to that fact. However the fact that the witnesses were related to the deceased does not mean that they were not competent to testify for the prosecution. Learned counsel for the*
C *appellant has not shown them to be biased"*

I think the credible evidence of P.W.4 was rightly accepted by both courts below in the present case and I can find no reason to disturb the same.

Learned counsel for the appellant finally submitted that when
D **the deceased held his jaw in pain with his head on the bonnet, he must have been "backing his assailant", He therefore contended that it was not possible for him to have been shot through the upper left chest as testified to by P.W.2 and P.W.4. I need only observe that learned counsel's conclusion was based entirely on speculation and conjecture as there was no evidence as to whether the deceased was facing or backing the appellant or as to the position of the appellant, namely whether he was standing in front or by the side of or behind the deceased the moment the deceased was shot.**
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F **There was also no evidence as to the angle the fatal shot was fired from, having regard to the position of the appellant qua the deceased. I therefore find it difficult in the absence of evidence to conjecture whether the deceased backed, faced, half-backed or half-faced the appellant at the time the latter mowed him down with his pistol. It suffices to state that on the evidence, which both courts below accepted as true, the appellant shot the deceased through the upper left chest and the deceased died as a result of the injuries he**
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H **sustained in this attack.**

It is for all the reasons that I have given above that issues 2 and 3 must also be resolved against the appellant.

In the final result, this appeal fails and it is accordingly dismissed.

The conviction and death sentence passed on the appellant by the trial court as affirmed by the Court of Appeal are hereby further affirmed.

BELGORE JSC (Dissenting)

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To understand this matter on appeal, it is pertinent to set out its salient facts. The appellant, an Assistant Superintendent of Police with Edo State Command, was sent out on anti-crime duty on 18th August, 1994. Information was received of some armed robbers around the Lagos-Benin Express Way within Edo State. The appellant leading an Inspector of Police and five other rank and file policemen in a patrol car headed towards the western side of Benin City and between Ugbowo (where the University of Benin is located) and Oluku where there is a junction to Owo and Akure on the Lagos-Benin express way. Being a strategic junction, a check-point was set up and the appellant deployed his men on both sides of the check-point. About 10.00 hours, a car of Volvo make was approaching from Lagos direction. The road check point, in the usual police style is in three segments - to wit: the central check-point and the approaches on either side of it. The Volvo car was coming at full speed and the curious thing about it was that it carried no registration number. The first team of policemen on the western side of the check-point flagged the car to stop, this order was ignored and the Volvo car sped past them. The appellant, on seeing this, drew out his pistol whereby the car stopped a little distance beyond him. The car was driven by the deceased, Remigious Mekoba who had with him in the car his younger brother, Vincent Mekoba, P.W.4. The Policeman closest to where the deceased stopped asked the deceased for the particulars of his vehicle, this led to an argument and the appellant had to draw closer to the car and also asked the deceased for the documents of the car. The deceased told him he had no documents for the car whereat the appellant asked him to surrender the keys to the car.

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It is from this point some divergent evidence emerged. The P.W.4, the only eye witness for the prosecution and brother of the deceased, Remigious Mekoba testified on oath inter alia that he was in the car on

that fateful day with his brother, coming from Lagos and going to Awomama in Imo State. They got to Benin and police stopped them. Then he proceeded as follows:

"As we got to Benin City, Police men stopped us. We did not see the police men and my brother Remigious Mekoba stopped the car and he reversed the car back. One of the police men came to us and asked him why we did not stop and my brother replied that he has now stopped. Another policeman then came up to us and opened the front door and drew my brother out of the car and slapped my brother. As he slapped my brother, my brother used his hands in holding his jaw and bent down and laid his head on the bonnet of his car. That policeman who drew my brother out of the car and slapped him then drew backwards to a distance of about 7 feet and pointed a gun in his hand and shot my brother through his left chest and my brother shouted my name saying, "Vincent, I am dying, I am dying, I am dying."

He continued

".... the policeman who shot my brother faced me and pointed his gun at me. Then one of the policemen around shouted "No, No, No" and the policeman who shot my brother lowered his aim and kept the gun."

This witness, P.W.4, made a statement to the police on 30th August, 1994, about two weeks after the incident. It must be pointed out that Remigious died as a result of the gun wound either at the check point or on the way to the hospital because he was pronounced dead at the hospital. In view of the evidence of the P.W.4 in Court, it is of great importance to copy verbatim what he told the police during investigation as per Exhibit B which reads:

"I the above named person voluntarily elect to state as follows: I am a native of Awomomah in Oru L.G.A. of Imo State. I am a student of Ojo High School, Lagos. Remigious Mekoba is my senior brother. On 18/8/94, I travelled with my brother in his Volvo car from Lagos to Awomomah in Imo State. When we got to Benin City along Lagos/Benin Expressway, Policemen on road block stopped us and my brother stopped the car. One of them drew my brother out of the car and slapped him. Their leader came and asked my brother questions which I did not hear because I was

inside the car. As my brother was about to answer the question, one of them fired him on the chest and my brother called me two times before he fell down. I ran out of the car and held my brother. Some of the Policemen carried my brother into their Pick-up and later removed him into my brother's Volvo Car to UBTH. When we got to the hospital they left the B *corpse in the car and went into one of the rooms in the hospital. I later left them in hospital and went to Lagos. I can identify the Policeman that fired my brother. My brother did not struggle with any Policeman."*

Thus, in his first statement he alleged that when the policemen asked them to stop, they stopped. In his statement on oath testifying in Court, he alleged that they did not stop because they did not see the policemen. He put it this way: "As we got to Benin City Policemen stopped us. We did not see the policemen in time as we were on speed. We passed the policemen and my brother Remigious Mekoba stopped the car and he D reversed the car back. One of the policemen came to us and asked him why we did not stop and my brother replied that he has now stopped." In his statement to the police copied above on 30th August, 1994, this witness clearly stated he never heard the altercation between his brother E and the policemen. Whereas in that statement Exhibit B he specifically stated that the deceased stopped as they were stopped, in his evidence in Court he stated that 'they" (meaning himself and the deceased) never saw the policemen and thus never stopped when ordered to stop and that he F heard all the altercations between the deceased and the appellant and other policemen. Whereas in his evidence in Court he stated clearly and graphically that the appellant slapped the deceased whereat the deceased slumped on the car bonnet and the appellant then stepped about seven feet back, aimed and shot at the deceased. Exhibit B is far from this as it G states:

"One of them (Policemen) drew my brother out of the car and slapped him. Their leader came and asked my brother questions which I did not hear because I was inside the car. As my brother was about to answer the H question one of them fired him on the chest and my brother called me two times before he fell down."

The evidence of this witness, P.W.4, is interesting as to what it contains.

In Exhibit B he told the police one policeman dragged his brother out of the car and slapped him and another policeman came and shot him. In Court he relied on only one person as dragging his brother out of the car and slapping him whereby he slumped on the bonnet of the car where he was shot. If he was leaning on the bonnet of the car when he was shot the bullet would not hit him in front on the chest but only at the back. It must be clearly stated that there is no dispute as to the fact that the bullet from the appellant's pistol killed the deceased. What is in issue is how the bullet hit him.

The appellant, in his statement under caution (voluntary statement to the Police) Exhibit A, he stated:

"I Mr. Clement Oguonzee ASP states as follows: that on the 18-8-94 at about 0900 hrs. I left the Control with one Inspector with six rank and files on vehicle patrol along Benin/Lagos road. As I was going with my men, there was an information from passers by that there are robbers operating on the road before Oluku. After University of Benin I told the driver to stop and my men came down from the vehicle. I told them to start stopping all cars for checking if the robbers can be arrested. One Sgt. Wilfred Asemota was the person stopping all cars coming from Lagos for other Policeman to check. I was standing at alert a little distance from my men. At a time I sighted one unregistered Volvo car coming from Lagos with a very High speed. All efforts made by men for the driver of the volvo to stop failed. I finally stopped the car with force, and the driver came down from the vehicle and ask me what are we checking when the country is not settled. The next thing he did was to grip my pistol. As he was struggling for the pistol with me, the pistol exploded and he was hit. This attracted all my men who ran to me carry the driver into the vehicle and rushed him to UBTH for medical treatment, the driver later died. The Inspector and others were sent to Police Head Quarter to inform O/C OPS & Training while one Sgt. John Marcus was left with me. As I was with the Doctor with Sgt. suddenly a group of University students came and attacked the Sgt and myself and they carried us to where they called June 12 election hall. This time my Browning pistol with six rounds of live ammunitions and barretta rifle with 18

rounds of ammunition have been taken from us by the students. We were seriously beaten by the students. My stars of both sides and the bottom of my Police shirt were removed by the students. They also took my eye glass. At a time, they gave us rice to eat and to say our last prayer. Fortunately I saw a son of one Mr. Egbekpe Sp who now pleaded for our safety. At about 2200 hrs of the same date, the PRO, Mr. Lucky Manuwa, ASP came to the campus to release both of us." B

