

**SUPREME COURT OF NIGERIA**  
27<sup>TH</sup> JANUARY, 2006. SC. 198/2004  
**CORAM:- S. M. A. BELGORE, A. O. EJIWUNMI, I. PATS-  
ACHOLONU, A. M. MUKHTAR, I. F. OGBUAGU, JJSC**

JOHN AGBO ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Evidence - Contradictions - In prosecution's case - Must be material and likely to cause a miscarriage of justice - In order to ground an acquittal (H1)

EVIDENCE - Witnesses - Contradictions - Court - Criminal procedure - Effect of material discrepancy in testimony - Need for court to make finding - In relation to any contradiction (H2)

MURDER - Witnesses - Contradictions - Alleged in respect of point of entry of the bullet - Does not exist (H3)

CRIMINAL PROCEDURE - Expert opinion - Cross examination - Ballistician need not be called by the prosecution - As there was no cross examination of the witnesses (H4)

EVIDENCE - Witnesses - Cross examination - Absence of - Means acceptance of the testimony - In its entirety (H4)

EVIDENCE - Witnesses - Veracity - Need for accused to maintain the truth - Or his evidence will lack credibility (H5)

APPEALS - Issues - Striking out - Materiality - Where appellant fails to proffer argument - In respect of an issue - It will be struck out as abandoned (H6)

CRIMINAL PROCEDURE - Appeals - Charges - Error therein - Where not raised at trial court - Objection on appeal will be ignored - Where accused was not misled by the errors (H7)

APPEALS - Issues - Determination of - An interwoven issue that is already determined - Or that is merely academic and technical - Need not be considered again (H8)

### **FACTS**

The accused/appellant was charged before the Abia State High Court, Ohafia, with the offence of murder. Appellant, a police constable was attached to a Magistrate as an orderly. He was sent by the Magistrate to escort his driver to deliver some bags of cement from Enugu to Arochukwu. After the delivery, on their way back, there was a Peugeot 504 Saloon Taxi Cab driven by the deceased, parked on the other side of the road in order to discharge some of his passengers. The appellant jumped down from their own van, went to the deceased and asked him why he blocked the road with his car. In the course of an argument that ensued, the appellant shot the deceased with his pistol and he died on the spot.

Seven witnesses testified for the prosecution, three of whom were eye witnesses. The appellant's case was that there was a struggle between him and the deceased in the process of which his gun was accidentally discharged when the deceased wanted to take possession of his pistol. The trial court rejected the defence of accident, convicted the appellant and sentenced him to death by hanging. His appeal to the Court of Appeal was dismissed. Appellant has further appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*“ 1. Whether the inconsistencies in the prosecution’s evidence were material enough to entitle the Appellant to an acquittal under S.24 of the Criminal Code.*

*2. Whether failure of the learned Justices to pronounce on one of the issues for determination formulated from the Appellant’s ground of appeal led to a miscarriage of justice.*

3. *Whether the trial and conviction of the Appellant was valid in law having regard to the information upon which he was arraigned”.*

**HELD** (Unanimously dismissing the appeal per **OGBUAGU JSC**)

***Contradictions - In prosecution's case - Must be material***

1. In a string of decided authorities by this Court, it is now firmly established that contradictions, to be fatal, the prosecution's case must go to the substance of the case and not to be of a minor nature. It is settled, that if every contradiction however trivial to the overwhelming evidence before the court, will vitiate a trial, nearly all prosecutions, will fail. That human faculty, may miss some minor details due to lapse of time and error in narration in order of sequence.

In the case of *Sele v. The State* (1993) 1 SCNJ 15 @ 22 -23 - per Belgore, JSC, it was held that if the contradiction, do not touch on a material point or substance of the case, it will not vitiate a conviction once the evidence, is clear and it is believed or preferred by the trial court. It is also settled that it is not in all cases where there are discrepancies or contradictions in the prosecution's case, that an accused person, will be entitled to an acquittal. That it is only when the discrepancies or contradictions, are on material point or points in the prosecution's case, which create some doubt, that the accused person, is entitled to benefit therefrom.

