

**SUPREME COURT OF NIGERIA**  
24TH SEPTEMBER, 1999. SC. 10/1998  
**CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI,**  
**S. U. ONU, U. A. KALGO, S. O. UWAIFO, JJSC.**

SUNDAY OMINI	.....	APPELLANT
V.		
THE STATE	.....	RESPONDENT

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**CRIMINAL LAW** - Murder - Ingredients that must be proved - Before a person charged with murder under s. 319 of the Criminal Code - Can be convicted.

**CRIMINAL LAW** - Murder - Unlawful killing - When it is unlawful to kill a human being.

**CRIMINAL LAW** - Manslaughter - Unlawful killing - Which does not constitute murder - Is manslaughter.

**CRIMINAL LAW** - Manslaughter - Failure to exercise sufficient care - Where the shooting which resulted in the death of the deceased - Was as a result of failure to exercise sufficient care by the appellant - The action comes within the purview of s. 317 of the Criminal Code.

**CRIMINAL LAW** - Murder - Insufficient proof - Where the offence of murder was not proved - The appellant can be convicted of manslaughter - Since the disregard of his legal duty to take care - Resulted in the death of the deceased.

**CRIMINAL LAW** - Unlawful killing - Reasonable care - Use of - In carrying out a lawful duty - Which is dangerous to life - Under s. 303 of the Criminal Code - Is inapplicable in the case of a member of the Mobile Police Unit - Checking motorists on the road.

**EVIDENCE** - Evaluation - Inconsistency in evidence - Where a witness is shown to have made previous statements - Inconsistent with the one given at the trial - Such evidence should be regarded as unreliable - And the previous statements do not constitute evidence - Upon which the court can act.

**MURDER** - Proof - Intentional killing - Where the killing resulting from the act of the appellant was not intended - His act does not fall within the provisions of s. 316 of the Criminal Code - And cannot constitute murder.

### **FACTS**

At the High Court of Ogun State the appellant was charged with the offence of murder contrary to s. 319 of the Criminal Code. The appellant, a Police Officer, attached to the Mobile Unit of the Nigeria Police Force, was on duty at a road block mounted on the Lagos - Abeokuta Road, along Owode Village, on October 8, 1986. The appellant signalled the on-coming driver of OG 6656 EB to stop at the Police check point at Owode Village Road, and ordered him to Park his vehicle on the Kerb side of the road beyond the check point. The driver complied. Where the driver alighted and walked to the appellant to find out the reason for the order, he heard the sound of a gun shot, followed by screaming and shouting of people from behind him. The driver who testified as PW1 discovered that one of the passengers in his vehicle had been hit by a bullet on her forehead and was bleeding. The appellant and the driver (PW1) conveyed the injured passenger to the hospital where she later died. The appellant testified in his own defence. His evidence at the trial varied from his extra judicial statement. He admitted he fired a shot from his SMG gun on that day. He claimed that he directed his shot at the tyres of a Peugeot 504 Station Wagon with registration No. 3 FGN 754 whose passengers were firing indiscriminately at the road block on that day. Appellant denied that it was his own shot that hit the Passenger in OG 6656 EB. He claimed that it must have been a shot from 3 FGN 754 that hit the deceased.

After the addresses of counsel for the Prosecution and of the de-

fence, the learned trial judge, found the appellant guilty of the offence of murder as charged. The appeal of the appellant to the court of Appeal, Ibadan Division against his conviction for murder was allowed, the sentence set aside, conviction for the offence of manslaughter under s. 317 of the criminal code was substituted. The appellant has further appealed to the Supreme Court raising four issues and the respondent raised two issues. The Court adopted the two issues raised by the respondent in determining the appeal.

**ISSUES FOR DETERMINATION**

*"2.1 Whether the prosecution had satisfied the evidential burden of proof beyond reasonable doubt.*

*2.2 Whether the Appellant was rightly convicted under Section 317 of the Criminal Code."*

**HELD** (Unanimously dismissing the appeal per lead judgment of **KARIBI-WHYTE JSC**)

***Evidence - Evaluation***

1. It is important to advert to the fact that the learned trial judge did not believe the oral testimony of the Appellant in Court on the existence of the Peugeot 3 FGN 754 (sic 3 FGN 745) at the scene. This is because of the material discrepancies in his account in his earlier statements on the 8th October, 1986, Exh. 'K' and his oral testimony before the trial judge. The learned trial judge was right in the view he took of the totality of the evidence of the Appellant on that issue because they are not evidence upon which he can act. In the Queen v. Asuquo Akpan Ukpong (1961) 1 ALL NLR. 25, it was held that when a witness is shown to have made previous statements inconsistent with the one given at the trial, such evidence should be regarded not merely as unreliable, but the previous statements do not constitute evidence upon which the court can act. Accordingly after evaluating the evidence before him, the learned trial judge was able to hold that the testimony of PW1 represented the acceptable account of the incident, - See Egboghonome v. State (1993) 7 NWLR (pt. 306) 383 at p. 436. (p. 2774 B)

***Murder - Ingredients***

2. It is at least well settled that to convict a person charged with murder under section 319 of the Criminal Code, the prosecution must prove beyond reasonable doubt

- B (a) the death of a human being,
  - (b) that it was caused by the act of the accused
  - (c) that the act or acts were done with the intention of causing death, or
  - C (d) the accused knew that death would be the probable consequence of his act or acts.
- In the instant case, there is no doubt that (a) and (b) have been proved beyond reasonable doubt. The same cannot be said of (c) and (d). There is clearly no evidence that the act of appellant, i.e. the shooting of the gun
- D was done with the intention of causing death. Of course the appellant knew that death would be the probable consequence of his act.
- (p. 2775 B)

***E Murder - Unlawful killing***

3. It is unlawful according to our law to kill a human being unless such killing is authorized or justified or excused by law - See S. 306 criminal Code. The killing here is neither authorized, justified or excused. It is

F therefore unlawful. (p. 2775 F)

***Unlawful killing - Reasonable care***

4. The Court of Appeal has resorted to the provisions of Section 306 of the Criminal Code dealing relating to the provision of unlawful killing to

G hold that the failure of Appellant to use reasonable care in carrying out his lawful duty has brought his conduct within the purview of section 303 of the Criminal Code. A careful reading of the section clearly shows that the duty is applicable and restricted to persons administering surgical or