The evidence of the appellant in Court on oath was not much different though more elaborate, but there was no contradiction on material facts; even under cross-examination. He found the Volvo car without registration number or any identity refusing to stop when first waved down by one of his men, Sgt Asemota. He had to pull out his pistol and barked order before the deceased stopped. On stopping he was arguing and rude. The car's documents could not be produced when demanded and the appellant demanded for the car's ignition key. This led to struggle and the deceased tried to snatch the pistol during the struggle. The pistol, not under safety hatch, fired during the struggle and hit the deceased in the chest. He was declared dead on reaching the hospital. The appellant denied aiming and firing the pistol at the deceased and maintaining it was an accidental discharge during the struggle with the deceased that killed the deceased. Thus the two opposing eye witness accounts - one by P.W.4, the brother of the deceased and one by the appellant, the officer in charge of the road block set up by the anti-robbery patrol. The appellant claimed he believed the Volvo car might have been stolen and the reason for this was lack of identification or registration mark on it; also no documents in respect of the car was being produced, even up to now. One would expect the prosecution to counter the suspicion of the appellant on the car by producing its documents to show it was not a stolen car. I am not saying the car was stolen but the prosecution had a duty to show that the appellant's suspicion was unfounded. D E F G

Did the appellant step back from the deceased to aim and fire the pistol at him? If the evidence of P.W.4 is to be believed would the bullet have hit him at the back or in front? What was the stand of the trial Judge on the evidence of P.W. 4? H

The appellant stated clearly in Exhibit A and evidence in Court that the gun accidentally went off during the struggle while the deceased was attempting to snatch it from him. The pistol was not produced in court for reasons given in Exhibit B. The Browning pistol was no doubt issued legally to the appellant in the course of his duty and the evidence as to its type and calibre and of course its capability could easily be given by the Police ballisticsian. The evidence of the P.W.4, brother of the deceased was (1) that after the deceased was slapped he held his head in his hands and rested it on the bonnet of the volvo car in this case his face was down and he could only be fired from the back. The bullet that killed him, according to P.W.2, the medical doctor, hit him from the front and came out at the back. (2) This witness also said the appellant, in firing the bullet moved back from the deceased to about ten feet before he aimed and fired. However, in his statement to the police, quoted earlier, he said "Their leader came and asked my brother questions which I did not hear because I was inside the car. As my brother was about to answer the question, one of them fired him on the chest ..." In his evidence in Court he departed from this simple statement even in examination in-chief alleging that the appellant attempted to kill him too but for the intervention of one of the policemen on duty who shouted "No! No! No!. All the time of the incident leading to the deceased being hit by the bullet from the appellant's pistol, there were other policemen on duty with the appellant, including Sgt. Wilfred Asemota. These other policemen were eye witnesses of the incident at the scene. They were never called and no reason was given for this serious lapse.

The trial Judge treated the evidence of P.W.4 as the one he could believe to a certain extent, that is to say, if there was corroboration. He readily, according to him, found one in the evidence of P.W.2. Dr. Aligbe. Dr. Aligbe was not at the scene of the incident, neither did he see the pistol nor the bullet. All he saw were point of entry of the bullet in the left front of the chest and its exit at the opposite side at the back when he performed the post mortem examination on the corpse of the deceased. His evidence, according to the law, is relevant as to his opinion on medicine and pathology and nothing more. He never claimed to be a ballisticsian

and if a ballisticsian, he would give evidence as to the velocity and impact of a projectile, he must see the weapon and assess its capability. This witness Jonathan Aligbe gave his qualification only as follows:

"..... I am a medical practitioner, I am attached to the Department of pathology in the University of Benin Teaching Hospital."

This of course does not mean he is a pathologist neither was his experience in evidence. He saw the corpse on 24th August, 1994 when it was identified to him by P.W.3. Is he a pathologist of morbid anatomy? His being attached to the pathology Department is not enough. Is he a registrar or a house officer? When did he qualify as a medical practitioner registered to practise in Nigeria. All these are essential primary duty of the prosecution to elicit for the witness to be regarded as an expert whose opinion will be relevant though not necessarily conclusive under the Evidence Act, Section 57. It is always necessary, so as to establish a witness as an expert, to have evidence of his qualification and experience and it will be wrong to blandly call a person an expert when his qualifications are not put in evidence (Azu V. The State (1992) 6 NWLR (Pt, 299) 303, 305, 306). There is no doubt the death of the deceased was due to gun shot wound from the pistol held by the appellant. In that case, without evidence of P.W. 2 the cause of death is known. However, in this case the learned trial judge made use of the evidence of P.W.2 on a matter outside his expertise, that is to say, his evidence of capability of a gun he never saw and field of ballistics totally not in his claimed discipline as a medical officer. He claimed the gun must have been fired between seven and ten feet from the deceased. How did he arrive at this opinion? He claimed he never saw evidence of a struggle on the corpse of the deceased. Then how will this evidence of a struggle manifest on the corpse? He never explained. He was taken up on this evidence in cross-examination. The learned judge used this part of the evidence as corroboration of the evidence of P.W. 4, the younger brother of the deceased. P.W. 4 was not the only eye witness at the scene, there were at least four others including Sgt. Wilfred Asemota who was not called. I shall advert to these witnesses not called later.

The evidence of P.W.4, Vincent Mekoba, viewed as a whole has left

much to be desired for an untainted witness. His statement to the police, Exhibit B (supra) and his evidence in Court are totally at variance. It was in Court that he introduced the appellant aiming and firing the pistol at the deceased after stepping backward for about ten feet. The trial Court B waved aside this important new twist in the evidence of this witness. He was luckily not the only eye witness of the incident, there were at least five other policemen at the scene. It is true the prosecution is not required to bring a host of witnesses on a particular point in evidence once C they have a credible witness. That credible witness must be factual, uncontradictory in material aspects and should be bereft of any other interest in the case. After quoting part of the evidence of P.W.4 (earlier quoted in this judgment) the learned trial judge went on:

"The accused person did testify that on that day of the incident he D went to the road with an Inspector of Police and six rank and file. Incidentally none of those Policemen testified in this case. However, the evidence of the 2nd prosecution witness who is an independent witness and who has not been shown to have any connection or relationship with E either the accused person or the deceased before the death of the deceased, lends weight to the evidence of the 4th prosecution witness and amply corroborated the evidence of the 4th prosecution witness. The evidence of 2nd prosecution witness also negated and rendered untrue the F evidence of the accused person that the pistol exploded while himself and the deceased were struggling for possession of the pistol and that the deceased was accidentally hit by the accidental discharge from the pistol. The 2nd prosecution witness was Jonathan Aligbe, a medical Practitioner attached to the Department of pathology in the University of Benin G Teaching Hospital (UBTH). He testified that he examined the corpse of Remigious Mekoba on the 24th of August, 1994. This witness testified that the deceased died of cardiac tamponade with corresponding cardio H respiratory failure from penetrating high velocity missile injury, affecting the soft tissues and the bones and that the missiles are in the form of bullet wounds emanating from gun. He went further and testified as follows:

"The range of the gunshot to the deceased in my opinion was be-

tween 7 to 10 feet. The gun would have been shot between 7 to 10 feet from the person of the deceased and the injury could not have been self inflicted. The holes and wounds were caused by one and the same shot even though the wounds differed in diameter due to resisting forces of penetration of bullet."

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"This Medical practitioner under cross-examination answered as follows:

"The gun would have fired within the range of 7 to 10 feet from the deceased. If two persons were struggling for possession of the gun and it exploded, it cannot inflict the type of injuries I found on the corpse of the deceased and which I have just described to this court. If the gunman fired the gun about 2 feet from the deceased, it cannot cause the type of wounds I have described and which I found on the corpse in this case. If the gun is fired one foot from the victim, the injury will no longer be the same as I have described."

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"This witness removed the possibility of accidental discharge from the pistol from a close range when he testified further in his evidence -in-chiefs as follows:

"There was no close encounter between the deceased and the gunman because there were no other external marks of injury and there were no vital reactions around the entrance wound of the bullet to suggest any struggle."

"From the evidence of the 2nd and 4th prosecution witnesses which I now believe, I hold that the gun (pistol) which the accused person held on 18th April, 1994 did not accidentally explode or discharged, I do not believe the accused person when he testified that the pistol exploded while the deceased and himself were struggling for the possession of the pistol. I believe the 2nd prosecution witness when he testified that the accused person moved backwards for a distance of about seven feet before he took his aim with the pistol and fired at the deceased."

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He did not believe the deceased gripped the pistol or that there was a struggle, merely on the evidence of P.W.4. But there were other witnesses around. The contradictions in the evidence of the P.W.4 ought to make the court wary of relying on it. No corroboration is needed in the evidence of a witness who is not an accomplice. But in this case, the

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Exhibit B made by P.W.4 at the first opportunity only mentioned the opening of the Volvo car door, the deceased dragged out and shot immediately point blank on being asked a question and before he could answer. P.W.4 said he never heard the question the deceased was asked by "one policeman and before the other policeman shot him" because he was inside the car. In Court, however, he claimed he heard and saw all that happened. Upon all these contradictions it would have helped the prosecution's case to call at least one other eye witness e.g. Sgt, Asemota.