In other words, for the principle of inconsistency of the evidence of witnesses to apply, it must be shown,

- (a) that the inconsistency, is material.
- (b) that the trial Judge failed to advert to the inconsistency in his judgment and
- (c) that the inconsistency must be such as to amount to substantial disparagement of the witness or witnesses concerned that reliance on such testimony, would likely result in a miscarriage of justice.

Thus, for any conflict or contradiction in the evidence of the prosecution witnesses to be fatal to the case, it must, be fundamental to the main issues before the court. (p. 227 C)

***Criminal procedure - Effect of material discrepancy in testimony***

2. So, where there are contradictions in the evidence of a witness or witnesses, the trial Judge, must make a finding in relation to the contradictions. If he fails to do so, this may vitiate a conviction. There is no doubt B and this is also settled, that where there are material discrepancies in the testimony of the prosecution witnesses, it is not possible to hold that the evidence for the prosecution, is overwhelming. - See *Opayemi v. The State* (1985) 2 NWLR (pt.5) 101. (p. 228 H)

C ***MURDER - Witnesses - Contradictions***

3. I have myself read/perused several times, the evidence of the PWS' 1, 3, 4 and 5, and I have seen no material, to talk of any contradiction in respect of the point of entry of the bullet or whether the deceased was shot D on the left or right ear. What is plain to me and this fact is not disputed by the Appellant and his learned counsel in this Court - Mrs. Essien, is that the deceased died as a result of a gun shot wound found by the P.W.1 - the Medical Doctor who performed the post mortem examination on 26 E January, 1985 - being the same date of the said incident.

I note however, that this issue, was canvassed in paragraph 3.1.1 (as has also been done in this Court) in the court below under Issue 2.1 of the Appellant which reads thus:

F *“Whether the essential elements of murder and the guilt of the Appellant were established beyond reasonable doubt as laid down by S.138(1) of the Evidence Act before he was convicted for murder and sentenced to death”.*

G At pages 128 to 129 of the Records also partly reproduced at the said paragraph 3 of the Appellant's Brief, the court below, stated as follows:

H *“In the instant case, the main question to be resolved by the court was whether or not the appellant fired the gun that hit the deceased on the head. The description of the exact spot or part of the head where the bullet penetrated the head is immaterial. All that need to be established are whether it was the appellant that fired the gun and if so, whether the bullet fired from the gun hit the deceased on the head and resulted in his death.*

*All these questions were satisfactorily answered in the instant case. The so-called inconsistencies referred to in the appellant's brief are therefore very immaterial".*

(the underlining mine)

I agree . I see no inconsistencies in the prosecution's evidence to B  
talk of their being material enough to entitle the appellant, to an acquittal  
under Section 24 of the Criminal Code as reproduced. (pp. 229 C/231 A)

### ***Expert opinion - Cross examination***

4. It is submitted in the Appellant's Brief, that the prosecution, should have C  
brought a ballisticsian to explain, how a bullet "*allegedly shot in the left ear  
ended up going in through the right ear and staying in the brain*".

With the greatest respect, I do not agree. Afterwards, P.W.1, was  
never cross-examined. The learned counsel for the Appellant - Dr. D  
Opaigbeogu, told the trial court, that he had no questions for the P.W.1.  
The effect is, or this means, that he accepted, in its entirety, the evidence  
of the P.W.1 as true and correct. (p. 230 F)

### ***Witnesses - Veracity***

5. I am, satisfied that the Appellant, regrettably, lied and lied in his evidence  
at the trial. I am however, aware and this is settled, that an accused person  
telling lies, is of no effect. See Okpere v. The State (1971) 1 ANLR 105 F  
where per Incuriam, it was stated that it has never been the law, that the  
mere fact that an accused person told lies, by itself, is sufficient to convict  
him with an offence connected with mendacity nor does the fact that an  
accused person has told lies, relieve the prosecution of its duty of proving  
the guilt of the offence with which he is charged, beyond reasonable G  
doubt.