H medical treatment to persons, or persons performing any other lawful act which is or may be dangerous to human life or health. Such persons are required to have reasonable skill and to use reasonable care in exercising the skill. Criminal responsibility follows the failure to exercise

reasonable care in the exercise of skill- See R v. Akerele (1941)7 WACA. 56. I do not think it is appropriate in the case of a member of the Mobile Police Unit, to equate his duty of checking motorists on the road as dangerous to life. (p. 2775 G)

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***Murder - Proof***

5. On the facts of this case the prosecution having failed to prove beyond reasonable doubt that Appellant by firing the shot that hit the deceased intended to kill the deceased, or to cause her grievous harm it seems to be the law that however reckless his conduct might have been, the killing resulting from his act was not intended, his act therefore does not fall within the provisions of section 316 of the Criminal Code and cannot constitute murder. (p. 2776 D)

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***Manslaughter - Unlawful killing***

6. An unlawful killing which does not constitute murder is in accordance with section 317 of the Criminal Code, Manslaughter - See Udo v. Queen (1964) 1 ALL NLR. 21. Our Criminal Code in sections 302-306 recognizes the difference between doing an unlawful act and doing a lawful act with a degree of carelessness which the legislature makes criminal - See Onah v. State (1977) 7 SC. 69. The evidence before the trial judge and the findings of fact accepted by the Court of Appeal clearly disclosed that Appellant was on the check point on lawful duty. He was issued with firearms for the purposes of carrying out his duty effectively. Although the defence of Appellant that he was aiming at the tyres of 3 FGN 754 (sic 3 FGN 745) Peugeot 504, when he fired the shot was rejected by the trial judge and the rejection was accepted by the Court of Appeal, there is no evidence otherwise that Appellant intentionally shot at the deceased to kill her. (p. 2776 F)

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***Manslaughter - Failure to exercise sufficient care***

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7. There is no gainsaying the fact the Appellant was at all times under a duty to take care in the handling of the firearm issued to him for the discharge of his lawful duty. Accordingly the Appellant fired the fatal

shot that killed the deceased during the discharge of a lawful duty. In accordance with section 304 Appellant was under a legal duty to use reasonable care and take reasonable precautions in the use or management of the firearm to avoid danger to the life, safety or health of any person that may be endangered. Such person is held to have caused any consequences which result to the life or health of any person by reason of the omission to perform that duty. It seems to me that the trial judge having found as a fact, which was accepted by the Court of Appeal, that the death of the deceased was as a result of the act of the Appellant, the shooting which resulted in the death of the deceased was as a result of the culpable disregard of his legal duty to take care, but without the necessary intent. The intention of Appellant was clearly to shoot at the vehicle. If as it appears from the evidence he failed to exercise sufficient care and consequently resulting in the death of the deceased, it seems to me that the action comes clearly within the purview of section 317 of the criminal code. (p. 2777 B)

***E Murder - Insufficient proof***

8. The reason why the judgment of the trial judge should be set aside is that the prosecution having not proved that Appellant intended to cause the death of the deceased, the offence of murder was not proved. On the other hand Appellant can be convicted of the offence of manslaughter because in complete and culpable disregard of his legal duty to take care in the handling of his gun in the discharge of his lawful duty, his act resulted in the death of the deceased - See Onah v. The State (1977)7 SC.69. (p. 2777 G)

**REPRESENTATION**

Chief (Mrs.) C. J. Aremu for Appellant  
Respondent absent, not represented

**CASES REFERRED TO**

Queen v. Ukpong (1961) 1 ALL NLR. 25  
Egboghonome v. State (1993)7 NWLR (pt. 306) 383 at p. 436

R v. Akerele (1941)7 WACA. 56. I

Udo v. Queen (1964) 1 ALL NLR. 21

Onah v. State (1977) 7 SC. 69

Odili v The State (1977) 4 SC. 1

Igbo v. The State (1975)9-11 SC. 129

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Asariyu v. The State (1987) 11-12 SCNJ. 125

Baridam v. The State (1994)1 SCNJ. 1

Akpan v. The State (1994) 12 SCNJ. 140

R v. Akerele (1941) 7 WACA. 56

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R. v. Kuye 3 WACA. 82

Andrews v. D.P.P. (1937) AC.576

R. v. Awonu (1947) 12 WACA. 95

**STATUTE REFERRED TO**

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Criminal Code, ss. 303, 304 and 306

**LEAD JUDGMENT KARIBI-WHYTE JSC**

On the 7th November, 1995, the Appeal of the Appellant to the Court below against his conviction for Murder under Section 319 of the Criminal Code was allowed, the sentence set aside, conviction for the offence of Manslaughter under section 317 of the Criminal Code was substituted. Appellant was accordingly sentenced to imprisonment of ten years with hard labour instead of death by hanging. The decision was unanimous. Appellant has further appealed to this court against the judgment of the court below.

**The Facts.**

The facts of the case are clear and undisputed; apart from the variance of the defence on his evidence at the trial from his extra judicial statement. They are contained in the evidence of PW1, and of the accused. Appellant, a police Officer, attached to the Mobile Unit of the Nigeria Police Force, was on duty at a road block mounted on the Lagos - Abeokuta Road, along Owode Village, on October 8, 1986. Appellant signalled the on-coming driver of OG 6656 EB to stop at the Police check point at Owode Village Road, and ordered him to park his vehicle on the

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Kerb side of the road beyond the check point. The driver of OG 6656 EB complied. When the driver alighted and walked to the Appellant to inquire for the reason for the order, he heard the sound of a gun shot, followed by the screaming and shouting of people from behind him. The driver PW1 observed that the passengers in his vehicle were hurriedly rushing out of it. When he moved closer to the vehicle, the driver, PW1, discovered that one of the passengers had been hit by a bullet on her forehead and was bleeding. PW1 stated in evidence that Appellant waived him off and advised him not to get nearer when he inquired why Appellant had to shoot. However, Appellant agreed and co-operated with PW1 to convey the injured passenger to the hospital at Ifo township. Unable to get medical attention at the hospital in Ifo town, the injured passenger was removed to Iiaro hospital and for the same reason of lack of medical attention, the injured passenger was moved to the state Hospital, Abeokuta, where she died within three minutes of arrival.