C It is remarkable that no reason was advanced for not calling any of these eye witnesses to testify. What could be the reasons for the contradictions in P.W.4's evidence? None. The Contradictions are material and could only be cured by an eye witness and not by the opinion of non-ballistician like P.W. 2. The prosecution has a duty to call all material witnesses for

D its case, whether those witness support or are against its stand, because as an officer of the Court, a duty is owed to lead the Court to arrive at a just conclusion; this is more so in a criminal case where the onus probandi for the prosecution is to prove beyond reasonable doubt. (Opeyemi VS. The State (1985) 2 NWLR (Part 5) 101, 102, 103. The P.W.4, in giving new twist to his previous statement to the police when he testified on oath had perhaps reason to make sure the death of his brother is paid for by somebody; this possibility under the circumstance of this case, is

F always there and should not be treated lightly. It is for this other evidence on how the bullet was fired was necessary especially when there were other eye witnesses at the scene. The prosecution decided not to call any of them and no reason was ever advanced for this lapse. The only reason presumed under the law is that if those witness were called their evidence would not support the case for the prosecution. The evidence of

G any other witness at the scene seeing what transpired is better than non-expert evidence of Dr. Aligbe, P.W.4 (See S/149 (d) Evidence Act). The P.W.4 on his performance was inconsistent and he was the only eye

H witness of the discharge of the bullet that killed his brother that the prosecution chose to call, the others ought to be called and it is not a luxury but a necessity to call them. Mande Ali VS. The State (See SC. 114/1972 and (1972) 10 SC.: (1972 NSCC (Vol. 7) 620, 621). It is not necessary

for the defence to prove bias on the part of P.W.4, likelihood of bias in enough. Since there were other independent eye witness of the discharge of the fatal bullet it was incumbent on the prosecution to produce their evidence by calling them, the opinion of an expert for what it is, cannot replace the evidence of another eye-witness as corroboration. Unfortunately it is not in the province of the discipline the P.W.2 claimed to give opinion on ballistics. It is true that no particular number of witnesses is required for proving a case of murder subject to exceptions in Sections 177, 178 and 179 (2) - (5) of evidence Act - see S. 179(1) Evidence Act, but because of the burden on the prosecution to prove beyond reasonable doubt the guilt of the accused person it is necessary to have another evidence against the sole evidence of a relation of the victim of the crime whose motive is subject to question as in this case. A witness whose evidence in Court indicated he was also threatened with the gun, never mentioned this, in his statement to the police. "The deceased saying "I am dying, I am dying" is replaced with "he called my name twice". It is the duty of the prosecution to call all the witnesses necessary to prove its case beyond reasonable doubt (Sugh VS. State (1988) 2 NWLR (Part 77) 475; Ogbodu VS. State (1979) 6 - 9 SC., Chukwu VS. State (1972) 1 NWLR (Part 217) 25, 258.)

In the instant case the evidence of P.W.4 is not cogent enough, it contains unexplained contradictions and it is the only eye-witness account tendered before the trial court whereas other eye witnesses were there. The prosecution chose not to call any other eye witness; the learned trial judge sought for corroboration and the only evidence he found in that regard is the opinion evidence of a medical practitioner on ballistics who was never at the scene. Criminal responsibility is a serious thing and it must not be treated with levity when it comes to burden of proof. Once the Judge at the trial thought corroboration of the evidence of P.W.4 of how the bullet was fired was necessary, it stands to reason that only an eye-witness account was required. Prosecution decided not to bring any other eye witness leaving the Court to rely only on the evidence of P.W 4 which I earlier explained; whereas there was a glut of eye-witnesses whose evidence were necessary. The very fact that the trial judge sought

refuge in the evidence of P.W.2, the medical practitioner, to resolve P.W.4's evidence on how the pistol was fired, manifest doubt in his mind. As P.W.2's evidence on this aspect is no more than an opinion of non-expert, his evidence goes to nowhere in Law. The trial judge never adverted to the danger of relying on uncorroborated evidence of P.W.4 and the evidence he regarded as corroboration is not relevant in law as P.W.2 is not a ballisticsian. This case is very different from that of Arehia & Anor. vs. State (1982) 4 SC. 78.92 and 93 where a host of eye-witnesses were relations of the victim of the crime wherefore their evidence was overwhelming, in this case only P.W.4 gave evidence on this crucial aspect of the firing of the pistol and the other independent witnesses available were not called, P.W.4, on his conflicting evidence alone and as a brother of the deceased, must probably have his own interest to serve in seeing somebody is criminally held responsible for his brother's death.

The court of Appeal apparently got swayed by the time honoured practice of not interfering with findings of fact by the trial court. The lead judgment by Ige JCA seems to say this when she wrote:

" The attitude of the court of Appeal is well settled that findings of fact made by a trial judge are matters peculiarly within his domain and he is presumed to be correct. He saw the witnesses and heard them and unless his findings are perverse and unsupportable by credible evidence, the court of Appeal will not interfere with them. See the cases of Adelumola v. The State (1988)1 NWLR (pt 73) 683; Balogun & Ors. vs. Agboola 1974 1 ANLR (pt.2 at 690; Bakare v. Adeyemi 1975 1 NMLR P. 128. The appellant's counsel has tried to discredit the evidence of P.W.4 because he is a brother to the victim. He cited in support the case of Hausa v. The State. It is true the court should exercise caution in accepting the evidence of a relation of the victim. The trial judge in this case averted his mind to this facts before he believed the evidence of the only eye witness and his evidence was corroborated by the evidence of the doctor. This witness is not a tainted witness neither was his credit shaken in the witness box. He is also not shown to be biased - see the case of Jimoh Ishola .v.The State 1978, 9&10 S.C81 at 100 Moreover there is no law which prohibits blood relations from testifying for the prosecution where

such a relation is an eye witness of the crime committed. See the case of Adelumola v. The State (supra); Onafowokan .v. The State (1986), 2 NWLR (pt.23) 496 at 503. Hausa v. The State 1994, 6 NWLR (pt,350) p.281 at 99.

There is no law requiring a host of witnesses to prove a point once the court is satisfied enough evidence has been adduced. The evidence of P.W.4 is tainted in that it was in contradiction of his previous statement to the police i.e Exhibit B. The evidence of P.W.2. Medical officer under which the trial judge sought refuge for corroboration of the P.W.4's evidence on the shooting is totally irrelevant as this medical practitioner was neither at the scene nor he an expert in ballistics and his evidence could not be better than those police officers at the scene of the incident who no doubt must have seen what took place. The court of Appeal therefore fell into the same error as the trial court in making big issue out of the opinion of P.W.2, albeit unprofessional one at that. Without the evidence of P.W.2, the cause of death is fully established as penetration of a projectile like a bullet into the deceased chest whereby the bullet gained exit out of his body after rupturing his heart and left lung with attendant haemorrhage thereby causing shock. The evidence as to absence of struggle is a congesture and the evidence of distance is a guesswork. How could he, being not a ballistician, not seeing the weapon to know its calibre and capability, and not being at the scene as a witness of the unfortunate incident, give evidence of distance of firing of a projectile from the gun from an estimated distance? His evidence on this all important aspect goes to irrelevancy and cannot under any circumstance be used as corroboration of P.W.4's evidence. The prosecution, for their own reason, not shown to court, decided not to call the other eye witnesses of the event and must be presumed caught under the provisions of S.149(d)of Evidence Act.

I find great merit in this appeal and for the reasons above enumerated, I allow it. I enter a verdict of discharge and acquittal in setting aside the judgment of the court of Appeal which affirmed the decision of the trial court.

WALI JSC (Dissenting)

I have read the lead judgment of the majority produced by my learned brother Iguh, JSC but due respect and humility I am unable to agree with the final conclusion arrived at in that judgment, I find myself in agreement with the dissenting judgment of my learned brother Belgore JSC for the articulated reasoning in that judgment culminating in allowing the appeal. For the purpose of emphasis I wish to make the following contribution-

The facts involved in this case are not seriously in dispute and briefly stated are as follows:

As a result of information received that armed robbers were operating along the Benin-Lagos Road, the appellant, an Assistant Superintendent of police lead a team of other policemen below his rank on patrol along the said road to check the menace. This was on 18/8/94. He mounted a check point at a point between Ugbowo and Oluku to check all vehicles coming from the Lagos side of the road. It was in that process that the deceased, driving past in unregistered volvo car emerged, and that despite signal by the police to stop the deceased did not do until he was finally stopped by the appellant when he showed up his pistol. The deceased was asked to produce the particulars of the vehicle to which he did not respond. Some altercations ensued between the police and the deceased that ended up in skirmishes resulting in the death of the deceased through a gun shot.