In spite of the above, it is also settled that the character of a witness  
for habitual veracity, is an essential ingredient in his credibility. For it is  
said, that for a man who is capable of uttering a deliberate falsehood (as H  
in the instant case leading to this appeal), is in most cases, capable of doing  
so under the solemn sanction of an oath. If therefore, it appears that he has  
formally said or written the contrary of that which he has now sworn, his

evidence should not have much weight with a jury (I add a court without jury), and if he has formerly sworn the contrary, the fact is almost conclusive against his credibility. (p. 237 F)

**B APPEALS - Murder - Issues - Materiality of**

6. Regrettably, as I have stated hereinabove, no arguments in respect of the said issue, have been canvassed in the Appellant’s Brief in this Court. It is settled, that any issue on which no argument has been proffered, is deemed abandoned. I therefore, hold that the Appellant and his learned  
C counsel, having failed or neglected to proffer any meaningful or any argument in respect of this issue, it is deemed by me, as having been abandoned. The said issue 2 is accordingly struck out and in fact, dismissed by me.

D                      But assuming I am wrong, with profound humility to the learned counsel for the Appellant, in my respectful view, the said issue is not material to the determination of whether the Appellant was guilty in respect of the offence of murder in which he was charged and convicted.  
E (p. 240 H)

***Appeals - Charges - Error therein***

7. Without wasting any more time on this issue, since the defence counsel  
F at the trial did not raise any objection as to the charge/information, by virtue of Section 167 of the Criminal Procedure Law, Cap. 31 Vol. II, Laws of Eastern Nigeria, 1963, applicable in the Imo/Abia State, it cannot be raised, either after the trial, or at the court below or in this Court. I so hold.

G                      For the avoidance of doubt, let me reproduce the provisions of Sections 166 and 167 of the C.P.L. (Criminal Procedure Law) Cap. 31, Laws of Eastern Nigeria, 1963 applicable in Imo/Abia State.

Section 166 provides as follows:

H                      *“No error in stating the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission”.*

Section 167 provides as follows:

*“Any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge has been read over to the accused and not later”.*

(the underlining mine)

The Appellant and his learned counsel, have not stated at any stage from the trial to this Court, that the Appellant was ever misled by the information charging the Appellant under Section 319 (1) of the Criminal Code. As I had noted hereinabove, there is no where in the Records, where the learned counsel appearing for the Appellant, ever took any objection as to the charge or Information or for any formal defect on its face. That being the case or position, I accordingly, ignore and discountenance the complaint under this issue. (p. 242 F)

### ***APPEALS - Issues - Determination of***

8. This issue, in my respectful view, is related to and interwoven with Issue 2, that I have disposed off. It is a repetition by the learned counsel as can be seen from the arguments proffered in respect thereof in the Brief of the Appellant. Going into it, with respect, is a sheer waste of the Court’s precious time. The arguments are also academic and again, border on technicality and not on the substance of the case. The issue lacks merit and it is accordingly dismissed.

The lone/single issue of the Respondent, is rendered in the Positive/Affirmative by me.

In concluding this Judgment, I note that there are Concurrent findings of the two lower courts. It is now settled, that the Court will not normally interfere, unless they are perverse or erroneous in substance or procedural law. I find no reason at all, to disturb/interfere with the decision of the court below. (p. 244 A)

### **NOTABLE POINTS OF INTEREST**

#### **MUKHTARJSC**

*1. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt*

I am aware that the totality of evidence must be devoid of material

contradictions and discrepancies that may cast some doubt in the mind of a trial judge. However, proof beyond reasonable doubt, does not mean proof beyond shadow of doubt, as stated by Denning J. in the case of Miller v. Minister of Pensions 1947 2 All E.R. page 372 at 373 when he said :-

B                      “Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable,” the case is proved beyond  
C                      reasonable doubt, but nothing short of that will suffice.”