Appellant, with four other Police Officers, were at the road block, at Owode Village on the Lagos-Abeokuta Road, on the 8th October, 1986. Appellant was in charge at the road block. The account of the incident as narrated by the Appellant varied in material respects from the account of PW1. Accordingly to Appellant, there was the vehicle with registration No. 3FGN 745 with full headlights on at about 9.30 a.m. on the fateful day, overtaking all the vehicles ahead of it on the same side of the road while coming from Lagos to Abeokuta. Appellant signalled 3FGN 745 to stop at the road block. It stopped in the middle of the road behind another commercial vehicle, all approaching the road block. The vehicle 3FGN 745 began to move rather slowly behind the lorry in front of it. When the lorry in front completed the road block, 3FGN 745 accelerated in high speed across the centre of the road block. Appellant said that the occupants about five in number had arms and were firing their guns incessantly at those standing by the road side.

Appellant stated that he ducked and lay flat on the ground. He later grabbed his gun and fired towards the direction of the vehicle 3FGN 745 then speeding away towards Abeokuta. He pointed his gun at the rear tyres with the intention of deflating the tyres at the rear. The



vehicle 3FGN 745 continued and drove away at great speed. Appellant heard and saw some passengers in OG 6656 EB in panic. He left his duty post which was almost one electric pole from where he was standing at the road block, to attend to the passengers in OG 6656 EB. Appellant saw the injured passenger who was bleeding from the centre of her forehead, and arranged to transport her to the hospital at Ifo Health centre. It was when Appellant was looking for the driver of OG 6656 ED at Ifo that he was arrested by Inspector Obioma and locked up at the Ifo police Station with P.C. Seke. Both were later taken to Otta Police Station till 10/10/86, Elewe-Eran Police Headquarters to Ilaro Federal Prisons on the 27th October, 1986. B C

Appellant was subsequently charged with the offence of murder contrary to section 319 of the Criminal Code arising from the incident. At the trial, the Prosecution called four witnesses who testified; this included the driver of OG 6656 EB, the PW1, in whose vehicle the deceased was travelling. Testifying before the trial judge in evidence PW1 stated that it was when he was trying to park his vehicle that appellant fired the fatal shot which shattered the back windscreen of his vehicle OG 6656 EB and hit Taiwo Akinwande sitting at the last row at the rear entrance door of the vehicle. PW1 stated that he heard the sound of a gun shot only once, and that no other vehicle passed by before he heard the gun shot which injured and killed Taiwo Akinwande. At the trial the prosecution tendered the statements of the Appellant on the 8th and 10th October Exhibits "B" and "K". Also tendered at the trial is Exh. H, a letter from the Permanent Secretary, Federal Ministry of Agriculture, federal Department of Forestry, 6 Ijeh Village, Obalende, Lagos, stating that 3 FGN 754, (sic 3 FGN 745) a white coloured station wagon was assigned to take an officer to Enugu for official assignment on 5th October, 1986. The vehicle arrived Enugu at about 4.p.m. the same day. The vehicle has been in Enugu since that day. The prosecution also tendered a post mortem report, Exhibit D which confirmed that the cause of death was traced to fractured skull and brain damage. There was also a ballisticians report and the magazine containing 19 live ammunitions, were tendered as Exh. E & F.G. D E F G H

Appellant testified in his own defence. He admitted he fired a shot from his SMG gun on that day. He claimed that he directed his shot at the tyres of a Peugeot 504 station wagon with registration No. 3 FGN 754 (sic 3 FGN 745) whose passengers were firing indiscriminately at the road block on that day. Appellant denied that it was his own shot that hit the passenger in OG 6656 EB. He claimed it must have been a shot from 3 FGN 754 (sic 3 FGN 745) that hit the deceased, Taiwo Akinwande.

After the addresses of counsel for the Prosecution and of the Defence, the learned trial judge, Somolu J, found the Appellant guilty of the offence of Murder as charged.

Some specific findings of the trial Judge

The learned trial judge did not believe the defence of the appellant that he fired at the tyre of the 3 FGN 754. As he expressed it,

".....Why if accused was behind 1st PW's passenger bus at the time he fired his SMG gun was Taiwo Akinwande who was at the rear and with her back obviously turned towards where accused stood to fire his gun from? Particularly as the rear windscreen of the 1st passenger bus and not the front windscreen of the 1st passenger bus was what was also smashed at the firing of the gun shot which hit it simultaneously to when deceased Taiwo Akinwande was hit and injured."

The learned trial judge doubted the possibility of 3 FGN 754 (sic 3 FGN 745) being found at the scene of crime in that place at the time. There was no evidence of the disappearance or earlier theft of the vehicle 3 FGN 754 (sic 3 FGN 745) at Enugu. The learned trial judge also found as a fact that when the incident was fresh in his mind, accused admitted that even if the other vehicle with Registration No. 3 FGN 754 (sic 3 FGN 745) was present at the scene of crime, it was the shot from his gun which he fired that hit the passenger in the bus of 1st PW, resulting in the death of the deceased, Taiwo Akinwande. The learned trial judge preferred the evidence of PW1 to that of the Appellant. He found the evidence of PW1 more truthful and consistent. Finally the learned trial judge held at pp. 40

*"I would prefer as between 1st P.W. and accused the evidence that no Peugeot 3 FGN 754 came on the scene at the same time at the police*

road block at Owode village with that of 1st P.W's bus on the fateful day in question. Or was present at all at the scene from which any of its occupants could have fired any guns when the passenger bus of 1st P.W. arrived at the scene and was subjected to the official directive of accused to pass through and park at the kerb side, with Taiwo Akinwande as one of its passengers sitting at its rear seat. From the comparisons of Exhibits B and K which are the two statements made by accused, soonest to the occurrence of this event, that on 8/10/86 and 10/10/86 respectively, I resolve respectively regrettably favourably in 1st P.W.'s favour and divergence which occurred between him and accused of the testimonies of the events which culminate on the 8th of October, 1986 to result in the death of Taiwo Akinwande, deceased."

The learned trial judge examined and eliminated the defences of mistakes, self-defence, necessity, provocation which in his view cannot in the light of the evidence before him be available to the appellant. The appellant was found guilty of murder as charged.