It was worth mentioning that the deceased was at the material time in company of his brother P.W. 4 in the same car.

Both the prosecution and the defence gave a different version of the actual circumstance of how the gun was fired.

In his evidence P.W. 4 Vincent Mekoba and who described himself as the deceased's brother stated thus:-

"On 18/8/94, I was coming from Lagos with my senior brother called Remigious in a car. We were going to Awomoma in Imo State of Nigeria. We were coming from Lagos. As we got to Benin City. Police men stopped us. We did not see the Police men in time as we were on speed.

We passed the police men and my brother Remigious Mekoba stopped the car and he reversed the car back. One of the policemen came to us and asked him why we did not stop and my brother replied that he has now stopped. Another policemen then came up to us and opened the front door and drew my brother out of the car and slapped my brother. As he B slapped my brother, my brother used his hands in holding his jaw and bent down and laid his head on the bonnet of his car. That Policeman who drew my brother out of the car and slapped him then drew backwards to a distance of about 7 feet and pointed a gun in his hand and shot my C brother through his left chest and my brother shouted my name saying, "Vincent, I am dying, I am dying I am dying," He was now holding his left breast with both hands. I then rushed out from the car and held my wounded brother. Myself and my brother fell down and as I got up the policeman who shot my brother faced me and pointed his gun at me. D Then one of the policemen around shouted "No, No, No," and the policeman who shot my brother then lowered his aim and kept the gun. Then myself and about four of the policemen conveyed my brother to the waiting pick-up van of the police. After about three minutes the policemen E removed my brother from their pick -up van and brought him into my brother's volvo car. One of the policemen took the driver's seat in my brother's volvo car and he asked me to enter the car. The Police man then drove my brother;s car with my brother and myself inside it, to the Uni F versity of Benin Teaching Hospital in, Benin City. When we got to the Hospital one of the Doctors came and asked what happened and when I told him what happened he shouted "JESUS." Another student also came and asked me what happened and I told him. The policeman was G asked to come and sign some papers in the Hospital and after he had signed those papers I did not see him again .. My brother was then taken to the mortuary. I can identify the policeman who slapped and shot my brother with gun. The Accused person is that police man who drew my brother out of the car, slapped him and drew back from my brother for a H distance of about 7 feet before pointing the gun at my brother and shooting at my brother."

Under cross examination P.W. 4 admitted making a statement to the

police which was admitted in evidence as Exhibit B. The defence gave its own version through the appellant who stated as follows in his evidence on oath:

" On 18/8/94, I reported at the operation and Training Office at
B about 7.a.m and booked myself for anti-crime patrol duty. I assembled
my men comprising one police Inspector and six rank and file and left
Benin City for Lagos Road for anti-crime patrol. I received information
C that robbers were operating along Benin/Lagos Road. At a certain point
between Ugbowo and Oluku along Benin/Lagos Road, I ordered my men
to come down. I lined them up on the left hand side when facing Lagos
direction. I put them in position and they were to intercept vehicles com-
ing from Lagos. I put three of them in front and put four at the back
while I was standing at the centre. The two groups were about two poles
D from each other and I was at the centre, I ordered the police men in from
to stop all private cars for searching. This exercise continued for some-
time until the deceased drove in, in a volvo car. The volvo was coming
from Lagos direction towards Benin. When the policemen in front stopped
E the volvo and it did not stop, I noticed that it was an unregistered Bel-
gium car without number. When I observed that the driver would not
stop, I personally came out and forced him to stop. He drove pass me a
little and stopped before getting to one of my policemen. The policeman
F then went to him and demanded for the particulars of the vehicle. Later
there was argument between them. This drew my attention to go there
personally. There were three people inside the volvo car. The deceased
who was the driver was on the steering. The 4th prosecution witness was
in the car and one other person on Army Uniform was sitting behind in
G the car. The Police man told me that the deceased refused to produce his
car particulars. I personally demanded the vehicle particulars from the
deceased who told me that he had none, adding that we are demanding
particulars when the country is burning. Since the car was unregistered
H and it had no number, I suspected that it was stolen. I then demanded the
ignition key of the car from the deceased. I asked him to hand the
ignition key to me. He refused and resisted. I then insisted to take the
key from him. He in turn gripped my pistol. I struggled to recover my

pistol from him. It was during this period that the pistol exploded and hit him. My men and I rushed him to the emergency section of the University Teaching Hospital for attention. The Doctor later came to certify that he was dead".

The statement made under caution by the appellant was admitted in evidence as Exhibit A through P.W.1

P.W.2 was the Medical Practitioner who conducted an autopsy on the body of the deceased in order to ascertain the cause of death which he stated as follows:-

" On external examination the body was that of a young black adult male apparently well nourished. There was a mild cyanosis bluish coloration both of the area cavity and of the peripheral finger nail belt. There was a penetrating wound at 9 O'clock on the areolar or nipple of the left breast and the wound measured 0.7cm. There was a corresponding exition the left upper back of the chest about 6cm from the mid line. The exit measured 1 cm in diameter.

Internal Examination: On opening up, all the organs were found to be in their normal anatomic positions. The left plueral cavity contained 2.5 litre of clothed blood. The pericardia cavity which was in direct communication with the left pleural cavity contained 75 mls. of clothed blood. Respiratory System: there was a hole on the anterior left lower lobe of the lung about 1.2 cm in diameter and surrounded by areas of ante mortem reactions. This very hole communicated with another hole 1.5 cm. in diameter posteriorby.

Cardiovascular System: The pericardium was affected enterolaterally and posterolaterally by the penetrating injury. There was also a penetrating wound on the lateral aspect of the heart that traversed anteroposteriorty through the left ventricle, rupturing the anteroleteral papillary muscle. The anterior wound which injured the heart measured 1cm while the posterior measured 1.2cm. There was no other abnormality found in the breast. There was similar penetrating injury affecting the 4th and the 8th intercostal muscle on the anterior and the posterior sides. The 9th rib was fractured in its superior and posterior portions near the mid line. The various other components of the other systems including the digestive

system, the endocrine system, the urogenital system and central nervous system appeared normal. In my opinion from the findings above, the deceased died of cardiac Tamponade with corresponding cardia respiratory failure from a penetrating high velocity missile injury affecting the soft tissues and the bones. The missiles are in the form of bullet wounds emanating from gun. The range of the gun shot to the deceased in my opinion was between 7 to 10 feet."

In a considered judgment by Edokpayi j, he made the following observation:

The only difference between the case of the prosecution and that of the defence is that while the defence contends that the gun exploded and hit the deceased accidentally as the Accused person and the deceased were struggling for the possession of the pistol, the prosecution's case is that the Accused person who had opened the front door of the deceased's car and dragged the deceased out of the car and slapped him, moved backwards from the deceased at whom he aimed with his pistol and fired and thereby intentionally killed him."

and then and proceeded to make the following findings-

"The Accused person did testify that on that day of the incident he went to the road with an Inspector of Police and six rank and file. Incidentally none of those policemen testified in this case. However, the evidence of the 2nd prosecution witness who is an independent witness and who has not been shown to have any connection or relationship with either the accused person or the deceased before the death of the deceased, lends weight to the evidence of the 4th prosecution witness and amply corroborated the evidence of the 4th prosecution witness. The evidence of that 2nd prosecution witness also negated and rendered untrue the evidence of the Accused person that the pistol exploded while himself and the deceased were struggling for possession of the pistol and that the deceased was accidentally hit by the accidental discharge from the pistol."

XX

This witness {P.W.2} removed the possibility of accidental discharge from the pistol from a close range when he testified further in his evi-

dence in chief as follows:-

"There was no close encounter between the deceased and the gunman because there were no other external marks of injury and there were no vital reactions around the entrance wound of bullet to suggest any struggle." {words in bracket supplied}

B

xx

"..... I hold that the gun (pistol) which the Accused person held on 18th April, 1994 did not accidentally exploded or discharged I do not believe the Accused person when he testified that the pistol exploded while the deceased and himself were struggle for the possession of the pistol. I believe the 2nd prosecution witness when he testified that the Accused person moved backwards for a distance of about seven feet before he took his aim with the pistol and fired at the deceased."

C

xx

"From the evidence of the 4th prosecution witness which I believe, and which evidence as to distance and cause of death is corroborated by the evidence of the 2nd prosecution witness, the shooting of the deceased was premedi tated and therefore not sudden or accidental."

D

xx

" I do not believe that the deceased attacked the accused."

xx

"The fact that the 4th prosecution witness was a brother to the deceased without more, cannot make him a tainted or biased witness The 4th prosecution witness has not been shown to have a purpose of his own to serve."

F

The learned trial judge then returned a verdict of guilty against the appellant and convicted him as charged.

G

Dissatisfied with the judgment of the trial court, the appellant appealed to the Court of Appeal, Benin Division. In its unanimous judgment delivered by Ige JCA, the Court of Appeal affirmed the decision of the trial court and dismissed the appeal.

