

**SUPREME COURT OF NIGERIA**  
13TH DECEMBER, 2001. SC. 241/2000  
**CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE,**  
**S. U. ONU, S. O. UWAIFO, A. O. EJIWUNMI, JJSC.**

FESTUS AMAYO	.....	APPELLANT
V.		
STATE	.....	RESPONDENT

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*APPEALS - Criminal defences - Concurrent findings - That defence of accident failed - Will not be disturbed - As there was no miscarriage of justice (H2)*

*CRIMINAL LAW - Criminal defences - Defence of mense rea or accident s. 24 CC - What is required - To prove each arm of the defences under s. 24 (H1)*

*MURDER - Elements of - Under s. 316 CC - Where not establish - When conviction for manslaughter will be substituted (H6)*

*CRIMINAL LAW - Murder - Intention - Elements required under s.316 CC - Include proof of intention - Which if not established - Accused will not be convicted (H5)*

*MURDER -Medical evidence - Cause of death - Where obvious – Medical evidence will not be a legal necessity (H4)*

*MURDER -Medical evidence - Where necessary - Identity of the corpse must be certain - As any doubt will defeat prosecution's case (H3)*

**FACTS**

This is an appeal against a conviction for murder and sentence of death. The appellant, a police constable was charged with the murder of one Julius Duru under s. 316 of the Criminal Code erroneously stated as

s.319 (1). The alleged offence took place on 22 October, 1987 junction, Port Harcourt Owerri Road. At the said junction there was a road check conducted by a certain policeman. The policeman stopped the vehicle and asked the driver what he had in the van. The driver replied that there was nothing. After inspecting the vehicle, the police man signalled the driver to move on. Just then another policeman emerged from under a mango tree and ordered the driver to stop. Soon after there was a Gun shot, the bullet went through to where Julius Duru was sitting and hit him fatally. Appellant was the second policeman. He was tried in the High Court of Imo State, found guilty of murder. The Court convicted him and sentenced him to death. The Court of Appeal affirmed the Conviction and sentence of death. Appellant has now appealed to the Supreme Court

**ISSUES FOR DETERMINATION**

- 1. Whether the appellant was exculpated from criminal responsibility for the death of the deceased by virtue of the provisions of section 24 of the Criminal Code.*
- 2. Whether the guilt of the appellant was established beyond reasonable doubt as laid down by law before he was convicted for murder and sentenced to death?*

**HELD:** (Unanimously allowing the appeal per lead judgment of UWAFIO JSC)

***Defence of mense rea or accident S. 24 CC***

1. In looking at the entire provisions of section 24, there is no way the first arm can be constructed to reflect ‘accident’ as a casual link or causative agent. That arm talks only about an act or omission occurring independently of the will. It is involuntary. It will normally require medical or some scientific evidence in proof: see *Hill v. Baxter* (1958) 1 Q.B 277 at 285. Whereas the second arm alone draws attention to an event occurring by accident. And accident as an event is none other than a voluntary act but which results in unforeseen and unintended consequence. It is a matter of ordinary factual evidence which will be subjected to the objective test. (p. 3461 G)

***Criminal defences – Concurrent findings***

2. Unfortunately, these matters cannot be canvassed since there is no appeal against the way findings of fact were made by the trial court and accepted by the court below. Those findings amount to concurrent findings of fact on the issue of the defence of accident with which this court will not interfere had there been an appeal against them unless there is miscarriage of justice; see *Onyekwe v. The State* (1988) 1 NWLR (pt.72) 565. The two courts below rejected the defence of accident. It follows that issue 1 must be answered in the negative. (p. 3464 E)

***Medical evidence - Where necessary***

3. The learned trial judge has by his finding eliminated the medical evidence and the evidence about the identification of the corpse. There is no doubt that where medical evidence is necessary, it is important to be certain of the identity of the corpse presented for autopsy. This is an aspect of the duty of the prosecution to prove its case beyond reasonable doubt. If therefore, there is reasonable doubt as to the identity of the corpse upon which the doctor performed the autopsy the prosecution's case fails. The reason for such certainty is to obviate any possible mistake of an autopsy being conducted on the wrong corpse which would produce unrelated and irrelevant cause of death to the corpse in question in the homicide case being tried; see *Rv. Laoye* (1940) 6 WACA 6 (p 1465 G)

***Medical evidence - Cause of death***

4. It is an accepted principle of law that where the cause of death is obvious, medical evidence ceases to be of any practical or legal necessity in homicide cases. This is usually so where death came by violent means and was instantaneous or nearly so. There is a long line of decided cases on this: see *Kato Dan Adamu v. Kano Native Authority* (1956) SCNLR 65. (p. 3566 C)

***Murder - Intention***

5. In considering the intent required under the above stated provision, it is vital to look closely at the facts which resulted in the killing. It could at times be difficult to ascertain the necessary mens rea (or what used to be called malice aforethought) when considering circumstances in which it could not be clearly said that the accused had certain matters in contemplation at the material time upon which the fact of the killing might be related: see *R. v. Doherty* (1887) 16 Cox C.C. 306, to which I shall return later. One of the elements of murder as provided for in S. 316(a) or (b) is that the act done must be with the intent to kill or to inflict grievous bodily harm. This is what is known as ‘specific intention’ which is necessary for sustaining a murder charge: see *D.P.P. v. Newbury* (1977) AC 500; (1976) 2 All ER 365 at 369.

It is clear that if that specific intention is unable to be established beyond reasonable doubt by the prosecution, then the court will be unable to find accused guilty of murder. It follows that a judge who decides to convict for murder and nothing else must be very sure that there are no facts that might justify the jury in returning a verdict of manslaughter. (p. 3467 D/3468A)

***Murder not established - Manslaughter substituted***

6. The appellant could not therefore be found guilty of murder under s.316(c). From what I have discussed in this judgment, he can be convicted of manslaughter under section 317 of the Criminal Code which provides that:

“317. A person who unlawfully kills another in such circumstance as not to constitute murder is guilty of manslaughter.