#### Appeal to the Court of Appeal

Appellant appealed to the court below alleging three grounds of appeal. Two issues for determination were formulated as follows-

(i) *Whether the prosecution has proved its case beyond reasonable doubt as required by S.137(1) of the Evidence Law as it relates ground 1 of the appeal.*

(ii) *Whether the verdict and sentence of murder is harsh, severe, and excessive especially when the defence of accident was not adequately considered by the learned trial judge.*

#### The findings of the Court of Appeal

After hearing arguments on the briefs filed, the court below held on the first issue that the prosecution proved its case beyond reasonable doubt as required by S.137(1) of the Evidence Act. It was held that the failure to call all witnesses is not fatal to the case of the prosecution, so long as the witnesses material for the proof of the case have been called. The cases of Francis Odili v The State (1977) 4 SC. 1, Anthony Igbo v. The State (1975)9-11 SC. 129; Sule Oladejo Asariyu v. The State (1987) 11-12 SCNJ. 125; Okon Udo Akpan v. The State (1991)5 SCNJ. 1; Sun-

2768 Omini v. The State (1999) 9 KLR Karibi-Whyte JSC  
day Baridam v. The State (1994)1 SCNJ. 1; Inyang Etim Akpan v. The  
State (1994) 12 SCNJ. 140.

On the second issue, which is based on the harshness, severity or  
excessiveness of the verdict, of murder, the court below considered the  
B facts of the case as found by the learned trial judge. Relying on the  
contentions of learned counsel, the court below found that there is no  
dispute that appellant was engaged in a lawful duty, and was doing a  
lawful act, (a check point duty), which is on the face of it dangerous to  
C human life. The court below thereupon posed to itself the question  
whether the law in Nigeria imposes any duty on persons doing such  
dangerous act? If so what is the penalty for a breach of such duty on  
persons doing such acts? The court below relied on the provisions of  
section 303 of the Criminal Code for the resolution of such a problem.  
D Section 303 states -

*"It is the duty of every person who, except in a case of necessity,  
undertakes..... to do any other lawful act which is or may be dan-  
gerous to human life, or health to have reasonable skill and to use rea-  
E sonable care in doing such act; and he is held to have caused any conse-  
quences which result to life or health of any person by reason of any  
omission to observe or perform that duty."*

Relying on the construction of this section in the Criminal Law & Proce-  
F dure of Southern Nigeria, by the Hon. Dr. Akinola Aguda, and the West  
African Court of Appeal Case of R v. Akerele (1941) 7 WACA. 56, the  
court below held that in the light of the admissions of the Appellant that  
he was shooting at the tyres of 3FGN 754 (sic 3 FGN 745) when the  
event occurred, it is clear that his failure to use reasonable care in carry-  
G ing out his lawful duty has brought his act within the ambit of s. 306 of  
the Criminal Code dealing with unlawful killing. Accordingly the court  
below applied the provisions of s. 317 of the Criminal Code to hold that  
the unlawful killing of the deceased does not amount to murder - R. v.  
H Kuye 3 WACA. 82.

The court below accordingly substituted a conviction for unlaw-  
ful killing i.e. Manslaughter, under s.325 of the Criminal Code.  
Appeal before the Supreme Court - Grounds of Appeal

The appeal before us is against the decision of the Court below convicting appellant for unlawful killing under section 325 of the Criminal Code. Appellant has filed three grounds of appeal which are as follows-

**1 ERROR OF LAW**

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*The learned justice of the Court of Appeal erred in law when he convicted the Appellants under s. 317 of the Criminal Code and sentenced him to 10 years imprisonment.*

**PARTICULAR**

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1. *Though the Appellant confessed to firing a gun, he explained that he fired the gun at a moving vehicle 3FGN 754 which had occupants who carried guns and were firing indiscriminately at the Police at the road block on that fateful day.*

2. *It was incumbent on the prosecution, so as to discharge the burden of proof imposed by S.137(1) of the Evidence Act, to have called a witness to testify whether that car passed through the road block at that point in time or not.*

3. *The fact that Exhibit 'H' was tendered was not enough proof of the burden on the prosecution.*

4. *The fact that there was infact a white peugeot 504 car with the exact number cited by the accused, and that the car left Lagos for Enugu on 5/10/86 should have raised enough doubt as to the guilt of the accused.*

5. *The prosecution ought to have tendered enough evidence to show the exact whereabouts of the 3 FGN 754 on the day of the crime. There is a possibility that it might have been stolen hence the return to Lagos by plane of the people who travelled to Enugu with it.*

**II ERROR OF LAW**

*The learned justice of the Court of Appeal erred in law when they held that the prosecution had proved the case as required under S.137(1) of the Evidence Act.*

**PARTICULARS**

1. *Though the prosecution is not required to prove the guilt of the accused beyond all iota of doubt, it is at least required to tender enough*

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*evidence to remove any reasonable doubt in favour of the accused. Where there is any doubt as in this case, as nobody from the Federal Ministry of Agriculture, Department of Forestry, came to give evidence, the accused should have been acquitted.*

B        2. Under cross examination of 3rd P.W. he stated that the other Police Officers manning the road block confirmed that the FGN car passed through the road that day with persons firing at them from the car.

III ERROR OF LAW

C        The judgment of the learned justices of the Court of appeal is against the evidence tendered at the trial."

ISSUES FOR DETERMINATION

*Appellant has formulated the following four issues for determination as arising from the grounds of appeal filed:*

D        "1. Whether the learned justices of Court of Appeal were right to have to convicted the accused under section 317 of the Criminal Code.

*11. Whether there was conclusive proof that the shot that caused the death of the victim was fired by the accused.*

E        *111. Whether the prosecution had satisfied the evidential burden of proof beyond reasonable doubt.*

*IV. Whether the evidence adduced at the trial justified the judgment of the learned justices of the Court of Appeal."*

F        On his part the Respondent has formulated the following two issues from the grounds of appeal.

*"2.1 Whether the prosecution had satisfied the evidential burden of proof beyond reasonable doubt.*

G        *2.2 Whether the Appellant was rightly convicted under Section 317 of the Criminal Code."*

A careful consideration of the issues as formulated by counsel in terms of the analysis of the grounds of appeal from which they have been formulated allows only for the two issues as formulated by the Respondent. It is not desirable to have a proliferation of issues over and above the grounds of appeal filed. Issues II and III, which were argued together, could come within the first issue. Accordingly, I shall adopt the issues for determination as formulated by Respondent in the determina-

tion of this appeal.

Submissions of Counsel

Learned Counsel to the Appellants in the brief filed and in oral expatiation before us, referred to section 317 of the criminal Code and submitted that the section presupposes that the person convicted under the section did actually kill but the degree of killing falls short of murder and therefore is convicted of manslaughter. It was submitted that a conviction for manslaughter is to be substituted for murder only on a successful defence of provocation, self-defence, or where the act of the accused contains an element of negligence. Counsel cited and relied on Andrews v. D.P.P. (1937) AC.576, and R. v. Awonu (1947) 12 WACA. 95.