H

The appellant has further appealed to this court. The appellant and the respondent filed and exchanged briefs of argument. Each raised 3 issues for determination in his brief. The issues filed by the respondent

are covered by those formulated by the appellant.

In my contribution, I shall confine myself to the issues of defence of accidental discharge of the gun, P'W.4 evidence as a tainted witness and corroboration of that evidence by P.W.2.

B A tainted witness has been described in several decided cases as a witness who has his own purpose to serve in his evidence. The term tainted witness is not part of the Evidence Act, nor has its description or interpretation been given in any statutory provision. It has however been recognised as accepted by practice. See R. V. Omisade & Ors. {1964} 1 C All N.W.L.R 133 where Mbanefo Ag. JSC {and Chief Justice of Eastern Nigeria} in his dissenting view on the issue stated thus:

a tainted witness, "even if he could not be regarded as an accomplice in the strict sense he is one on whose evidence it would D be unsafe to act without corroboration."

The conduct by the learned trial judge in looking for corroboration of the evidence of P.W.4 which he said he found in the evidence of P.W.2 have left me in no doubt to conclude that he regarded P.W..4 as a tainted E witness and on whose evidence alone he found he could not or ought not rely to convict the appellant. So the issue that P.W.4. is a tainted witness was settled in the affirmative by the learned trial judge himself and requires no further comment by me.

F The next point to comment upon is whether P.W. 2's evidence corroborated that of P.W. 4 as regards the question that the deceased died as a result of gun-shot emanating from the gun of the appellant. My answer is in the affirmative; but on whether the death of of the deceased was not as a result of accidental discharge as put up by the prosecution, the G evidence of P.W. 2 and P.W.4 must be critically and objectively scrutinized and considered.

I have already re-stated the facts of the case of the prosecution and the defence as contained in the evidence of the p.w.4 and the appellant H respectively. It will not be out of place if I repeat, albeit in brief, the evidence of the respective witnesses. P.w.4, the star witness of the prosecution and the only eye-witness called by the prosecution had before giving evidence on oath made a statement to the police which was

admitted in evidence as Exhibit B after over-ruling objection to its admissibility by the prosecution. Exhibit B in substantial part reads:

"On 18/8/94, I travelled with my brother in his Volvo car from Lagos to Awomoma in Imo State. When we got to Benin City along Lagos/Benin Express way, Policemen on road block stopped us and my brother stopped the car. One of them drew my brother out of the car and slapped him. Their leader came and asked my brother questions which I did not hear because I was inside the car. As my brother was about to answer the question, one of them fired him on the chest and my brother called me two times before he fell down. I ran out of the car and held my brother. Some of the policemen carried my brother into their pick-up and later removed him into my brother's Volvo car to UBTH. When we got to the Hospital, they left the corpse in the car and went into one of the rooms in the Hospital. I later left them in the Hospital. I can identify the policeman that fired my brother. My brother did not struggle with any policeman."

In Exhibit B. P.W.4 did not state that it was the appellant that drew out the deceased from the car and slapped him, nor did the exhibit contain the statement that. The policeman who drew my brother out of the car and slapped him then drew backwards to a distance of about 7 feet and pointed a gun in his hand and shot my brother through left chest and my brother shouted my name saying, "vincent, I am dying, I am dying, I am dying." He was now holding his left breast with both hands myself and my brother fell down and as I got up the policeman who shot my brother faced me and pointed his gun at me. Then one of the policemen around shouted "No,No,No." and the policeman who shot my brother then lowered his arm and kept the gun When we got to the Hospital one of the Doctors came and asked what happened and when I told him what happened he shouted "JESUS". Another student also came and asked me what happened and I told him..... The Accused person is the policeman who drew my brother out of the car, slapped him and drew back from my brother for a distance of about 7 feet pointing the gun at my brother and shooting at my brother." Exhibit B was made by P.W.4 on 30/8/94, twelve days after the incident

while he gave his evidence on 15/12/95, about 16 months after the incident. Exhibit B which was made at the earliest opportunity when the facts were fresh in P.W.4's mind did not contain the detailed facts referred to above and given by him in his evidence 16 months after the incident. The impression that one would gather from Exhibit B is that the policeman that pulled the respondent out of the car is not the same policeman that was said to have fired the deadly shot at the deceased.

Another aspect of the evidence of P. W 4 which is not contained in Exhibit B is his statement that "As we got to Benin City, policemen stopped us. We did not see the policeman in time as we were on speed. We passed the policeman, and my brother Remigious Mekoba stopped the car and he reversed the car back. One of the policemen came to us and asked him why we did not stop and my brother replied that he has now stopped." In Exhibit B, P.W. 4 stated that "when we got to Benin City along Lagos/Benin Expressway, policemen stopped the car." It did not contain the statement of not seeing the police or reversing after stopping the car. There was no mention that the vehicle was speeding. With these differences between Exhibit B and the evidence of P.W.4 on some material facts as analysed above, can it be said it is the type of evidence the court can rely without more to base conviction on a serious charge like murder? My obvious answer will be in the negative and that is why in my view the learned trial judge looked for corroboration which he said he found in the evidence of P.W.2. How did the evidence of P.W.2 corroborate that of P.W.4?

In matters of science or trade, an expert, or person intimately acquainted with it, may be called upon to give his opinion on the probable result or consequence from certain facts already proved.

P.W. 2 is an expert witness called to give evidence in his own field as a Medical Doctor in order to ascertain the cause of death. He is not an expert to give evidence on the distance from where the gun was fired, as he does not possess with the reference to the particular point, by reason of education or specialized experience, superior knowledge not acquired by ordinary persons; nor has he, by habits of life and business, peculiar skill in forming opinion on the subject, P.W.2 was not an eye

witness to the incident and all that he had said on the issue is nothing but speculation and goes to no issue.

There is no cogent explanation by the prosecution as regards the material contradiction between Exhibit B and the evidence of P.W.4. Viva Voce. In the absence of such cogent explanation, the contradiction shall be resolved in favour of the accused. See Boy Muka & Ors V. The State {1976 } 9-10 SC 305; Arehia v. The State {1982} 4 SC 78; Onobogu v. The State {1974} 9 SC 1; The Queen v. Joshua {1964} 1 All NLR 1 and Jizurumba v. The State {1976} 3 SC 89.

For a witness to be perfectly credible, he must not be in the slightest degree partial or biased in his evidence to one party or the other. Although a brother is a competent witness for his other brother, the interest arising from the relationship detracts proportionately from the credit of such a witness. And when Exhibit B is read along with Viva Voce evidence of p.w.4, partiality or bias towards his deceased's brother is easily discernible. Such evidence needs to be corroborated by rule of practice. See Adekunle v. The State {1989} All NLR 754 and Doka & Ors. v. The State {1967} All NLR 355.

The appellants case is as revealed in his evidence viva voce and his cautionary statement Exhibit A.

In Exhibit A, the appellant stated as follows:-

"On 18/8/94 at aboutthen the driver later died."

The appellant's was consistent in both Exhibit A and in his evidence that the deceased grabbed his pistol and when he was struggling with the deceased to rescue it, it accidentally exploded and hit the deceased. When he was cross examined on the possibility of the pistol to fire in the course of struggle, he said:

"It is not correct that unless the trigger of a rifle is pulled it does not fire. If there is a struggle for possession or control of a pistol even when nobody touched the trigger, the pistol may fire."

It was part of p.w. 4 evidence which the learned trial judge accepted that the deceased after he was slapped "raised his hands in holding his jaw and bent down and laid his hand on the bonnet of the car." There was no evidence that the deceased raised himself from the bonnet of the

car when he was allegedly fired at by the appellant. If at all that happened, the bullet shot could have hit the deceased from the back rather than on the left side of the chest coming out from the left shoulder. The story narrated by the appellant is more in line with narration of the incident by the p.w. 4 in his evidence, thus consistent with the truth of what happened. It would be mere concoction of evidence by p.w.4 to say that the deceased was shot on the left chest by the appellant when the former was lying on his chest against the bonnet of the car.

Where a defence of accidental discharge is raised by the defence, the prosecution has a duty to disprove it. See Sholuade v. The Republic {1966} All NLR 134. The test under s. 24 of the criminal code is whether the prohibited act was or was not done accidentally or independently of the exercise of the will of the accused person. See Wedgee Shire Council v. Bonney {1907} 4 CLR 977 in which similar provision with S. 24 CC was interpreted. Also in Sweet v. Parsley {1970} AC 132; {1969} 1 All ER 347; {1969} Cr. App. R. 221 at 225 226 Lord Reed made the following exposition on the law-

"To make a man liable to imprisonment for an offence which he does not know he is committing and is unable to prevent is repugnant to the ordinary man's conception of justice and brings the law to contempt ."