It is my firm belief that the learned trial judge had the above at the back of his mind, as he was evaluating the evidence before him, and the  
D Court of Appeal did the same as it was dealing with the issue.

(p. 250 D)

2. Need for law enforcement agents to safeguard lives

E Indeed the evidence before the trial court was quite overwhelming and points to the guilt of the appellant. Situations like this whereby policemen rashly bring out their guns, (albeit to merely threaten or frighten citizens) is rapidly becoming rampant. They are meant to use the guns to safeguard  
F the lives of the citizenry they are paid to protect, but the reverse is the case.

A policeman will not hesitate to pull the trigger of his gun at the slightest provocation, and would indeed do that with relish and reckless abandon, not caring whether the consequence of his act will be fatal. The incident in the instant case is a locus classicus. A law enforcement agent who is  
G supposed to bring sanity and order on the road brings out his gun and fires it just because a driver obstructs his right of passage (that is even if there was an obstruction, as the evidence in court is that there wasn't.) In fact the mere fact that he deemed it necessary to bring out a gun from wherever  
H he had kept it is enough act of recklessness, even if no shot was fired, and in this case there is ample evidence that it was. I believe such rash acts must be stopped to prevent innocent human lives from being wasted.

(p. 251 F)



### **REPRESENTATION**

Miannaya A. Essien (Mrs.) for the Appellant.

Chief S.U. Akuma, Esq- Attorney-General, Abia State with him. N.U.

Wachukwu, Esqr,

(D.P.P.) and V.O. Chukwu, Esq., (State Counsel) both of Ministry of Justice, Abia State.

### **CASES REFERRED TO**

Queen v. Ekanem (1960) 5 FSC 14

Nasumu v. The State (1979) 6-0 S.C. 153

Kalu v. The State (1998) 4 NWLR (pt.90) 503, 524; (1988) 10-11 SCNJ 1

Ogoala v. The State (1991) 2 NWLR (pt. 175) @ 516; (1991) 3 SCNJ, 61 @ 72

Enahoro v. The Queen (1965) 1 ANLR. 12 @ 149 - 150

Akinsule v. The State (1972) 5 SC. 72

Eugene Ibe v. The State (1992) 6 SCNJ.; (pt. II) 172 @ 177

Atiji v. The State (1976) 2 S.C. 79 @ 83 - 94

Ibeh v. The State (1997) 1 SCNJ 256

Opayemi v. The State (1985) 2 NWLR (pt.5) 101

Okasi & anor. v. The State (1989) 2 SCNJ. 183; (1989) 1 NWLR (pt.100) 642

Asuquo William v. The State (1975) 9 -11 S.C. 139

Okpere v. The State (1971) 1 ANLR 105

R. v. Leonard Harris 20 CA R 144 @ 147

Eholar v. Osanyande (1992) 6 NWLR (pt.249) 524 @ 534

### **STATUTES REFERRED TO**

Evidence Act s. 138(1)

Criminal Code ss. 319(1), 24, 316(1)

Criminal Procedure Law Cap. 31 Vol. II Laws of Eastern Nigeria, 1963, ss. 166, 167

Queens Code of Australia s. 302

**LEAD JUDGMENT BY OGBUAGU JSC**

This is an appeal from the decision of the Court of Appeal - Port-Harcourt Division, delivered on 25<sup>th</sup> February, 2004, dismissing the Appellant's appeal to it, from the decision of the High Court, Ohafia Judicial Division presided over by Ekumankama, J.