Relying on the facts of the instant case, Counsel argued that the learned trial judge found as a fact that the act of the Applicant did not amount to murder as he did not exercise the degree of care required when firing at the check point. It was submitted that the evidence of the appellant at the trial was that he aimed at the tyres of the 504 car. It was further submitted that if Appellant did not aim at the bus and there were other shots from another car as he alleged, then he could not be guilty of killing anyone at all, and could therefore not be guilty of manslaughter under section 317 of the Criminal Code. Learned Counsel referred to the evidence of PW1 and to the uncertainty whether the bullet that killed the deceased was from the gun of the appellant. In the state of uncertainty Appellant was entitled to the benefit of doubt and accordingly acquitted, and not found guilty of manslaughter. It was submitted relying and citing Ariche v. State (1993)6 NWLR (Pt302) 752 SC. Alabi v. State (1993)7 NWLR. part (307) 511 SC., that an accused person has no duty to prove his innocence. Onus to prove his guilt beyond reasonable doubt is on the prosecution. Finally on this issue learned Counsel referred to the concurring opinion of Mukhtar, JCA that the circumstantial evidence to ground a conviction in this case must be very strong. It was submitted that the circumstantial evidence here in fact was very weak and should not have been relied upon for a conviction. It was argued relying Mathew Obakpolor v. The State (1991)1 NWLR. 113 that where the accused

raises a defence of alibi, there is duty on the prosecution to investigate such alibi - Accordingly, it was incumbent on the prosecution to ensure that the circumstances surrounding the 504 car is cleared before conviction can be had.

B In his reply, learned counsel to the Respondent also referred to the facts of the case and the evidence of PW1 and of the Appellant at the trial. The case of the Prosecution is that Appellant fired his gun, and the deceased was killed by this gun shot. Appellant admitted he fired his gun, but claimed that about the same time a Peugeot 504 station wagon with  
C Registration No. 3 FGN 754 (sic 3 FGN 745) was at the scene whose occupants were firing indiscriminately at the check point. The deceased must have been hit by a shot from this vehicle. He claimed his shot was aimed at the tyres of this vehicle. At the trial PW1 gave evidence that  
D only one shot was fired at the scene and that no vehicle passed before this shot was fired. In the extra judicial statements of Appellant, Exhibits 'B' and 'K' he admitted he mistakenly shot at the deceased, though his target was a moving vehicle. However, in his testimony at his trial, he  
E claimed the gun he fired hit its target but that the vehicle notwithstanding sped away. Learned Counsel submitted on the authority of Egboghonome v. The State (1993)7 NWLR. pt.506 p. 383, that where an accused person in his oral testimony in court resiles on his written statement, the  
F court is to evaluate the statement in order to reach a just decision. It is important to observe that the learned trial judge did not believe the oral testimony of the Appellant in court, or on the existence of a Peugeot 504 station wagon at the scene. These findings of fact were supported by the court below, and learned counsel urged on us not to disturb them-  
G referring to Utuk v. The State (1995) 9 NWLR (pt. 420) 392 at p. 403 Learned Counsel to the Respondents citing section 306 of the Criminal Code submitted, that in view of the findings of fact by the lower courts that the deceased was killed by the shot fired by the Appellant, and since  
H there was no justification or excuse for such a killing, the killing was unlawful. It was submitted that the prosecution proved that Appellant unlawfully killed the deceased in satisfaction of the evidential burden of proof. Counsel to Respondent rejects the claim by learned counsel to



Appellant that there was a doubt in the minds of the courts below that Appellant fired the shot that killed the deceased.

Issue 2.

This is the question whether the Appellant was rightly convicted under section 317 of the Criminal Code. Appellant's formulation is submitted in issue 1. Issue IV does not qualify for an issue. Learned Counsel to the Respondent has formulated the issue appropriately. Section 317 of the criminal Code defines the offence of Manslaughter. It was submitted that Appellant was engaged in a lawful act and was expected to have reasonable skill and to use reasonable care in the performance of his duty. The lower court came to the view that Appellant failed to use reasonable care in the performance of his duty and by virtue of section 303 of the Criminal Code he should be held to have caused any consequence which resulted in the death of the deceased. Since death of deceased was caused by failure of Appellant to use reasonable care in the performance of his duty, his killing of the deceased was unlawful. Accordingly Appellant was rightly convicted for unlawful killing of the deceased.

Analysis of the issues and submissions.

I have endeavoured to set out above the contentions of counsel on the two issues formulated. Ideally, the issues formulated come to the question whether the court below was right in substituting the sentence of ten years imprisonment with hard labour for the conviction for murder instead of acquitting the appellant of the offence of murder with which he was charged and convicted by the learned trial judge.

The facts of the case have been fully stated. The only discrepancies of the account of the incident at the trial was between the evidence of the PW1, the driver of OG 6656 EB, the vehicle in which the deceased was travelling when she was hit by the bullet from the gun shot, and of the evidence of the Appellant, who was alleged to have fired the shot. Whereas PW1 testified that he heard only one gun shot, Appellant claimed that there were several gun shots about the same time, and the only shot he fired was aimed at the tyre of a Peugeot 504 3 FGN 754 (sic 3 FGN 745) from which several gun shots came towards the check point. PW1

testified that no other vehicle followed when he was directed to park his vehicle at the Kerb of the road. Appellant's evidence was that the Peugeot 3 FGN 754 closely followed OG 6656 EB and accelerated after the latter had stopped, and indeed sped away even when the tyre was hit by his B gun shot.

It is important to advert to the fact that the learned trial judge did not believe the oral testimony of the Appellant in Court on the existence of the Peugeot 3 FGN 754 (sic 3 FGN 745) at the scene. This is because of the material discrepancies in his account C in his earlier statements on the 8th October, 1986, Exh. 'K' and his oral testimony before the trial judge. The learned trial judge was right in the view he took of the totality of the evidence of the Appellant on that issue because they are not evidence upon which he D can act. In the Queen v. Asuquo Akpan Ukpong (1961) 1 ALL NLR. 25, it was held that when a witness is shown to have made previous statements inconsistent with the one given at the trial, such evidence should be regarded not merely as unreliable, but the E previous statements do not constitute evidence upon which the court can act. Accordingly after evaluating the evidence before him, the learned trial judge was able to hold that the testimony of PW1 represented the acceptable account of the incident. - See Egboghonome v. State (1993)7 NWLR (pt. 306) 383 at p. 436. F

On this hypothesis, the learned trial judge was able to find as a fact that at the time of the incident there was no other vehicle behind the bus OG 6656 EB in which the deceased was killed, and that only a single shot was fired which the Appellant admitted was from his gun. The learned G trial judge considered Exh.H, the letter from the Federal Ministry of Agriculture, Obalende, which indicated the movements of 3 FGN 754 (sic 3 FGN 745) during the period so as to eliminate the possibility of its being present at the scene. The court below accepted these findings of fact by H the learned trial judge. There is therefore concurrent findings of fact on these issues which have not been shown to be erroneous. They cannot therefore be disturbed. See Utuk v. The State (1995) 9 NWLR (pt.420) 392 at 403, Ibeh v. The State (1997) 1 NWLR. 632.