It was held by this court in Iromantu v. The State {1964} 1 All NLR 311 that-

" Where a person discharges a firearm unintentionally and without attendant Criminal malice or negligence he will be exempt from criminal responsibility both for , the firing and for its consequences."

It is settled principle of law that the appellate court will not disturb concurrent findings of fact by the lower courts, unless such findings are improper or perverse having regard to the evidence. See Ogbero Egri v. Edeho Uperi {1974} NNLR 22; Amusa Opoola Adio & Anor v. The State {1986} 2 NWLR {pt. 24} 581; Woluchem v. Gudi {1981} 5 SC 291. As I have analysed and shown earlier in this judgment, the solitary evidence of p.w. 4 on which the learned trial judge relied to base the conviction which was subsequently affirmed by the Court of Appeal, is

perverse. I found reason to interfere with the judgments of the two lower courts in consequence of which I hereby allow the appeal.

While it is not necessary for the prosecution to call every available evidence to prove its case, as laid down in s. 179{1} of the Evidence Act and interpreted and applied in Odili v. The State {1977} 4 SC 1 and Alonge v. IGP {1959} 4 FSC 203, but it is incumbent on the prosecution where there is a vital point in issue and there is one witness whose evidence would settle it one way or the other, to call such a witness. See R. v. George Kure 7 WACA 175; Anthony Igbo v. The State {1975} 9-11 SC 129, and R.v. Thompson Udo Essien 4 WACA 112. The evidence of a ballisticsian and one or more of the eye witnesses would have settled the case in one way or the other if they had been called by the prosecution.

It is for these reasons and the more detailed ones in the judgment of my learned brother Belgore, JSC which I have had the privilege of reading, that I also allow this appeal, set a side the conviction and sentence by the lower courts and substitute a verdict of discharge and acquittal of the appellant.

E

KUTIGIJSC

The appellant was charged and convicted of the offence of murder contrary to section 319 (1) of the Criminal Code. He was sentenced to death.

At the trial the prosecution called four witnesses while the appellant testified in his own defence but called no witnesses.

The facts of the case are as stated on pages 79 - 80 of the record in the lead judgment of Atinuke Ige, JCA., (with which Akpabio and Nsofor, JJ.CA., agreed) as follows:-

"On 18/8/94 one Remigious Mekoba and his brother, Vincent Mekoba were travelling from Lagos to Imo State in a Volvo car driven by Remigious. At a certain point between Ugbowo and Oluku junction along Benin/Lagos Express Road, some policemen including the appellant stopped them at a check point.

Remigious and his brother Vincent didn't see the policemen in time

hence they drove past the checking point. They had to reverse the car to the Police checking point. One of the Policemen asked them why they failed to stop when stopped but Remigious Mekoba replied that they have eventually stopped. At that state the appellant, an Asst. Superintendent of Police who was in charge of that checking point opened the front door of the car, drew out Remigious out of the car and slapped him. As he Remigious laid his head on the bonnet of his car in pains, the appellant moved backwards to a distance. Pointed his gun at Remigious and shot him on the left part of his chest. Remigious then shouted to his brother saying "Vincent, I am dying, I am dying, I am dying."

As Vincent rushed to the aid of his brother, they both fell down. When PW. 4 Vincent got up, the Appellant pointed his gun to him but he was stopped by the shout of another Policeman who said "No, no, no". After the shooting, Vincent and some Policemen carried Remigious in his Volvo car and drove to the University of Benin Teaching Hospital where a doctor confirmed him dead. That is the story as told by the prosecution. The accused denied the charge and pleaded accidental discharge during a scuffle with him by the deceased."

At the conclusion of the trial, the learned trial judge after a careful consideration of the evidence found the appellant guilty as charged and accordingly sentenced him to death as stated above.

The appellant being dissatisfied with the judgment of the High Court, appealed to the Court of Appeal, Benin-City Division. In his brief of argument, five issues were formulated for resolution. Issue 2 and 5 were struck out on the ground that they were not covered by any ground of appeal. The remaining three surviving issues were thus:-

- (i) Whether, in the evaluation of evidence the trial Judge was right to have held that the evidence of PW.2, not an eye witness, corroborated the evidence of PW.4, the deceased's brother having regard to the circumstance of the case.
- (ii) Whether in the evaluation of evidence the learned trial Judge properly considered the particular aspect of PW.4's evidence at page 13 lines 19 - 23 where he said, "When we got to the hospital one of the Doctors came and asked what happened and when I told him what hap-

pened he shouted 'Jesus'. Another student also came and asked me what happened and I told him". In the circumstance the story of 7 feet to 10 feet and distance of shot must become common knowledge in the hospital where the question of distance was not part of P.W.4's Statement to the Police nor did the police investigate it.

(iii) Whether the trial Judge could not have considered a case of negligence on the part of the accused person as to reduce the charge from murder to manslaughter and sentence him accordingly."

The Court of Appeal thoroughly considered all the above issues and in a unanimous judgment dismissed the appeal and confirmed the conviction and sentence. It is against the judgment of the Court of Appeal that the appellant has now further appealed to this Court.

In the appellant's brief three issues have been formulated as arising for determination in this case. They are:-

"Issue 1.

Whether the holding of the learned Justices of the Appeal Court that "It is my candid view that the learned trial judge's finding in this case can just not be faulted, and I do not intend to interfere with them" was perverse having regard to the evidence before the trial court.

Issue II

Whether the learned trial judge and the learned Justices of the Court of Appeal were right in holding that the evidence of PW.2 and PW.4 corroborated each other.

Issue III

Whether the learned Justices of the Court of Appeal were right in holding that a case of accidental discharge was not made out by the appellant."

There is no doubt that all the three issues above revolve around the credibility or otherwise of the evidence of the single eye witness (PW.4), that of the medical doctor (PW.2), who performed the post mortem examination, as well as the evidence of the appellant himself who alleged that his was a case of negligence or accidental discharge during a struggle with the deceased. Summarily stated, the appellant's counsel contended that because PW.4 is a brother of the deceased, he was therefore a tainted witness with his own interest to serve and that his entire evidence needed

corroboration. That because there was no corroboration of the evidence of PW.4, the evidence of the appellant to the effect that the death of the deceased was as a result of accidental discharge stood uncontradicted. As for the Medical doctor (PW.2), it was contended that being a medical doctor called to testify about his findings on post mortem examination, he was not competent to say categorically that the gun was fired at the deceased from a specific distance and that only an expert like a ballisticsian could have done that but none was called to testify. For the defence of accidental discharge, it was contended that the appellant, both in his statement to the police (Exhibit "A") and evidence in court, unequivocally stated that the explosion of the gun was accidental and that he had no intention to kill anyone. It was stressed that, that defence ought to have been upheld by the lower court.

It is trite law that the issue of credibility of a witness is solely within the province of the trial court which saw and heard the witness testify and that it is not the duty of an appellate court to reverse the findings of fact of a trial court unless they are shown to be perverse or unjustified. (See BAWARE v. THE STATE (1987) 1 NWLR (Part 52) 579; ODOFIN v. AYOOLA (1984) 11 SC. 72. FABUNMIYI & ANOR. v. OBAJE & ANOR. (1968) NMLR. 242. It is also trite that this Court ought not lightly interfere with concurrent findings of fact of the lower courts as in this case, except where the concurrent findings are perverse or based on a wrong perspective of the entire case (See ARUNA & ANOR. v. THE STATE (1990) 6 NWLR (Part 155) 125; EBBA v. OGODO (1984) 4 SC. 84.

It is clear to me from the record that PW.4 is the only eye witness called by the prosecution in this case and the learned trial judge had the opportunity of listening to him and watching his demeanour in the witness box. And he believed his evidence in toto. The fact that he (PW.4) is a brother to the deceased without more, cannot in my view make or turn him into a tainted or biased witness. He was not shown to have been an accomplice in the commission of the offence nor that he had any interest or purpose of his own to serve as such witness. Relationship by blood without any more cannot tantamount to a disqualification from

being a prosecution witness, and I am not aware of any of our laws which provide as such. Consequently the evidence of PW.4 in my view requires no corroboration. (ISHOLA v. THE STATE (1978) 9 & 10 SC. 81; ONAFOWOKAN v. THE STATE (1986) 2 NWLR (part 23) 496; AREHIA & ANOR. v. THE STATE (1982) 4 SC. 78; HAUSA v. THE STATE (1992) 1 NWLR 219. B

I repeat again that the evidence of PW.4 was believed and accepted while that of the appellant was rejected by the learned trial judge who saw and watched both of them testify. And if the evidence of the single eye witness (PW.4) sufficiently proved the case against the appellant, as did in this case, there is no rule of law or practice disentitling the court from convicting on the evidence. (See ANTHONY IGBO v. THE STATE (1975) 9-11 SC. 129; ALONGE v. INSPECTOR-GENERAL OF POLICE (1959) 4 FSC. 203). It must also be stated that the fact that PW.4 saw the deceased shot with a gun by the appellant and the fact that the deceased was pronounced dead on arriving at the hospital, all go to show that there was no need to have called PW.2, the medical doctor, to give any evidence of the cause of death of the deceased. The court was in a position to have inferred the cause of death from the facts and circumstances of the case without any medical evidence (see KUMO v. THE STATE (1968) NMLR 227; LORI v. THE STATE (1980) 8-11 SC. 81; KATO DAN ADAMU v. POLICE (1956) 1 FSC. 25) Under the circumstances also, I fail to see what effect or relevance if any, the evidence of a ballisticsian or other policemen allegedly present at the scene could have had on the case particularly when the shooting itself was not denied, the contention being that it was an accidental discharge only. My view therefore is that the prosecution was not bound to have called a ballisticsian or other policemen who were not in any way material witnesses for the prosecution, (see NWAMBE v. THE STATE (1995) 3 NWLR (Part 384) 385; OKONOFUA v. THE STATE (1981) 6-7 SC. 1. D E F G

I find no merit whatsoever in this appeal. And it is for the above H reasons and others contained in the lead judgment of my learned brother, Iguh, JSC., with which I agree, that I too dismiss the appeal.