“ I have no doubt that by shooting at the vehicle the present appellant did an unlawful act which was at the same time dangerous, and that it is an act which all reasonable people will so recognize and must condemn as an act bound to subject anyone in the vehicle to the risk of harm. But I cannot categorically say he intended to kill or cause grievous bodily harm to anyone; in fact I will not at all say he had that specific intention in the circumstances. I think his conviction for murder by the trial court was wrong. The court below was therefore in error to have

affirmed the conviction. (p. 3475 D)

## NOTABLE POINTS OF INTEREST

### UWAIFO JSC

B

#### *1. CC s. 24 - Mens rea and accident differentiated*

B

In amplification of the two definitions already culled from Adelumola's case per Oputa JSC and Chukwu's case per Karibi-Whyte JSC, an accident is some sudden unexpected event taking place, upon the instant, without one's foresight and which produces a result not foreseeable. It is untidy to combine the defences in the two arms of section 24, as though both relate to and define the defence of accident but they may be raised in the alternative: one being 'automatism', the other accident as may be appropriate, depending on the true nature of the evidence. If the appellant for instance, had reacted to the sudden shock from the bite of a snake or the sting of a wasp by dropping his rifle with the consequences now being dealt with, that would raise the question whether his defence would be 'automatism' or accident. He might have considered raising both on those acts but in the alternative. In the present case, nothing is contained in the evidence to remotely suggest that the former defence may be resorted to. (p. 3463 F)

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#### *2. Manslaughter - Test as to what is unlawful and dangerous*

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The test as to what is unlawful and dangerous does not depend on the knowledge or thinking of the accused. It is based on the objective test, that is, what a reasonable person would describe as unlawful and dangerous. In *R. v. Church* (1996) 10 B. 59 at 70, Edmund Davies, L., delivering the judgment of the Court of Criminal Appeal, said:

".....an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognize must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm." (p. 3472 B)

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**3. S. 316 (c) CC - Causing death in prosecuting unlawful purpose**

It is important to understand a crucial requirement under the provision of s. 316(c) by closely examining its relevant terms which talk about “an act done in the prosecution of an unlawful purpose” (which act is of such a nature as to be likely to endanger human life). Although the words in parenthesis form part of the provision they are concerned with the severity of the likely consequences. They do not relate to what the accused has done directly, namely (1) an act (done by him) in the (2) prosecution of an unlawful purpose (the motive or reason for the act). It seems from this analysis, that the act itself is different to the unlawful purpose.

A ready case which will fall under s.316(c) of our Criminal Code is a case of a person who goes to steal, armed. In the course of stealing, he finds that he is about to be arrested or disturbed. In order to escape or complete the stealing process he shoots (whether to scare or to injure) and causes death. (p. 3473 B/3474 G)

**OGUNDARE JSC**

**4. Murder - Intention to cause death or grievous harm must be proved** To constitute the offence of murder, however, it must be proved that the Appellant, the time he fired his gun, intended to cause the death of the deceased or to cause him grievous harm. There is, however, nothing in the evidence of PW3 to suggest that the gun was aimed at the deceased or the vehicle in which was travelling. It might be that the Appellant fired at random. That being so, the necessary intent to constitute the offence of murder has not been established beyond reasonable doubt. The learned trial Judge ought to have considered the possibility that on the fact. before him, a conviction for manslaughter was a verdict open for consideration. I think for this reason alone, the appeal ought to succeed (p. 3477 F)

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**REPRESENTATION**

B.E.I. Nwofor Esq. for the appellant

J.T.U. Nnodum Esq. Administrator-General, Ministry of Justice, Imo

State for appellant.

### **CASES REFERRED TO**

Bratty v. Attorney-General for the Northern Ireland (1963) A.C. 3 a 409

Chukwu v. The State (1992) 1 NWLR (pt.217) 255 at 269 B

Adelumola v. The State (1988) 1 NWLR (pt. 73) 683 at 692-693

Hill v. Baxter (1958) 1 Q.B. 277 at 285

Agwu v. The State (1998) 4 NWLR (pt.544) 90

Watmore v. Jenkins (1962) 2 Q.B. 572 at 576 C

Ayinde v. The Queen (1963) 1 All NLR 393

Rv. Laoye (1940) 6 WACA 6

Bakari v. The State (1965) N.M.L.R 163

Bwashi v. The State (1972) 6 S.C. 93

Lori v. The State (1980) 8-1 S.C. 81 D

Justin Oamhen v. The State (1984) 4 S.c. 1

Oguntolu v. The State (1987) I NWLR (Pt.50) 464

Akinfe v. The State (1988) 3 NWLR (pt.85) 729

E

### **STATUTE REFERRED TO**

Criminal Code, ss. 316,24

F

### **LEAD JUDGMENT BY UWAIFO JSC**

This is an appeal against a conviction for murder and sentence of death. The appellant, a police constable, was charged with the murder of one Julius Duru under section 316 of the Criminal Code, Cap. 30, Laws of Eastern Nigeria, 1963, erroneously stated as section 319(1). The alleged offence took place on 22 October, 1987 at Avu junction, Port Harcourt/Owerri road. He was tried in the High Court of Imo State presided over by Ubah, J. On 26 November, 1991, the learned trial judge in the concluding part of his judgment held: H

*“The testimonies of the 3rd, the 1st and 5th prosecution witnesses offer ample, and satisfactory proof of the ingredients of*

*the offence of murder. In my humble view, the prosecution has proved the charge beyond reasonable doubt”.*

Earlier, he regarded the 3rd P.W as the only eye-witness relied on by the prosecution. He accordingly found the appellant guilty of the offence of murder and convicted him. He then sentenced him to death.

B On 13th July, 2000, the Court of Appeal (Port Harcourt Division) dismissed the appellant’s appeal and affirmed the conviction for murder and sentence of death. In the leading judgment by Akpiroroh, JCA, with which Nsofor and Ikongbeh JJCA concurred, he observed C as follows:

*“The 3rd P.W not being an accomplice or having any interest to serve in the case, his evidence was rightly in my view acted upon by the learned trial Judge in holding that the killing of the deceased by the appellant was voluntary. It is now well settled D that a 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 discharged (sic: charged).”*

E There is no doubt that both the trial court and the court below accepted the 3rd P.W. as a vital witness upon whose evidence much reliance was placed.

The appellant has now appealed to this court and raised two issues for determination as follows:-

F 1. Whether the appellant was exculpated from criminal responsibility for the death of the deceased by virtue of the provisions of section 24 of the Criminal Code.

G 2. Whether the guilt of the appellant was established beyond reasonable doubt as laid down by law before he was convicted for murder and sentenced to death?

H It is necessary at this stage to state the facts of this case. First, as narrated by Monday Raymond who testified as P.W.1. On 22 October, 1987, he drove his commercial vehicle, a pick-up van registration No. IM3611 WA, from Owerri along Port Harcourt Owerri road towards his own village, Umuagwo. He had in his vehicle one Henry Anele (P.W.3) who sat between him and his conductor, Julius Duru (now deceased) in the driver’s cabin. At Avu junction, there was a



road check conducted by a certain policeman. The policeman stopped the vehicle and asked what the driver carried in the van. He replied that there was nothing. While all three in the driver's cabin remained seated, the policeman inspected the back of the van. He then tapped on the vehicle, signalling the driver to move on. He began to move on slowly towards some policemen who had used iron bar to mount a road block. A policeman emerged from under a mango tree near the road and ordered the driver to stop. Just then there was a gunshot, the bullet from which went through the side of the van where Julius Duru sat. The bullet hit him fatally. The driver did not know at that stage that it was a gunshot because when he heard the sound, thinking it came from a burst tyre or bad exhaust pipe, he turned towards Julius and asked him to check at both. But Julius replied that he had been shot. It is plain, therefore, that P.W.1 did not witness the shooting, that is, he did not actually see who shot at that instant.