The question before the court of Appeal therefore was that on the facts before learned trial judge could he have entered a conviction for murder under section 319 of the Criminal Code? The Appeal held that the failure of the Appellant to use reasonable care in carrying out his lawful duty of a Police man on duty on a check point, has brought his act within the ambit of section 306 of the criminal Code, and therefore could be convicted for unlawful killing.

**It is at least well settled that to convict a person charged with murder under section 319 of the Criminal Code, the prosecution must prove beyond reasonable doubt**

- (a) the death of a human being,
- (b) that it was caused by the act of the accused
- (c) that the act or acts were done with the intention of causing death, or

(d) the accused knew that death would be the probable consequence of his act or acts.

In the instant case, there is no doubt that (a) and (b) have been proved beyond reasonable doubt. The same cannot be said of (c) and (d). There is clearly no evidence that the act of appellant, i.e. the shooting of the gun was done with the intention of causing death. Of course the appellant knew that death would be the probable consequence of his act. It is unlawful according to our law to kill a human being unless such killing is authorized or justified or excused by law - See S. 306 criminal Code. The killing here is neither authorized, justified or excused. It is therefore unlawful.

The Court of Appeal has resorted to the provisions of Section 306 of the Criminal Code dealing relating to the provision of unlawful killing to hold that the failure of Appellant to use reasonable care in carrying out his lawful duty has brought his conduct within the purview of section 303 of the Criminal Code.

Section 303 of the Criminal Code provides as follows -

*"It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or do any other lawful act which is or may be dangerous to human*

*life or health, to have reasonable skill and to use reasonable care in doing such act; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty."*

B A careful reading of the section clearly shows that the duty is applicable and restricted to persons administering surgical or medical treatment to persons, or persons performing any other lawful act which is or may be dangerous to human life or health. Such persons are required to have reasonable skill and to use reasonable care in exercising the skill. Criminal responsibility follows the failure to exercise reasonable care in the exercise of skill- See R v. Akerele (1941)7 WACA. 56. I do not think it is appropriate in the case of a member of the Mobile Police Unit, to equate his duty of checking motorists on the road as dangerous to life. Not so operation of the gun and the ordinary exercise of his skill.

On the facts of this case the prosecution having failed to prove beyond reasonable doubt that Appellant by firing the shot that hit the deceased intended to kill the deceased, or to cause her grievous harm it seems to be the law that however reckless his conduct might have been, the killing resulting from his act was not intended, his act therefore does not fall within the provisions of section 316 of the Criminal Code and cannot constitute murder.

F An unlawful killing which does not constitute murder is in accordance with section 317 of the Criminal Code, Manslaughter - See Udo v. Queen (1964) 1 ALL NLR. 21. Our Criminal Code in sections 302-306 recognizes the difference between doing an unlawful act and doing a lawful act with a degree of carelessness which the legislature makes criminal - See Onah v. State (1977) 7 SC. 69. The evidence before the trial judge and the findings of fact accepted by the Court of Appeal clearly disclosed that Appellant was on the check point on lawful duty. He was issued with firearms for the purposes of carrying out his duty effectively. Although the defence of Appellant that he was aiming at the tyres of 3 FGN 754 (sic 3 FGN 745) Peugeot 504, when he fired the shot was rejected by the trial

judge and the rejection was accepted by the Court of Appeal, there is no evidence otherwise that Appellant intentionally shot at the deceased to kill her.

There is no gainsaying the fact the Appellant was at all times under a duty to take care in the handling of the firearm issued to him for the discharge of his lawful duty. Accordingly the Appellant fired the fatal shot that killed the deceased during the discharge of a lawful duty. In accordance with section 304 Appellant was under a legal duty to use reasonable care and take reasonable precautions in the use or management of the firearm to avoid danger to the life, safety or health of any person that may be endangered. Such person is held to have caused any consequences which result to the life or health of any person by reason of the omission to perform that duty.

It seems to me that the trial judge having found as a fact, which was accepted by the Court of Appeal, that the death of the deceased was as a result of the act of the Appellant, the shooting which resulted in the death of the deceased was as a result of the culpable disregard of his legal duty to take care, but without the necessary intent. The intention of Appellant was clearly to shoot at the vehicle. If as it appears from the evidence he failed to exercise sufficient care and consequently resulting in the death of the deceased, it seems to me that the action comes clearly within the purview of section 317 of the criminal code.

The Court below regrettably failed to direct its mind to this aspect of the law. The trial judge ignored this part of the evidence before him and therefore came to the erroneous conclusion that the prosecution proved the offence of Murder beyond reasonable doubt.

The reason why the judgment of the trial judge should be set aside is that the prosecution having not proved that Appellant intended to cause the death of the deceased, the offence of murder was not proved. On the other hand Appellant can be convicted of the offence of manslaughter because in complete and culpable disregard of his legal duty to take care in the handling of his gun in

**the discharge of his lawful duty, his act resulted in the death of the deceased - See Onah v. The State (1977)7 SC.69.**

I have arrived at the same conclusion with the Court of Appeal, although our reasoning have been slightly different. The decision of the Court of Appeal was right and is hereby affirmed.

The Appeal of Appellant is hereby dismissed.

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### KUTIGI JSC

I have had the privilege of reading in advance the judgment of my learned brother Karibi-Whyte, J.S.C. in this appeal. He has covered in detail all the issues canvassed before dismiss the appeal and affirm the judgment of the court of Appeal.

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### ONU JSC

I had the advantage of a preview of the judgment of my learned brother Karibi-Whyte, JSC just read. I am in complete agreement with it that the appeal lacks merit and therefore fails.