Dissatisfied by the said decision of the Court of Appeal (hereinafter called "*the court below*"), the Appellant has further appealed to this Court on four (4) grounds of appeal. Without their particulars, they read as follows:

“ 1. *The learned Justices of the Court of Appeal erred in Law when they held that the defence of accidental discharge was not available to the Appellant.*

D      2. *The learned Justices of the Court of Appeal erred in law when they failed to hold that there were material inconsistencies in the evidence.*

3. *The learned Justices of the Court of Appeal erred in law when they failed to determine and pronounce upon the third issue for determination in the Appellant's brief thereby causing a miscarriage of justice.*

E      4. *The learned Justices of the Court of Appeal erred in law when the Appellant's conviction under 8.319(1) of the Criminal Code was uphold thereby causing a miscarriage of justice”.*

The facts of this case as presented by the prosecution, are that on 26<sup>th</sup> January, 1985, the Appellant, a police constable, escorted the driver of a Magistrate he was attached to as an orderly, to deliver some bags of cement from Enugu to Arochukwu. After the delivery, on their way back, at a place called Ndi Uduma Awoke, Ohafia Junction - near to the Ohafia Army Barracks, the road was narrow. There was a Peugeot 504 Saloon Taxi Cab driven by the deceased, parked on the left side of the said road, but on his own right side in order to discharge some of his passengers. The driver of the van in which the Appellant was travelling, according to him, slowed down to enable him pass the said Taxi cab. At this stage, the Appellant, jumped down from the van and went to the deceased and asked him why he blocked the road with his car. An argument ensued between the Appellant and the deceased. It was in the course of the argument, that

the Appellant was said to have shot the deceased with his pistol which he was carrying with him. Seven witnesses testified for the prosecution. Three (3) among them, were eye-witnesses. Two of them - P.WS. 3 and 5 who are relations of the deceased, were passengers in the deceased's said car. The third one, was the driver of the said van in which the appellant was travelling back to Enugu on the fateful day. The P.W.1, was the medical Doctor who performed the post-mortem examination on the corpse of the deceased. The Appellant gave evidence for himself and called no witness. B

The Appellant's case, was that there was a struggle between him and the deceased and it was during the struggle, that the deceased wanted to take possession of his pistol and in the process, his gun was accidentally fired and the bullet from his gun, hit the deceased. In effect, his defence was "*accidental discharge*"- He alleged that during the struggle, the deceased tore his uniform. C D

The learned trial Judge, held that the prosecution had proved their case beyond reasonable doubt. His Lordship rejected the defence of accident. He convicted the Appellant and sentenced him to death by hanging. E

Dissatisfied by the conviction and sentence, the Appellant appealed to the court below that affirmed the decision of the lower court. Aggrieved by the said decision of the court below, the Appellant, has further appealed to this Court. F

The Appellant has raised three (3) issues for determination namely, "1. *Whether the inconsistencies in the prosecution's evidence were material enough to entitle the Appellant to an acquittal under S.24 of the Criminal Code.*" G

2. *Whether failure of the learned Justices to pronounce on one of the issues for determination formulated from the Appellant's ground of appeal led to a miscarriage of justice.*

3. *Whether the trial and conviction of the Appellant was valid in law having regard to the information upon which he was arraigned".* H

The Respondent, has formulated one lone issue for determination, namely.

“(a) *Whether the learned Justices of the Court of Appeal were right in affirming the conviction and sentence of the Appellant in the circumstance.*”.

### ISSUE I

B The learned counsel for the Appellant in his Brief, has referred to the evidence of the P.W.1 - the Medical Doctor who performed the post-mortem examination, the PWS 3, 4, 5 and 6 and that of the Appellant and his Statement to the Police - Exh. “A” and submitted that the inconsistencies were material. Learned counsel for the Respondent on the other hand, C has submitted that any inconsistency in the evidence of the said prosecution witnesses as to whether the deceased was shot from behind his left ear instead of the right ear, was not material in the circumstance of the issue before the trial court which was whether or not the defence of D accident availed the Appellant.

I note that this issue was not raised by the then defence counsel in the trial court during his address. Not that this is of any moment. I also note that it was the Appellant, who signed the original Notice of Appeal to the E court below and this issue, was not raised therein. Again, this fact is of no consequence.