The learned trial Judge so found. However, he also found, as already shown, that P.W.3 was an eye-witness indeed, the only eye-witness to the shooting.

In his evidence, P.W.3 narrated how he boarded the vehicle on the day in question and sat between the driver and his conductor who was close to the right-side door. I think it is pertinent to reproduce the crucial portions of the evidence of this witness. In evidence-in-chief he said:

*"As we got near Avu Junction, people in police uniform flagged the vehicle to stop. The driver P.W.1 slowed down to stop. As the P.W.1 was about to stop the policeman who flagged him down turned his back to the vehicle and faced the other side of the road. Then the PW1 tried to continue moving onwards. Then another policeman immediately fired his gun towards us. He fired at us from the right side of the vehicle. The boy who was sitting outer most near the door of the pick up was hit by bullet from the gun fired by the policeman. The P.W.1 cleared from the road stopped and began to cry. Then the policeman who fired the gun also came to the vehicle and started crying."*

Under cross-examination, he said:

“I saw two policemen on our side of the road. The accused was one of them. No policeman signaled the P.W.1 to move on. Our vehicle was on our proper side of the road. From the position of the accused to the place our vehicle slowed down was about 8 1/2 meters. After the gunshot I saw the accused come to the vehicle. He held the injured person, weeping.” (Emphasis mine)

The appellant in his defence admitted being at the road block on duty that day. He said he held a rifle and stayed on one side of the road reading newspaper. After a while he left where he was to move over to the other side of the road. It was at that point that his rifle fell from him, hit the ground and exploded just as a pick-up van was passing by. He picked up the rifle and ran towards the vehicle when he heard a cry of agony. He claimed he had no intention to fire at any body let alone kill. His defence was one of accident.

#### Issue 1

The appellant still sticking before this court to his narration of the event which led to the death of Julius Duru, relies on the defence under section 24 of the Criminal Code. In the appellant’s brief of arguments, learned counsel for the appellant has devoted a large body of argument to that defence as contained in that section thus:

“24. Subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.. ..”

There are two situations of quite different bases reflected in the above-quoted provisions. When either is successfully raised, it leads to an acquittal. They can be separated for consideration as follows: (1) No criminal responsibility due to a person: for an act or omission which occurs independently of the exercise of his will. This is a situation where the will of a person was not involved; he did not exercise his will at all; the act was involuntary. Such an act is not punishable.

In *Bratty v. Attorney-General for Northern Ireland* (1963) A.C. 386 at 409, Lord Denning said:-

“No act is punishable if it is done involuntarily: and an

*involuntary act in this context - some people nowadays prefer to speak of it as 'automatism' - means an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep-walking."* B

The term "automatism" is itself defined inter alia as:

*"Behaviour performed in a state of mental unconsciousness or dissociation without full awareness... Term is applied to actions or conduct of an individual apparently occurring without will ... Automatism may be asserted as a criminal defence to negate the requisite mental state of voluntariness for commission of a crime".* See Black's Law Dictionary, sixth edition, p. 134. C

This must be differentiated from the second situation in section 24 of: (2) No criminal responsibility due to a person: for an event which occurs by accident. This involves a voluntary act, but as said by Karibi-Whyte JSC in Chukwu v. The State (1992) 1 NWLR (Pt.217) 255 at 269: D

*"Where the voluntary act results in an event which was neither intended nor foreseen, the consequence is an accident."* E

Oputa JSC put it in these words in Adelumola v. The State (1988) 1 NWLR (Pt.73) 683 at 692-693 inter alia:

*"It seems to me that the expression 'an event which occurs by accident' used in section 24 of Cap. 42 of 1958 describes an event totally unexpected by any ordinary person, the reasonable man of the law ... An event is thus accidental if it is neither subjectively intended nor objectively foreseeable by the ordinary man of reasonable prudence."* F

It must be noted that both Karibi- Whyte JSC and Oputa JSC G decidedly restricted their respective observations to the second arm of section 24 which alone relates to the defence of accident. In fact, Karibi- Whyte JSC underlined the second arm of the section. **In looking at the entire provisions of section 24, there is no way the first arm can be construed to reflect 'accident' as a causal link or causative agent. That arm talks only about an act or omission occurring independently of the will. It is involuntary. It will normally require medical or some scientific evidence in proof see** H

**Hill v. Bater (1958) 1 Q.B. 277 at 285. Whereas the second arm alone draws attention to an event occurring by accident. And accident as an event is none other than a voluntary act but which results in unforeseen and unintended consequence. It is a matter of ordinary factual evidence which will be subjected to the objective test.**

I had in the Court of Appeal made an observation about automatism as a defence in *Agwu v. The State* (1998) 4 NWLR (Pt.544) 90. I say at page 109:

*“Such a defence, as far as I know, has hardly been raised in this country; but it must not be ruled out that it can be raised or that it is available under that arm of section 24 when an appropriate occasions arises.”*

I have on reading OKonkwo and Naish: Criminal Law in Nigeria 2nd edn., in the course of preparing this judgment, discovered that the defence of automatism has in some form been raised or considered in this country. At page 144 of the book, under the sub-heading ‘Automatism’, the authors say:

*“Section 24 of the Criminal Code provides a defence where an act or omission is independent of the exercise of the will.”*

They then refer to what Winn, J. observed in *Watmore v. Jenkins* (1962) 2 Q.B. 572 at 576 that:

*“It is equally a question of law what constitutes a state of automatism. It is salutary to recall that this expression is no more than a modern catch-phrase which the courts have not accepted as connoting any wider or looser concept than involuntary movement of the body or limbs of a person.”*

The defence was raised in *Ayinde v. The Queen* (1963) 2 SCNLR 362, (1963) 1 All NLR 393 in the form of an “involuntary act” and considered but rejected. It was also raised in *R. v. Elomba* Charged No. 1/95C/1962 (unreported). It is unnecessary to say more than that in the present case other than that I have found the research of the authors in question in this regard helpful.