I wish to add the following words of mine in expatiation

At the close of the prosecution's case before the learned trial judge {Somolu, J.} for the murder of one Taiwo Akinwande on the 8th day of October, 1986 at Owode village on the Abeokuta-Lagos Motorway, the learned judge on 1st August, 1990 returned a verdict of guilty and acting pursuant to section 319 of the criminal code, Cap.29 Vol,11, Laws of Ogun State of Nigeria, sentenced him to death. The appeal to the Court of Appeal sitting in Ibadan by the appellant was allowed in part in that his sentence was reduced to that of manslaughter punishable under Section 317 of the Criminal Code (ibid) as opposed to the defence of accident urged in his favour.

The facts relevant to the case have been given adequate treatment in the judgment of my learned brother that I do not consider it necessary to consider them all over herein. Suffice it to say that in my desire to highlight what I consider to be the salient points for decision, I must first

of all set out the issues which were proffered by the appellant that arose for our resolution. They are:-

"1. *Whether the learned justice of Court of Appeal were right to have convicted the accused under Section 317 of the Criminal Code.*

11. *Whether there was conclusive proof that the shot that caused the death of the victim was fired by the accused.*

111. *Whether the prosecution had satisfied the evidential burden of proof beyond reasonable doubt.*

iv. *Whether the evidence adduced at the trial justified the judgement of the learned justices of the Court of Appeal".*

As appellant's issue No. 1, which on my opinion, overlaps the respondent's issues 1 and 2, is enough to dispose of this appeal I shall proceed to consider it, albeit that learned counsel for the appellant on oral argument would appear to have jettisoned same by submitting in its place thereof as follows:-

That the prosecution ought to have tendered the ballistics report had they wanted to prove their case beyond reasonable doubt. The case of *Eze Ibeh v. The State* {1997} 1 SCNJ 256 was called in aid, adding that as demonstrated in her brief, Section 317 of the Criminal Code would be applicable if only the appellant did the killing. She further contended that as there has been no proof by the prosecution that it was the appellant who did the killing introducing evidence of this at the trial with no eye-witnesses, this Court should be urged to allow the appeal. Reference was particularly made to the evidence of PW4, adding that other members of the Road Block of {policemen} should have been called and that failure to have done so was fatal to the prosecution's case.

In the appellant's written brief the following arguments were maintained.

Firstly, that under Section 317 of the Criminal Code it is provided thus:-

*"A person who unlawfully kills another in such circumstances as not to constitute murder is guilty of manslaughter".*

In effect, this presupposes that the person convicted under the Section did actually kill but the degree of killing falls short of murder and there-

fore is convicted of manslaughter. The only time such a conviction is substituted for murder, contended learned counsel, where though the accused is found guilty of killing, he has other defences such as provocation, self-defence or where the act of the accused contains an element of negligence. The cases of Andrew v. D.P.P. {1937} AC.576 and R. v. Awonu {1947} 12 WACA 95 were cited in support of the proposition. In the instant case, it was further argued, the learned trial judge found as a fact that the act of the appellant did not amount to murder but was negligent by failing to exercise the degree of care required when he fired at the deceased at the road block. The appellant in his evidence had insisted that he aimed at the tyres of the 504 car vide page 24, lines 3-5 of the Record. If the appellant did not aim at the bus and there were other shots from another car as he claimed, it was contended, then he could not be guilty of killing anyone at all, nor could he be guilty of manslaughter under Section 317 of the Criminal Code. Even the PW1, the driver of the vehicle, it was further argued, could not say with certainty that the bullet that killed the deceased was from the gun of the appellant. He claimed to have heard a gun shot from behind him and saw people in his bus rushing out. There as such, no proof as to which bullet, whether that of the appellant or some other persons which hit the deceased, it was argued. In such a case, it was maintained, the appellant should have been given the benefit of the doubt and acquitted. An accused person, it was further argue, is not under a duty to prove his innocence but it is rather for the prosecution to prove his guilt beyond reasonable doubt. In support thereof the two cases of Ariche v. The State {1993} 6 NWLR (part 302) 752 and Alabi v. The State (1993)7 NWLR (Part 307) 511, were cited, adding that as Mukhtar, J.C.A. in her concurring judgment put it, the circumstantial evidence to ground a conviction must be very strong. Reliance was put on page 89 line 12 from the foot of the page; which was not the case in the instant case. It was therefore submitted that circumstantial evidence which in the instant case was in fact very weak should not have grounded a conviction. As in criminal trials where the accused raises a defence of alibi, the prosecution is under a duty to investigate the alibi as decided in Mathew Obakpolor v. The State (1991)



1 NWLR (Part 165) 113; similarly in the instant case, it was submitted, it is incumbent on the prosecution to make sure that the circumstances surrounding the 504 car is cleared before conviction can be secured.

On the appellant's submission that the prosecution ought to have tendered a ballistics report in order for them to prove their case beyond reasonable doubt, it is now an established principle of law that it is not in all cases that evidence of the cause of death needs proof. See Essien v. The State (1984) 3 SC.14 at 18 and State v. Danjuma (1997) 5 NWLR (Part 506) 512. In fact, the court may infer the cause of death as indeed happened in the instant case. See Kato Dan Adamu v. Kano Native Authority (1955) 1 FSC 21. The case of Eze Ibeh v. The State (supra) relied on for the proposition that a ballistics report was needed to prove the case beyond reasonable doubt is, in my respectful view, not apposite.

That case involved the charge of murder by the appellant, (a police officer), of two brothers ("the Dawodu brothers") where one of the issues raised was whether the Court of Appeal was not in error to have affirmed the decisions of the trial judge on the defence of accident by the appellant, and whether on the whole it could be said that the Court of Appeal satisfactorily considered the defence of accident raised by the appellant.

In rejecting the appellant's defence of mistake and/or accident in the present case, the learned trial judge said among other things as follows:-

*".....From the comparisons of Exhibits B and K which are the two statements made by the accused, soonest to the occurrence of this event, that on 8/10/86 and 10/10/86 respectively, I resolve regrettable favourably in 1st PW's Favour and divergence which occurred between him and accused of the testimonies of the events which culminate on the 8th of October, 1986 to result in the death of Taiwo Akinwande.*

*In both exhibits B and K, accused was vigorous in his admission that it was the gunshot from his SMG gun which hit 1st PW's passenger but and consequently still wounded one of the passengers in it, whom he agreed was Taiwo Akinwande. Also in both of them, accused admits*

that his shot which he aimed differently at the 3 FGN 754, 504 station wagon peugeot car did not hit its actual intended target, contrary to his testimony in court. Accused is the only one who can explain why he changed that story in court from both exhibits further, it was unnecessary and a palpable falsehood for accused to have testified at this trial that more than one of the occupants in his fabricate or imagined 504 station wagon car fired at accused or his men on that road block on the fateful day. Exhibits B and K belie him grossly. At his trial accused seemed to assume the relentless posture of an impenitent liar."