ONU JSC

The appellant, an Assistant Superintendent of Police has further appealed to this court against the judgment of the Court of Appeal, Benin Division (hereinafter referred to as the court below) which on 11th July, 1997 affirmed the decision of Edokpayi, J. sitting at the Edo High Court of Justice, Benin City that on the 1st day of March, 1996 convicted him of the murder of one Remigious Mekoba (hereinafter called the deceased).

The facts of the case which are not in dispute may be concisely stated as follows:-

That on 18th August, 1994 while on duty, appellant assembled a team of six rank and file policemen and booked himself for anti-crime patrol duty with them on the Benin Ore Road. The deceased and P.W.4 at a point between Ugbowo and Oluku junction drove pass the policemen in their car because they did not see them in time. At any rate, they reversed the car to meet them. In answer to the question by one of the policemen as to why they failed to stop, the deceased replied that they had eventually stopped. Thereafter, the two versions of what led to the deceased's death may be summarized thus:

From the defence angle, it is that the policemen closest to the position where the deceased stopped, demanded for the vehicle particulars as a result of which an argument ensued. That this drew the attention of the appellant who went to the scene of the argument and demanded for the vehicle particulars. That when the deceased informed him (appellant) that he had none, the appellant demanded for the keys of the vehicle and when the deceased refused to deliver same but the appellant insisted on having them, the deceased went for his pistol. That a struggle ensued between the two leading to the pistol accidentally exploding and hitting the deceased who was subsequently rushed to the University of Benin Teaching Hospital where he later died. From the prosecutions's point of view, witness Number 4, Vincent Mekoba, who was with the deceased at the time of the incident testified that after failing to stop at the first instance with his car, the deceased eventually stopped it and reversed back to where he was accosted by the appellant who then dragged him

out, slapped him, stepped back some 7 to 10 feet and shot him point blank with his pistol.

It is not open to dispute; indeed it is trite law that the duty of the trial court is to hear, evaluate the evidence, watch the demeanor of the witness and arrive at a conclusion. See Ajadi v. Olarewaju (1969) 1 ALL NLR 382; Fatoyinbo v. Williams (1956) 1 FSC 97; Okpiri v. Jonah (1961) 1 ALL NLR 102 at 104 and Akibu v. Opaleye (1974) 1 ALL NLR 344 at 356. In the instant case, the facts not being in dispute, the learned trial Judge came to the view that the prosecution had proved its case beyond reasonable doubt; that the evidence of P.W.2 corroborated the evidence of P.W.4 as to the distance from where the shot came and therefore, that there was no struggle between the appellant and the deceased. In which case, this court will decline to interfere with the decision arrived at which the court below rightly in my view, affirmed. See Omisade v. The Queen (1964) NMLR 67. Said the learned trial Judge:

"From the evidence of the 2nd and 4th prosecution witnesses which I now believe, I hold that the gun (pistol) which the accused person held on 18th April, 1994 (sic) did not accidentally explode or discharged, I do not believe the Accused person when he testified that the pistol exploded while the deceased and himself were struggling for the possession of the pistol. I believe the 2nd prosecution witness when he testified that the Accused person moved backwards for a distance of about seven feet before he took his aim with the pistol and fired at the deceased."

Continuing, the learned trial Judge held inter alia:

"From the evidence of the 4th prosecution witness which I believe, and which evidence as to distance and cause of death is corroborated by the evidence of the 2nd prosecution witness, the shooting of the deceased was premeditated and therefore not sudden or accidental The Defence of self defence therefore does not avail him. I have said earlier that I do not believe that the deceased had any scuffle with the Accused person. I do not believe that the deceased gripped the pistol of the Accused person or that the pistol accidentally fired or accidentally exploded during any struggle for the possession or repossession of the pistol. I do not believe that the deceased attacked the Accused person."

Even if it had been the case of the accused person that he fired the deceased in return for the deceased person's attack on him, the provocation or self defence would still not have availed the Accused person in this case. See the case of Akang v. The State (1971) 1 ALL NLR 47 at
 B page 49 per Coker, JSC. I do not believe the Accused person when he testified that a third person dressed in army uniform was inside the Volvo car with the deceased on that day of the incident. He said no such thing in his statement to the Police. I believe the 4th prosecution witness when
 C he testified that when himself and his brother fell down and he got up, the Accused person faced him and pointed the pistol at him and that one of the Policemen around had to shout no, no, no before the accused lowered his aim and kept the pistol. The immediate subsequent behaviour of the Accused person, after the shooting of the deceased, in facing
 D the 4th prosecution witness to whom he pointed the pistol as the 4th prosecution witness got up from the ground further points to the fact that the shooting of the deceased to death was not accidental."

On the central role of the 4th prosecution witness in the proof of the
 E prosecution's case the learned trial Judge said:

"The 4th prosecution witness is the only eye witness in this case and his evidence which I believe is amply corroborated by the evidence of the
 F 2nd prosecution witness as to the cause of death and the distance between the deceased and the accused person before the shooting. Section 179(1) of the Evidence Act, 1990, provides that "Except as provided in this Section, no particular number of witnesses shall in any case be required for the proof of any fact." The learned defence Counsel did submit that the 4th prosecution witness was a tainted witness whose evidence that
 G court should view with caution as follows: As I have earlier said Section 179(1) Evidence Act states as follows:

"Except as provided in this Section, no particular number of witnesses shall in any case be required for the proof of any act."
 H In the case of Anthony Igbo v. The State (1975)9-11 SC. 129 *rationes* 2 and 3 the Supreme Court held as follows:

"(2) That it is not necessary for the prosecution in order to discharge the onus of proof laid upon it to call a host of witnesses. It is

enough if evidence is called sufficient to discharge the onus;

(3) that there is no rule of law or practice which shall make a court hesitate in convicting upon the evidence of one witness in the case where there is no suggestion that the witness is an accomplice if the court is satisfied by the evidence given."

B

(See also the case of Oteki v. The State (1986) 4 SC. 222 at page 251). The fact that the 4th prosecution witness was a brother to the deceased, without more, cannot make him a tainted or biased witness. In the case of Jimoh Ishola (Alias Ejingbadero) v. The State (1978) 9 & 10 SC. 81 at page 100 Idigbe, JSC pointed out the two qualifications for a witness becoming a tainted witness as follows:"

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See the principles laid down by this court for what are the ingredients of a 'tainted witness' vide Okoro v. The State (1988) 4 NWLR (Part 94) 255 at 274 and Mbenu v. The State (1988) 3 NWLR (Part 84) 615 at 617.

D

In affirming the decision of the learned trial Judge after a most dispassionate consideration the court below observed inter alia as follows:-

"It has been argued on behalf of the appellant that the learned trial Judge relied heavily on the evidence of P.W4 and the alleged corroborative evidence of P.W.2 the medical doctor. Counsel conceded the evidence given by the Doctor to the extent of the injury resulting from the discharge of the gun but his contention is as to the distance from which the pistol exploded. Counsel said P.W.4 didn't mention the distance of 7ft to 10ft in his statement to the Police and that the investigating Police Officer P.W1 who visited the scene of crime did not measure any distance from which the shot was fired.

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For the Respondent it was submitted that trial court was right in accepting the evidence adduced by the prosecution while rejecting the spurious evidence of accidental discharge introduced by the appellant. The learned trial Judge was said to have been perfectly in order on the issue of credibility of witness and his findings of fact should not be reversed because they are not perverse. In support he cited the cases of Muftau Bakare v. The State (1987) 1 NWLR (Part 52) 579 at 580; Abdullahi v. The State (1985) 4 SC. 183 at 192.

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The learned trial Judge in his judgment said both the accused per-

son and the 4th P.W are *ad idem* (sic) evidence that the missile which killed the deceased emanated from the pistol held by the accused appellant on that day. Even the learned Counsel for the appellant in his brief of argument conceded that much that the evidence of the doctor p.w.2 to the extent of the injury found on the deceased resulted from the discharge of the gun.