It has become necessary to set out the difference between the two arms of section 24 because, although learned counsel for the appellant realised that the two arms exist under that section, he merged

them together in his argument in which he said: “It is submitted that from the evidence adduced by the appellant as pointed out above, the appellant is entitled to the benefit of both arms of section 24 of the Criminal Code to excuse him from criminal responsibility for the death of the deceased” He then went on to illustrate this from the evidence of the appellant which says: “As I was approaching the road the riffle (sic) I was holding fell from me and hit on the ground and exploded.” It is a clearly erroneous submission assuming that this piece of evidence is available to the appellant, that upon the facts alleged the two arms of section 24 can be combined as a defence of accident. If I may repeat, the first arm of the defence under section 24 is only available if there is an involuntary act or omission or there is an act or omission which happens outside the will of the person concerned, such as is triggered by a spasm, a reflex action, convulsion or sleep-walking, or even perhaps a sudden reaction to a sharp bite, or the like. As already shown, if the rifle dropped from the appellant, it was an unintended event which happens through loss of control or through carelessness. It was not that he was in a state of mental unconsciousness which suddenly arose from the known causes. When the rifle then exploded and the deceased was hit, according to him, that would be an unintended and unforeseen consequence which occurred by accident.

Therefore, going by the evidence relied on by the appellant, it is only the second arm of the said section 24 that he may be entitled to raise, that is to say, that the dropping of the rifle from him and the consequent explosion of it which hit and killed the deceased was an event which occurred by accident. In that sense, and in amplification of the two definitions already culled from Adelumola ‘s case per Oputa JSC and Chukwu’s case per Karibi-Whyte JSC, an accident is some sudden or unexpected event taking place, upon the instant, without ones foresight and which produces a result not foreseeable. It is untidy to combine the defences in the two arms of section 24, as though both relates to and define the defence of accident but they may be raised in the alternative: one being ‘automatism’, the other accident as may be appropriate, depending on the true nature of the evidence. If the appellant, for instance, had reacted to the sudden shock from the bite of a

snake or the sting of a wasp by dropping his rifle with the consequences now being dealt with, that would raise the question whether his defence would be 'automatism' or accident. He might have considered raising both on those facts but in the alternative. In the present case, nothing is contained in the evidence to remotely suggest that the former defence may be resorted to. Learned counsel for the appellant has proceeded with the defence (I now take it) of accident by criticising the way the learned trial Judge dealt with and rejected the evidence of accident raised by the appellant. He said the learned Judge placed the onus on the appellant to establish that defence; that he made certain speculative remarks, and drew certain inferences not supported by the evidence on record, to the prejudice of the appellant; that the defence was not properly and adequately considered before the learned Judge disbelieved and rejected it; that the judge relied strongly on the evidence of some of the prosecution witnesses in rejecting the defence when indeed it was unsafe to act on their evidence; and that he erroneously considered the unlawfulness of the appellant's act in holding onto his gun in disobedience to a 'stand down' order by his superior officer. **Unfortunately, these matters cannot be canvassed since there is no appeal against the way findings of fact were made by the trial court and accepted by the court below. Those findings amount to concurrent findings of fact on the issue of the defence of accident with which this court will not interfere had there been an appeal against them unless there is a miscarriage of justice; see Onyekwe v. The State (1988) 1 NWLR (Pt.72) 565; Mbele v. The State (1990) 4 NWLR (Pt.145) 484; Ogbu v. The State (1992) 8 NWLR (Pt.259) 255; Mohammed v. The State (1997) 9 NWLR (Pt.520) 169. The two courts below rejected the defence of accident. It follows that issue 1 must be answered in the negative.**

## Issue 2

This issue can be understood simply as whether a case of murder was proved against the appellant. The argument on this as canvassed on behalf of the appellant touches on (1) whether the prosecution proved the identity of the deceased; (2) whether the cause of

death was proved; and (3) whether there is proof of the essential ingredients of the offence of murder. It has been contended that the evidence of Onyegbule Dum, the father of the deceased, who testified as P.W.2 and that of Dr. Innocent Njemanze (P.W.6) who performed the autopsy were in conflict as to the identification of the corpse; and that the learned trial Judge having found so rejected both. The argument is that the identification has been faulted and therefore that a case of the killing of Julius Duru by the appellant has not been established by the prosecution. Learned counsel for the respondent's contention is that the real issue is the actual identify of the person allegedly murdered and not who in fact did the identification for autopsy purposes.

The learned trial Judge in his judgment as to the identification of the deceased's corpse, observed and held as follows:-

*"But the evidence of Dr. Njemanze the 6th P.W. shows that two persons named in his testimony who did not testify, identified the corpse to him for the purpose of an autopsy. P.W. 2 had testified that he identified the corpse. There is no evidence that the 6th P.W. knew the late Julius Dum before his demise. Therefore the conflict in evidence of the two prosecution witnesses, and the failure of the persons named by P.W.6 to testify raises a serious doubt about the identity of the corpse which P.W.6 examined, as well as the entire medical evidence. It is my view that the evidence of the 6th P.W., Dr. Njemanze cannot be safely considered in proving the event of death and its cause."*

It is because of the passage quoted above that the appellant's counsel submits that the identity of the person allegedly murdered has not been established beyond reasonable doubt; and there is no medical evidence of the cause of death of the deceased. The conclusion he wants drawn is that no case has been made against the appellant.

**The learned trial Judge has by his finding eliminated the medical evidence and the evidence about the identification of the corpse. There is no doubt that where medical evidence is necessary, it is important to be certain of the identity of the corpse presented for autopsy. This is an aspect of the duty of the prosecution to prove its case beyond reasonable doubt. If**

therefore, there is reasonable doubt as to the identity of the corpse upon which the doctor performed the autopsy the prosecution's case fails. The reason for such certainty is to obviate any possible mistake of an autopsy being conducted on the wrong corpse which would produce unrelated and irrelevant cause of death to the corpse in question in the homicide case being tried: see **R. v. Laoye (1940) 6 WACA 6.**

As it is, there is no medical evidence in this case so that the question of the identification of the corpse, or who did to the doctor does not arise. I think there is merit, in the circumstances, in the contention of learned counsel for the respondent when he says that the issue is not whether there was identification of the corpse and who did but rather whether there is evidence of the true identity of the person allegedly murdered. **It is an accepted principle of law that where the cause of death is obvious, medical evidence ceases to be of any practical or legal necessity in homicide cases. This is usually so where death came by violent means and was instantaneous or nearly so. There is a long line of decided cases on this: see Kato Dan Adamu v. Kano Native Authority (1956) SCNLR 65; Bukari v. The State (1965) NMLR 162; Bwashi v. The State (1972) 6 SC 93; Lori v. The State (1980) 8-11 SC 81; Justin Oamhen v. The State (1984) 4 SC 1; Oguntolu v. The State (1987) 1 NWLR (Pt.50) 464; Akinfe v. The State (1988) 3 NWLR (Pt.85) 729.**