In resolving this issue, the court below - per Akintan, JCA, (as he then was), after painstakingly, reproducing the material evidence of some F of the prosecution’s witnesses, stated at pages 128 and 129 of the Records inter alia, as follows:

“*The next question to be resolved is whether there were material contradictions and inconsistencies in the evidence led by the prosecution in support of its case. The contradiction and inconsistency raised in the G appellant’s brief centered around whether the bullet hit the deceased by the left or right ear. The law is settled that it is not every trifling inconsistency in the evidence of the prosecution witnesses that could be fatal to its case. It is only when such inconsistencies or contradictions are H substantial and fundamental to the main issue in question before the court and thus create doubt in the mind of the trial Judge that an accused is entitled to benefit therefrom. See Okonji v. The State (1987) 1 NWLR (pt. 52) 659; The State v. Aibangbe (1988) 3 NWLR (pt. 84) 548; Wankey v.*

*The State* (1993) 5 NWLR (pt.295) 542; *Azu v. The State* (1993) 6 NWLR (pt.299) 303; and *Theophilus v. The State* (1996) NWLR (pt.423) 139.

*In the instant case, the main question to be resolved by the court was whether or not the appellant fired the gun that hit the deceased on the head. The description of the exact spot or part of the head where the bullet penetrated the head is immaterial. All that need be established are whether it was the appellant that fired the gun and if so, whether the bullet fired from the gun hit the deceased on the head and resulted in his death. All these questions were satisfactorily answered in the instant case. The so-called inconsistencies referred to in the appellant's brief are therefore very immaterial".*

(the underlining mine)

**In a string of decided authorities by this Court, it is now firmly established that contradictions, to be fatal, the prosecution's case must go to the substance of the case and not to be of a minor nature. It is settled, that if every contradiction however trivial to the overwhelming evidence before the court, will vitiate a trial, nearly all prosecutions, will fail. That human faculty, may miss some minor details due to lapse of time and error in narration in order of sequence. See the cases of Queen v. Ekanem (1960) 5 FSC 14; Nasumu v. The State (1979) 6-0 S.C. 153; Kalu v. The State (1998) 4 NWLR (pt.90) 503, 524; (1988) 10-11 SCNJ 1; Ogoala v. The State (1991) 2 NWLR (pt. 175) @ 516; (1991) 3 SCNJ, 61 @ 72; and many others.**

**In the case of Sele v. The State (1993) 1 SCNJ 15 @ 22 -23 - per Belgore, JSC, it was held that if the contradiction, do not touch on a material point or substance of the case, it will not vitiate a conviction once the evidence, is clear and it is believed or preferred by the trial court. It is also settled that it is not in all cases where there are discrepancies or contradictions in the prosecution's case, that an accused person, will be entitled to an acquittal. That it is only when the discrepancies or contradictions, are on material point or points in the prosecution's case, which create some doubt, that the accused person, is entitled to benefit therefrom. See Wankey vs. The State (supra). (It is also reported in (1993) 6 SCNJ. (pt II) 152 @ 161)**

**In other words, for the principle of inconsistency of the evidence of witnesses to apply, it must be shown,**

**(a) that the inconsistency, is material.**

**(b) that the trial Judge failed to advert to the inconsistency in his judgment and**

**(c) that the inconsistency must be such as to amount to substantial disparagement of the witness or witnesses concerned that reliance on such testimony, would likely result in a miscarriage of justice.**

See also *Queen v. Abdullahi Isa* (1961) 1 ANLR (pt.4) 668; *Enahoro v. The Queen* (1965) 1 ANLR. 12 @, 149 - 150; *Akinsule v. The State* (1972) 5 SC. 72. and *Eugene Ibe v. The State* (1992) 6 SCNJ.; (pt. II) 172 @ 177. **Thus, for any conflict or contradiction in the evidence of the**

**prosecution witnesses to be fatal to the case, it must, be fundamental to the main issues before the court.** See *Effia v. The State* (1999) 6 SCNJ. 92 @ 98. - per Ejwunmi, JSC, citing several other cases therein.