These concessions have narrowed down the issues involved in this appeal to whether or not the discharge was accidental or intentional.

The 4th P.W's evidence is that of an eyewitness and the learned trial Judge had the opportunity of watching his demeanor in the box and he believed him. The appellant made a heavy weather of the fact that P.W4 didn't include in his statement Exhibit 'B' to the Police - the question of the accused stepping backwards for 7 - 10ft before firing the pistol at deceased. The appellant referred to it as a contradiction in the evidence of the prosecution. I seem to agree with the view of the learned trial Judge that the issue of 7ft. distance before shooting is only an enlargement of P.W's previous statement to the Police and not a contradiction. What is important in this case is who fired the gun that caused the wounds found on the deceased by 2nd p.w. and the wounds that resulted into the death of the deceased?"

The above extracts from the two courts below no doubt, constitute findings of facts by the trial court which saw and heard the witnesses - a situation which the appellate court (in the instant case, the court below) with no similar opportunity refrained from disturbing or coming to different findings upon being unable, it would seem clear, to fault the conclusion arrived at or to demonstrate that such conclusion could not follow from the credible evidence led in the trial court. See Odofin v. Ayoola (1984) 11 SC. 72 at 106; Ebba v. Ogodo (1984) 4 SC. 84 at 98; The State v. Iyaro (1988) 2 SC. (Part 1) 167 at 172 and Babatunde Ajayi v. Texaco (1987) 9-11 SC. 1 at 27. Indeed, the two decisions constitute concurrent findings of fact. The attitude of this court to such findings of the two lower courts is of course that it will not interfere with them except the appellant can show special circumstances - either that there was a miscarriage of justice or a serious violation of some principles of law or

procedure or that the findings are erroneous violation of some principles of law or are perverse or that the findings are erroneous. See Nwadike v. Ibekwe (1987) 4 NWLR (Part 67) 718; Western Steel Works v. Iron & Steel Workers Union (1987) 1 NWLR (Part 49) 284; Enang v. Adu (1981) 11 - 12 SC.25 at 42; Ogunsola Ajadi v. Alhaja Ladunni Okenihun (1985) 1 NWLR (Part 3) 384 and Sobakin v. The State (1981) 5 SC. 75, to mention but a few. In the instant case, I can see none of the vitiating factors in concurrent findings to warrant my disturbing them.

From the foregoing, I have no hesitation therefore in answering the first two issues submitted at the instance of the appellant, to wit:

ISSUE 1

Whether the holding of the Learned Justices of the Appeal Court that "it is my candid view that the Learned Trial Judge's finding in this case can just not be faulted, and I do not intend to interfere with them" was perverse having regard to the evidence before the trial court, and

ISSUE 11

Whether the learned trial Judge and the learned Justices of the Court of Appeal were right in holding that the evidence of P.W.2 and P.W.4 corroborated each other.

in the negative and affirmative respectively.

It remains to consider issue No. 3 which asks: Whether the Learned Justices of the Court of Appeal were right in holding that a case of accidental discharge was not made out by the appellant.

Like I have done in the first two issues I would have unhesitatingly disposed of this issue by answering it in the positive but for:

(i) the citing to us of this court's earlier decision in Mande Ali v. The State (1972) 10 SC. 87 and

(ii) the defence contention that apart from failure to call none of the Policemen present at the scene of crime on the day it was perpetrated, the non-tendering of the gun is fatal to the prosecution's case.

In answering the first arm of this issue, I need only fall back to what the two courts below decided in relation to the testimony of 4th P.W. Having earlier upheld the decision of the court below that affirmed the decision of the trial court on the question of evaluation of evidence, particularly

that of 4 P.W., it is in my opinion, that it is none of the business of this court or any appellate court for that matter, to substitute its view for that of the trial court which had the singular advantage of seeing and hearing the witnesses and assessing their credibility. See Egri v. Uperi (1974) 1 B NMLR 22 at 26; Ebba v. Ogodo (supra); Benmax v. Austin Motor Co. Ltd (1955) AC. 370 and Lion Buildings v. M.M Shadipe (1976) 12 SC. 135 at 135. As the trial court's findings rested on the credibility of 4th P.W. bordering on demeanor, it is not the province of this court as an appellate court to interfere therewith. Thus, as this court had occasion to state in Motunwase v. Sorungbe (1988) 5 NWLR (Part 92) 90 C

"In matters of credibility based on demeanor of witness, a Court of Appeal cannot and ought not interfere - as it did not have the advantage of seeing such witness testify. If what is involved are findings based on inferences which the learned trial Judge has drawn from the evidence, the Court of Appeal is in as good a position as the trial court and can make its own findings if in its own view the findings made by the learned trial Judge are wrong." See also Nnajifor v. Ukonu (1985) 2 NWLR D (Part 9) 686 and Kponuglo v. Kodadja (1933) 2 WACA 24. E

The facts in the case of Mande Ali (supra) to which our attention was adverted being a far cry from those relevant to the case in hand, I hold that that case is inapposite to the one herein.

Now, turning to the second arm of this issue firstly, it does not lie in the mouth of the appellant to complain about the prosecution's failure to call the policemen at the scene of crime. Being a police officer himself, it is indeed intriguing that an accusing finger is now being pointed at the prosecution for failure to invite the policemen present at the scene of crime to testify. It is trite law that there is no rule which imposes an obligation on the prosecution to call a host of witnesses; all the prosecution need do is to call enough material witnesses to prove its case, and in so doing it has a discretion in the matter. See Samuel Adaje v. the State G (1979) 6-9 SC.18 at 28. Bako Baha v. Yauri N.A. POLICE (1970) NWLR H (1979) 6-9 SC.18 at 28. Bako Baha v. Yauri N.A. POLICE (1970) NWLR 107 at 112; E. O. Okonofua & Anor v. The State (1981) 6-7 SC. 1 at 18. See also Section 179 (1) of the Evidence Act. What is more it is the law that if a witness is not called by the prosecution, the defence is at liberty

to do so. See Okpulator v. The State (1990) 7 NWLR (Part 164) 581. It is also trite that the court can convict upon the evidence of one witness without more if the witness is not an accomplice in the commission of the offence and his evidence is sufficiently probative of the offence with which the accused has been charged. See Oteki v. A.G. Bendel State B (1986) 2 NWLR (Part 24) 648; Ugboma v. Ugboma 3 ECSLR 860 and Numo Mallam Ali v. The State (1988) 1 NWLR (Part 68) 1 at 20. It is also the law, supported by a long line of authorities (the instant case included) that the evidence of one credible witness - here the evidence of C 4th P.W. an eye-witness - acceptable and believed by a trial court, is sufficient to justify conviction. See Adelumola v. The State (1988) 1 NWLR (Part 73) 683. The case of Mande Ali (supra) is therefore, in my respectful view, clearly distinguishable from the case in hand.

(i) that a ballisticsian was not called by the prosecution to testify i.e. D as an expert and that failure to do so is fatal to the prosecution's case; and

(ii) that when the deceased held his jaw in pain with his head on the bonnet of his car, he must have been "backing his assailant."

On (i) above, as the appellant in his extra-judicial statement (Exhibit A) E stated:

"The next thing he did was to grip my pistol. As he was struggling (sic) the pistol with me, the pistol exploded and he was hit."

and furthermore, that:

"If there is a struggle for possession or control of a pistol, even F though when nobody touched the trigger, the pistol may fire."

no argument, plausible or tendentious can be proffered in favour of calling a ballistics expert to testify on a matter which I consider a non-issue. G The death of a human being (i.e. the deceased) had been caused through the direct act of the appellant by the use of his pistol i.e. that the prosecution which had the onus to establish the same had done so. See R. v. Oledima 6 WACA 202 and Onyenankeya v. R. (1964) 1 ALL NLR 15. H Where a person, as in the instant case, attacked the deceased with a lethal weapon (here a pistol) and the victim dies on the spot, it is hardly necessary to prove the cause of death by medical evidence (like in the instant case calling P.W.2). See Bakari v. The State (1965) NMLR (Part 50) 464

at 469.

On (ii) above, learned counsel for the appellant has contended that it was not possible for the deceased to have been shot through the upper left chest as testified to by P.W.2 and P.W.4. My short answer to this ingenious submission is that I will be delving into the realm of speculation and conjecture to venture an opinion as to where each of the appellant and the deceased faced or stood and in particular in relation to the appellant, as to what angle, direction, and how and when he fired his pistol. See Idapu Emine v. The State (1992) 7 NWLR (Part 204) 480 and Abayomi Adelanwa v. The State (1972) 10 SC. 13 at page 19.

It is for the foregoing reasons and the fuller ones articulated in the leading judgment of my learned brother Iguh, JSC with which I am in complete agreement that, I too, dismiss this appeal. I confirm the decisions of the two courts below.

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