In Bwashi v. The State (supra), the medical report of an autopsy was rejected by the trial Judge on the ground that there was conflict in the medical report as regards the identity of the body on which the examination was performed. But he relied on other evidence and drew the necessary inference as to the cause of death and convicted the accused for murder. On appeal to this court, the conviction and sentence were confirmed. In the present case, there is evidence that a person who was P.W.1 motor conductor and whose name he gave as Julius Duru received gunshot wounds in his presence on 22 October, 1987. He saw blood gushing from his body. In his presence, he cried in agony, vomited blood and died shortly thereafter. From these facts, it is plain to me beyond dispute that the identity of the dead man, whose cause of



death is known, is not in doubt. Also not in doubt is the person who shot him. The evidence of P.W.3 is clear on that. He saw the appellant shoot with his rifle and the shot hit the deceased while sitting in the vehicle. The appellant himself acknowledged that the bullet from his rifle hit the deceased although he had claimed that it was accidental.

What remains to be resolved in this appeal is whether the facts disclosed bring the appellant within the offence of murder as charged under section 316 of the Criminal Code of Eastern Nigeria. The relevant provision of that section reads:-

*“316. Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say -*

*(a) if the offender intends to cause the death of the person killed, or that of some other;*

*(b) if the offender intends to do to the person killed or to some other person grievous harm .... is guilty of murder.”*

**In considering the intent required under the above-stated provision, it is vital to look closely at the facts which resulted in the killing. It could at times be difficult to ascertain the necessary mens rea (or what used to be called malice aforethought) when considering circumstances in which it could not be clearly said that the accused had certain matters in contemplation at the material time upon which the fact of the killing might be related: see *R. v. Doherty* (1887) 16 Cox CC 306, to which I shall return later. One of the elements of murder as provided for in s. 316(a) or (b) is that the act done must be with the intent to kill or to inflict grievous bodily harm. This is what is known as “specific intention” which is necessary for sustaining a murder charge: see *D.P.P. v. Newbury* (1977) AC 500 at 509; (1976) 2 All ER 365 at 369 per Lord Salmon who said inter alia:-**

*“ ... in manslaughter there must always be a guilty mind. This is true of every crime except those of absolute liability. The guilty mind usually depends on the intention of the accused. Some crimes require what is sometimes called a specific intention, for example murder, which is killing with intent to kill or inflict grievous*

*bodily harm. Other crimes need only what is called a basic intention, which is an intention to do the acts which constitute the crime. Manslaughter is such a crime."*

The authorities of *R. v. Larkin* (1943) 29 Cr. App. R. 18 and *R. v. Church* (1966) 1 Q.B. 59, to which I shall refer later in this judgment, were cited in *D.P.P. v. Newbury* and approved. **It is clear that if that specific intention is unable to be established beyond reasonable doubt by the prosecution, then the court will be unable to find the accused guilty of murder. It follows that a Judge who decides to convict for murder and nothing else must be very sure that there are no facts that might justify the jury in returning a verdict of manslaughter:** see *Kwaku Mensah v. R.* (1946) AC 83; *Sharmal Singh v. R.* (1962) AC 188. In the latter case, Lord Devlin, delivering the judgment of the Privy Council, observed at page 195:

*"Their Lordships agree with the Court of Appeal that the trial Judge fell into error (a very natural one considering the nature of the defence that was pressed upon him) in that he overlooked that the crown not only had to dispose of the defence set up but had also to prove that the evidence adduced by the prosecution was consistent only with murder."*

In the present case, the appellant relied on the defence of accident throughout. His evidence in this regard was rejected by the learned trial Judge, I think with complete justification with regard to the claim that the rifle fell from him, and this was upheld by the court below. I have to say, however, if it had been accepted that the rifle fell from him and exploded, the question whether the bullet could possibly have flown to reach the level of the vehicle so as to hit the deceased where he sat therein (a possibility which the learned trial Judge dismissed out of hand) would have had to be carefully considered. I say this because when occasions of accident occur they do often present with unimaginable results.

However, the defence of accident was rejected; the evidence adduced on behalf of the prosecution, particularly as given by P.W.3 (the eye-witness) regarded as a truthful witness, was accepted and acted upon by the court to convict for murder and no other offence. It was not urged upon the trial court, and the court did not consider on its own, that the facts revealed in that evidence could support manslaughter rather than murder, notwithstanding that the defence of accident

raised was rejected. In *R. v. Hopper* (1915) 2 K.B. 431, approved in *Kwaku Mensah v. R.* (supra), Lord Reading C.J. observed at page 435 at follows:

*“We do not assent to the suggestion that as the defence throughout the trial was accident, the judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by counsel at the trial of a prisoner, we are of opinion that it is for the judge to put such questions as appear to him properly to arise upon the evidence even although counsel may not have raised some question himself. In this case it may be that the difficulty of presenting the alternative defences of accident and manslaughter may have actuated counsel in saying very little about manslaughter, but if we come to the conclusion, as we do, that there was some evidence - we say no more than that - upon which a question ought to have been left to the jury as to the crime being manslaughter only, we think that his verdict of murder cannot stand.”*

*We desire to add further that we do not accept the argument addressed to us by counsel for the crown, and relied upon by the judge in his summing-up, that because the appellant said that he was not angry at the time, that must be taken against him as negating the proposition that the crime could be manslaughter. In saying that he was not angry the appellant was trying to shelter himself behind the plea of accident, and it was open to the jury to say that the statement he made was not true. Other views of the facts than those given by him in his evidence cannot be excluded. In a court of justice it is for the court, with the assistance of the jury, to arrive at the true view of the facts without paying too much attention to whether particular witness is called by one side or the other.”*

Now, I come back to *R. v. Doherty* (supra). There was a summing up made to the jury which I consider useful in homicide cases such as the present one. It was a case of a shooting incident. I do not intend to state the facts. It is unnecessary to do so since they are irrelevant as to how the portion of the summing-up may apply. At the conclusion of the evidence for the prosecution - the accused not having testified as there was no right then in law for accused person to do so, but made a statement - Stephen, J. charged the jury thus at pp.307-308:

“Murder is unlawful homicide with malice aforethought. Manslaughter is unlawful homicide without malice aforethought. First, as to the term ‘aforethought’, its meaning has been laid down clearly by Holt, C.J., who in *Reg. v. Mawgridge* (Kelyng, 174) says: ‘He that doth a cruel act voluntarily, doth it of malice prepensed’, which is the same as aforethought. ‘Aforethought’, therefore, does not necessarily imply premeditation, but it implies intention which must necessarily precede the act intended. What, then, is the intention necessary to constitute murder? Several intentions would have this effect; but I need mention only two in this case, namely, an intention to kill and an intention to do grievous bodily harm. If the act which caused death, the firing of the pistol, was done with either of these intentions, Doherty’s crime was murder. But it is difficult to see how a man can fire a loaded pistol at another without intending to do him grievous bodily harm, so that if you think that Doherty fired the pistol at the deceased’s body, intending to hit him, but taking his chances where he hit him, that would be murder, though he did not intend to kill. If, on the other hand, you think that he fired it vaguely, without any special intent at all, and by so doing caused his death, that would be manslaughter.”