Continuing, the learned trial judge held as follows:- "After all said and done, accused at this trial admitted the thoroughness of the exercise which culminate in the endorsement of his other statement made on the 10th of October, 1986 while still on the investigations of this murder case by and before the then DSP. P.A. Akolu ..... In Exhibit K was the earlier of both accused's statements, made on the very day of the occurrence of the commission of this crime under trial, accused first broached the nature of the mistake or accident he could have made or committed in the firing of his gun as between the intended Peugeot 504 station wagon and 1st PW's passenger-bus and affirmed that he shot the gun not at his intended target but another....."

He concluded on the point by holding: "Consequently, I find it proved in an unclumsy manner that the gunshot from accused's SMG gun is the only possible one which and infact hit the passenger-bus of 1st PW and also Taiwo Akinwande deceased....."

The learned trial judge considered such defences that could have availed the appellant by finally proceeding to convict and sentenced him to death.

The appellant appealed to the court of Appeal (hereinafter referred to as the court below) which, after a careful scrutiny of the record placed before it, arrived at the unanimous decision by allowing the appeal in part on 7th November, 1995. It stated inter alia as follows:-

"(i) that prosecution proved its case beyond reasonable doubt as required by Section 137 (1) of the Evidence Act. The above is irrespective of the fact that the learned trial judge would appear to have rambled in many parts of his judgment and even speculated when he said

as follows:- "Following thereafter, I deduce the inference that the deceased, Taiwo Akinwande, was hit on her forehead because she obviously looked back from the rear seat of the passenger-bus." (Of. Idapu Emine v. The State (1991) 3 NWLR (Part 204) 480).

Thus, the failure to call all the witnesses to testify for the prosecution was not fatal to their (prosecution's) case. Once material witnesses as in the instant case were called it is enough. See Francis Odili v. The State (1977) 4 SC. 1, Anthony Igbo v. The State (1975) 9-11 SC. 129; Asariyu v. The State (1987) 4 NWLR (Part 67) 709; Okon Udo Akpan v. The State (1991) 5 SCNJ 1; Sunday Baridam v. The State (1994) 1 SCNJ 1 and Inyang Etim Akpan v. The State (1994) SCNJ 140. It is now trite that a single witness may be sufficient where he is not shown to be an accomplice. See Baridam v. The State (supra) and Akpabio & Ors. v. The State (1994) 7-8 SCNJ 429.

(ii) Since the appellant was on duty at the police road block when the incident of firing of his gun took place and he admitted firing it when coincidentally a peugeot 504 station wagon with registration No. 3 FGN 754 was at the scene at the same time with its occupants simultaneously firing indiscriminate shots, the conclusion arrived at that his (appellant's) lone shot and none other hit the deceased was conclusive. This, set side by side with his (appellant's) claim that he only aimed and fired at the vehicle's tyres - a story which both courts below rejected - are in my view, unimpeachable findings of fact.

Furthermore, despite the fact that the appellant attempted to retract his voluntary statements (Exhibit 'B' and 'K') in which he admitted he mistakenly shot at the deceased this, coupled with the evidence of PW1 who asserted that there was only one shot at the moving vehicle which although losing one tyre in the process, sped away at an incredible speed which was disbelieved, the appellant's conviction secured under Section 303 of the Criminal Code was right and its confirmation by the court below ought not to be disturbed. The law is now settled that where an accused in his oral testimony in court resiles from his written statement, the court instead of discountenancing both pieces of evidence would be right to evaluate the oral statement in order to reach a just decision.

So held this Court in Stanley Idigun Egboghononme v. The State (1993) 3 NWLR (Part 306) 383. See also Emoga v. The State (1997) 12 NWLR (Part 531) 1. As the trial court disbelieved the oral testimony of the appellant regarding the existence of the alleged Station Wagon peugeot B car at the scene of crime on the fateful day and the court below confirmed that view, the two decisions constituted concurrent findings of fact. These two decisions not being perverse or erroneous, I will be loath to disturb them. See Utuk v. The State (1995) 1 NWLR (Part 420) 392 at 403 and Efe v. The State (1976) 11 SC. 751 (per Idigbe, JSC).

C As any killing which is not justified or excused by law is unlawful vide Section 306 of the Criminal Code (ibid), the conclusion arrived at by the trial court that it was the appellant that fired the shot that killed the deceased - a decision which the court below confirmed - the prosecution D has, in the instant case, in my opinion, proved that the appellant unlawfully killed the deceased and that that satisfied the evidential burden of proof thereof. The appellant having failed to exercise reasonable care, in the performance of his duty (i.e. being negligent) in his act E which led to his shooting the deceased, he was rightly in my opinion, convicted of manslaughter. As this Court stated in Inyang Onah v. The State (1977) All NLR 16 at 17" if as it does appear from the evidence he failed to exercise sufficient care and consequently failed to observe that F there was a human being on the palm tree aforesaid or near the bird, then it seems to us that his action comes clearly within the purview of Section 317 of the Criminal Code."

G For the reasons I have given and the more elaborate ones contained in the leading judgment of my learned brother Karibi-Whyte, JSC I too, dismiss this appeal and confirm the decision of the court below.

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### KALGO JSC

H I have read in draft the judgment of my learned brother Karibi-whyte JSC and for the reasons which he has fully set out in the judgment, I entirely agree with him that there is no merit in the appeal. I agree that the Court of Appeal was right in substituting a conviction for

the offence of manslaughter under Section 317 of the Criminal Code in place of that of murder by the trial court under Section 319 of the same Code against the appellant for the reasons given in the lead judgment.

Accordingly, I dismiss this appeal and affirm the conviction of the appellant for manslaughter contrary to section 325 of the Criminal Code. I abide by the consequential order made as to sentence in the lead judgment.

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**UWAIFO JSC**

I read in advance the leading judgment of my learned brother Karibi-Whyte JSC and for the reasons he has carefully stated, I agree with it. I too find no merit in the appeal and dismiss it.

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