I earlier on reproduced the evidence of P.W.3 upon which the learned trial Judge obviously based his judgment. He narrated how the vehicle driven by P.W.1 came to a road block and was flagged down by a policeman to stop. As the vehicle was about to stop, the policeman turned his back. What happened next, as narrated by P.W.3 is important.

He said:

“Then the P.W.1 tried to continue moving onwards. Then another policeman immediately fired his gun towards us.”

This other policeman was the appellant. He fired from the right side of the vehicle and the bullet hit the man who was sitting near the right side door of the vehicle. The bullet penetrated the vehicle. At that point, P.W.1 stopped the vehicle on the side of the road and began to cry. What next followed, as narrated by P.W.3 is noteworthy. He said:

“Then the policeman who fired the gun also came to the vehicle and started crying.”

This was repeated under cross-examination in which it was put this way:

*“After the gun shot I saw the accused come to the vehicle. He held the injured person, weeping.”*

The cross-examination said further that no policeman signalled P.W.1 to move on. Apparently this witness did not know, going by the evidence of P.W.1, that the other policeman had tapped on the vehicle as a sign that the vehicle should move on. It seems very unlikely that P.W.3 knew that PW.1 had been cleared by that policeman to move on. It also seems that the P.W.1 had responded to that tap on his vehicle by the policeman by attempting to leave the scene. The appellant, perhaps, saw the vehicle move on as though it was going away without being signalled to do so. It was at that very instant that the appellant fired his rifle.

On the facts of this case, if the ordinary reasonable person were to be asked: Did the appellant intend to shoot to kill, or did he intend to shoot to cause grievous bodily harm? The answer may well be a straight, no. It is likely to be “I don’t think so.” But perhaps being in some doubt, the answer can be, “I can’t really say”. These possible answers must be because of the way the appellant vaguely shot thoughtlessly at the vehicle and the manner he spontaneously broke down one realising what harm he had done. According to P.W.3, he came up to the vehicle and resignedly held the injured conductor, weeping. It was an unrestrained show of remorse on seeing what he had caused. On the other hand, if the person were to be asked, how can anyone shoot like that, was that not dangerous? There would be no hesitation to answer in the affirmative. This would represent the view of reasonable and sober people. It is I think, a fair view to say that upon an adequate summing-up (or a judge as a jury calmly directing himself) on the facts of the shooting and the accompanying scenerio, a jury must be wary indeed of returning a verdict of murder.

In R v. Larkin (1943) 29 Cr. App. R.18, the deceased woman had died as a result of her throat having been cut by a razor held by the accused. The accused admitted that he was flourishing the razor for the purpose of threatening another person but said in evidence that the woman had drunkenly blundered against it. It was held by the Court of

Criminal Appeal, affirming his conviction for manslaughter, that the act of flourishing the razor in a threatening manner was unlawful and was at the same time likely to injure another person. Humphrey J.said at p. 23:

B *“Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes that death of that other person of that act then he is guilty of manslaughter.”*

C The test as to what is unlawful and dangerous does not depend on the knowledge or thinking of the accused. It is based on the objective test, that is, what a reasonable person would describe as unlawful and dangerous. In *R v. Church* (1966) 1 Q.B. 59 at 70, Edmund Davies, J., delivering the judgment of the Court of Criminal Appeal, said:

D *“ ..... an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people*  
 E *would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm,”*

F G The two cases of *Larkin* and *Church* have been approved in several cases by House of Lords including *D.P.P. v. Newbury* (1977) A.C. 500 at 507; (1976) 2 All E.R. 365 at 367 where Lord Salmon observed that an accused is guilty of manslaughter if it is proved that he intentionally did an act which was unlawful and dangerous and that act inadvertently caused death, and it is unnecessary to prove that the accused knew that his act was unlawful and dangerous.

H Perhaps it is pertinent to state the facts of *Newbury* to see how instructive they are in relation to the facts of the present case. Two boys of 15 years of age climbed a rail way bridge and waited for an oncoming train. They pushed a heavy piece of paving stone from the bridge in the path of the train. The stone went through the window of the driving cab and killed the guard therein. It was said by the defence that the boys merely intended to cause the stone to hit the roof of the driving cab to cause it some damage but not to injure or kill anyone.

The verdict was manslaughter.

It may be necessary to consider the third circumstance under section 316, namely,

(c) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life. B

It is important to understand a crucial requirement under the provision of s.316(c) by closely examining its relevant terms which talk about “an act done in the prosecution of an unlawful purpose” (which act is of such a nature as to be likely to endanger human life). Although the words in parenthesis form part of the provision they are concerned with the severity of the likely consequences. They do not relate to what the accused has done directly, namely (1) an act (done by him) in the (2) prosecution of an unlawful purpose (the motive or reason for that act). It seems from this analysis, that the act itself is different to the unlawful purpose. Hence it is easy to appreciate what his court held in *Aga v. The State* (1976) 7 S.C 173 at p. 78 that: D

“... we do not consider that the finding of guilt by the trial court, based as it is on sub-section 316(c) of the Code was correct in law. We think that the expression ‘an act done in the prosecution of an unlawful purpose’ in the sub-section must mean an act done in furtherance of a purpose which is unlawful.” E

So if s.316(c) is read as “an act done in furtherance of an unlawful”, it will be seen that the act is clearly not the same as the unlawful purpose. They are two different things, one being used towards achieving the other. F

This can be demonstrated further. Section 302(2) of the Queensland Code is similar to our section 316(c) under consideration. In *R. v. Hughes* (1951) 84 ELR 170, s. 302(2) arose for consideration. There, two women were engaged in a fight. The accused who lived in the same house with them went on a punching orgy against one. She retreated to her room but he followed her, threw her on the bed and continued to punch her. He inflicted severe injuries on her thereby, from which she died in hospital later. The man was charged with murder and tried. The Judge directed the jury that it was a case in which G H

they could find for murder under either s.302(2) of the Queensland Code (which is similar to our s.31(b) or s.302(2) which, as already said, is similar to our s.316(c).

B The accused was convicted of murder. The defence then appealed on the ground of misdirection and argued that under s. 302(2) the act which causes death must be something different to the act which constitutes the unlawful purpose. The High Court of Australia having found merit in that argument observed at pp. 174-175:

C *"In our opinion the second case or paragraph of s.302 had no application to the facts of the present case and the direction was erroneous. The paragraph relates to an act of such a nature as to be likely to endanger human life when the act is done in the prosecution of a further purpose which is unlawful. The direction of the trial court appears to be founded on the view that the assault on the deceased woman constituted at once the unlawful purpose and the dangerous act.*

D

*In our opinion the evidence did not warrant a conviction for murder within s.302(2). If the case did not come within s.302(2) the equivalent of s.316(a) and (b) of the Nigerian Code, it was not a case of murder. Section 302(2) ought not to have been mentioned at all. The importance of this lies in the fact that s.302(1) requires a specific intent, whereas, the nature of the act done and the purpose in the prosecution of which it is done, are the critical things for the purposes of s.302(2)."*

F

It was therefore held that a finding of guilty under s.302(2) resulting in a verdict of murder was erroneous. The accused was found guilty of manslaughter.

G

A ready case which will fall under s.316(c) of our Criminal Code is a case of a person who goes to steal, armed. In the course of stealing, he finds that he is about to be arrested or disturbed. In order to escape to complete the stealing process he shoots (whether to scare or to injury) and causes death.

H

Another instance is illustrated somehow in R v. Okoni (1938) 4 WACA 19. There, the Bale of Igboora wanted one Shittu who had



seduced the wife of the son of the Balogun out of town. On learning that the said Shittu was back in town, he ordered beating of Oro dum to warn women to run to their houses. Shitta was suspected of hiding in one of the houses. The Bale and others organised to set the house on fire. A woman who lived in the house was burnt to death. The Bale and others were convicted of murder under s. 316(3) of the Criminal Code, Western Region (the same as s.316(e) under consideration). The conviction was affirmed by the West African Court of Appeal. Perhaps the act of trying to send Shittu on exile was unlawful and the setting of the house on fire in order to achieve that aim was in furtherance of that unlawful act although this rationale was not made clear in the judgment. In my view, that is the only approach in which the decision can be justified under s.316(e).

Clearly, it can be seen that the act of shooting was in furtherance or prosecution of the unlawful purpose of stealing. In the present case, there is only one unlawful act which is at the same time dangerous. **The appellant could not therefore be found guilty of murder under s.316(c). From what I have discussed in this judgment, he can be convicted of manslaughter under section 317 of the Criminal Code which provides that:**

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

**I have no doubt that by shooting at the vehicle the present appellant did an unlawful act which was at the same time dangerous, and that it is an act which all reasonable people will so recognise and must condemn as an act bound to subject anyone in the vehicle to the risk of harm. But I cannot categorically say he intended to kill or cause grievous bodily harm to anyone, in fact I will not at all say he had that specific intention. In the circumstances, I think his conviction for murder by the trial court was wrong. The court below was therefore in error to have affirmed the conviction.**

I must say in fairness to the two court below, that it was not an unusual error partly because the case both the appellant and the respondent pressed on them all along, as they did in this court, was without advert

ing for one moment to the issue of manslaughter. One sought total acquittal and the other total conviction of the homicide charged.

Whereas the facts presented an alternative and more appropriate offence of manslaughter.

B In consequence, I allow the appeal and set aside the judgment of the court below which affirmed the judgment of the trial court. Instead, the appellant is hereby convicted for manslaughter and sentenced to 10 year's I.H.L the sentence to run from the day he was convicted by the High Court, i.e. 26 September, 1991.

C \_\_\_\_\_

### **KARIBI- WHYTE JSC**

D I have read the judgment of my learned brother Uwaifo JSC in this appeal. I agree with his conclusion allowing the appeal of the appellant and setting aside the conviction for murder. In its stead is substituted a conviction for manslaughter with a sentence of 10 years I.H.L. to run from the 26th September, 1991 the date of conviction by the High Court.

E \_\_\_\_\_

### **OGUNDARE JSC**

I have read in advance the judgment of my learned brother Uwaifo JSC just delivered.

F The appellant was charged in the High of Imo State on an information with the offence of murder "contrary to section 319(1) of the Criminal Code, Cap.30 Vol. II Laws of Eastern Nigeria, 1963 applicable in Imo State." He was convicted at the conclusion of trial after evidence had been led on both sides. The learned trial Judge found him guilty of the offence of murder and sentenced him to death. He appealed to the Court of Appeal which affirmed the conviction and sentence. He has now further appealed to this court.

G Two issues are canvassed in this appeal. My learned brother H has dealt exhaustively with the facts and the arguments advanced by learned counsel for the parties on these two issues. I need not go over them again.

The conviction of the appellant for murder was based solely

on the evidence of P.W.3 which ran thus:

*"I remember 22nd October 1987, I was going to my school-Ohaji High School. Then I went up to Port- Harcourt Road/Federal Low Cost Housing Road J unction where I joined a motor vehicle to-  
wards the Port-Harcourt Road. It was a 404 Peugeot Pick Up B  
van. I saw the driver and one other person sitting by him. P.W.1 is the deliver of the 404 Peugeot Pick Up. The boy sitting near the  
driver, P.W.1 allowed me to sit between him and the P.W.1. We drove  
towards Port Harcourt. As we got near Avu JUNCTION, People in  
police uniform flagged the vehicle to stop. The driver P.W.1 slowed C  
down to stop. As the P.W.1 was about to stop the policeman who  
flagged him down turned his back to the vehicle and faced the  
other side of the road. Then the P.W.1 tried to continue moving  
onwards. Then another police man immediately fired his gun to- D  
wards us. He fired at us from the right side of the vehicle. The boy  
who was sitting outer most near the door of the pick up was hit by  
bullet from the gun fired by the policeman. The P.W.1 cleared from  
the road stopped and began to cry. Then the policeman who fired  
the gun also came to the vehicle and started crying. Later they E  
reversed the vehicle and carried the injured person to a hospital  
while I continued to my school;" (italics mine for emphasis)*

The learned trial Judge accepted the evidence of this witness which evidence disclosed that the appellant deliberately fired his gun F that day. This deliberate firing of the gun amounted to an unlawful act and the unlawful act resulted in the death of the deceased. To consti-  
tute the offence of murder however, it must be proved that the appel-  
lant, at the time he fired his gun, intended to cause the death of the G  
deceased or to cause him grievous harm. There is however, nothing in  
the evidence of P.W.3 to suggest that the gun was aimed at the de-  
ceased or the vehicle in which he was travelling. It might be that the  
appellant fired at random. That being so, the necessary intent to consti-  
tute the offence of murder has not been established beyond reasonable H  
doubt. The learned trial Judge ought to have considered the possibility  
that on the fact before him, conviction for manslaughter was a verdict  
open for consideration. I think for this reason alone, the appeal ought to  
succeed.

I agree entirely with the reasoning of my learned brother Uwaifo, JSC. I too allow the appeal, set aside the conviction of the appellant for the offence of murder and substitute, therefore, a conviction for the offence of manslaughter contrary to section 317 of the Criminal Code Cap. 30 Laws of Eastern Nigeria 1963 still applicable in Imo State. I subscribe to the sentence to 10 years imprisonment passed on the appellant by my learned brother Uwaifo JSC.

Before concluding this judgment, I need to comment briefly on the statement of offence as appearing in the information. The appellant was charged for the offence of “murder contrary to section 319(1) of the Criminal Code ... “ Subsection (1) of section 319 does not create the offence of murder; rather it provides for the punishment for murder. Sub-section (1) of section 319 reads:

*“Subject to the provisions of this section any person who commits the offence of murder shall be sentenced to death.”*

The proper section is 316 of the Criminal Code of Eastern Nigeria. Clearly, the error here has been as a result of gross carelessness on the part of the prosecution counsel. Defence counsel ought to have raised objection at the trial but did not. And as the point has not been raised in this appeal, I say no more on it.

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### ONU JSC

I have been privileged to have a preview of the leading judgment of my learned brother Uwaifo, JSC. just delivered. I entirely agree with him that the appeal of the appellant from the court below which affirmed the judgment of the trial court be allowed. The verdict of manslaughter returned, in my view, based as it were on the evidence of P.W.3, Henry Ohanele, formed the bedrock upon which the law and facts relied upon stemmed amply justify such a verdict. See *Lamba Kumbin v. Bauchi Native Authority* (1963) NNLR 49, a case where the appellant was convicted in a Grade “A” Native Court of culpable homicide punishable with death contrary to section 221(b) of the Penal Code (in pari materia with section 316 of the Criminal Code, Cap 30, Laws of Eastern Nigeria, 1963).

It appeared at the trial that the appellant struck the deceased a back handed blow on the abdomen with a stick, causing a loop of bowel to protrude and that this injury caused the death of the deceased. The stick was about five feet long and between one half and three quarters of an inch in diameter at one end, increasing to about one inch at the other end. There was no express evidence that the blow was severe. B

On appeal, the High Court of Northern Nigerian sitting in Bauchi heard the evidence of a medical practitioner who had examined the deceased's body. This evidence showed that the blow had fallen on the site of an old, large umbilical hernia. The deceased's injury could have been caused by a comparatively trivial blow, and its seriousness was the result of the hernia. If the blow had not fallen on the hernia it might have cause a laceration but it would not have gone through the muscle. The same injury could not have caused by a similar blow on normal healthy people. The doctor did not think that the hernia would have shown through native clothing. C D

There being no evidence that the appellant knew the deceased was not in sound state of health.

Held:

*"It was impossible to find that the appellant knew or had reason to known either that the blow he struck would probably cause death or that it was likely to cause it, and accordingly the conviction of culpable homicide punishable with death contrary to section 221(b) of the Penal Code could not stand and a conviction of culpable homicide not punishable with death (contrary to section 220(b) could not be submitted.* E F

*A conviction of causing death when intending to cause hurt only, contrary to section 25 of the Penal Code, was substituted."* G

It was further held in the same case albeit per Curiam per Reed, Ag. S.P.J:

*"(1) ..... (not applicable)....."*

*(2) Whether death is a likely or a probable consequence of a person's act is a question of degree. If a weapon is used the question will generally resolve itself by a consideration of the weapon used, the part of the deceased's body where it was struck and the amount of force used. A thin stick is not as dangerous as a thick stick; a stick is not as dangerous as a sword, knife or other* H

*lethal weapon (e.g. a gun); a blow struck on a limb is not as dangerous as blow struck on the head; a hard blow is more dangerous than a light one. All these are matters which the trial court must consider where the accused person's "knowledge" of the consequences of his act is relevant.*" (Italics above are mine for further comments later)

In the case in hand bearing in mind the element of knowledge, the crucial portions of the evidence of P.W.3 in the instant case, ran as follows:

In evidence in chief he said:

C "As we got near Avu junction, people in police uniform  
flagged the vehicle to stop. The driver P.W.1 slowed down to stop.  
As the P.W.1 was about to stop the policeman who flagged him  
down turned his back to the vehicle and faced the other side of  
D the road. Then the P.W.1 tried to continue moving onward. Then  
another policeman immediately fired his gun towards us. He fired  
at us from the right side of the vehicle. The boy who was sitting  
outermost near the door of the pick-up was hit by bullet from the  
gun fired by the policeman. The P.W.1 cleared from the road  
E stopped and began to cry. Then the policeman who fired the gun  
also came to the vehicle and started crying."

Under cross-examination, he said:

F "I saw two policemen on our side of the road. The ac-  
cused was one of them. No policeman signalled to PW.1 to move  
on. Our vehicle was on our proper side of the road. From the  
position of the accused to the place our vehicle slowed down was  
about 8 1/2 metres. After the gun shot I saw the accused come to  
G the vehicle. He held the injured person, weeping."

Based upon the foregoing pieces of evidence principally from the lone witness (P.W.3), the learned trial Judge convicted the appellant and his appeal to the Court of Appeal was dismissed.

H The question I must ask myself and provide an answer is, had the appellant in the instant appeal been shown in the circumstances to have knowledge of the consequences of his act? It appears clear that my learned brother Uwaifo, JSC has rendered an answer, which is in the negative. I find myself unable to provide any different answer in

the light of his reasoning and conclusion, which I respectfully hereby adopt.

It is for the above reasons and the fuller ones contained in the leading judgment of my learned brother Uwaifo, JSC that I too allow the appeal, convict the appellant of the offence of manslaughter and accordingly sentence him to 10 years I.H.L. with effect from 26th September, 1991. B

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**EJIWUNMI JSC**

I have had the privilege of reading in advance the judgment just delivered by my learned brother Uwaifo, J.S.C. As I agree with the reasons given in the said judgment for allowing the appeal I will also allow the appeal. The appeal is therefore allowed by me, the judgment of the court below is set aside, in place of the conviction for murder that of manslaughter is hereby ordered to be entered against the appellant. He is sentenced to 10 years I.H.L. commencing from the date of his conviction. D

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