There is no doubt and this is also settled, that where two or more witnesses, testify in a criminal prosecution, and the testimony of such witnesses is contradictory and irreconcilable, it would be illogical to accept and believe the evidence of such witnesses. See *Onubogu v. The State* (1974) 9 S.C. 1 @ 20; (1974) 4 ECSLR 403; *Nasumu v. The State* (Supra) @ 159; *Nwosu v. The State* (1986) 2 NWLR (pt.35 6 & 8 and *Orepekan & 7 ors*; In *Re: Amadi & 2 ors. v. The State* (1993) II SCNJ. 68 @ 78.

I will pause here, to state that “*contradiction*”, is stated/analyzed by this Court, in the case of *Ayo Gabriel v. The State* (1989) 5 NWLR (pt.122) 457, 468 - 469; (1989/12 SCNJ 33 @ 42 - per Nnaemeka-Agu, JSC, *inter alia* thus:

“..... *A piece of evidence contradicts another when it affirms the opposite of what that other evidence has stated not when there is just a minor discrepancy between them. ....Two pieces of evidence contradict one another when they are by themselves inconsistent. On the other hand, a discrepancy may occur when a piece of evidence stops short of, or contains some minor differences in details*”.

**So, where there are contradictions in the evidence of a witness**

**or witnesses, the trial Judge, must make a finding in relation to the contradictions. If he fails to do so, this may vitiate a conviction.** See Atiji v. The State (1976) 2 S.C. 79 @ 83 - 94 - per Nasir, JSC, (as he then was) and Ibeh v. The State (1997) 1 SCNJ 256 - per Belgore, JSC. **There is no doubt and this is also settled, that where there are material discrepancies in the testimony of the prosecution witnesses, it is not possible to hold that the evidence for the prosecution, is overwhelming. - See Opayemi v. The State (1985) 2 NWLR (Pt.5) 101.**

I had noted that this issue of an alleged contradiction, was never raised at the trial, by the learned counsel for the Appellant, and so, there was no finding and there could not have been, any finding by the learned trial Judge, in this regard. The same is the position in the court below.

**I have myself read/perused several times, the evidence of the PWS' 1, 3, 4 and 5, and I have seen no material, to talk of any contradiction in respect of the point of entry of the bullet or whether the deceased was shot on the left or right ear. What is plain to me and this fact is not disputed by the Appellant and his learned counsel in this Court - Mrs. Essien, is that the deceased died as a result of a gun shot wound found by the P.W.1 - the Medical Doctor who performed the post mortem examination on 26 January, 1985 - being the same date of the said incident.**

But for the purpose of completeness and to put this issue beyond any controversy, it is noted by me, that both the P.W.3 and the P.W.5 (two of the eye witnesses who were among the passengers in the vehicle of the deceased at the time of the incident), swore and as also appears/stated in paragraph 3.1.1 of the Appellant's Brief, that the deceased was shot in the left ear. There is no where from pages 19 and 20 of Records, that the P.W.4 - the driver of the vehicle that carried the Appellant, ever stated or testified, that the bullet entered through the right ear. Remarkably, the learned counsel for the Appellant at page 3 of their Brief in the said paragraph 3.1., referred to page 19 lines (not line) 25-26 of the Records H -where the following appear from line 24 thus:

*"I heard the Accused struggling with the people and suddenly I heard a sound of gun shot".*

Continuing from lines 26 to 27, the said P.W.4, stated thus:

*“After the gun shot the Accused jumped back into our vehicle and I ran away.”*

The P.W.I, in his evidence testified at page 13 lines 17 to 21 of the  
B Records, inter alia, as follows:

*“.....On further examination I found that it was a corpse of a man of about 4ft. 7 inches with a penetrating wound probably due to gun shots seen in the inferm prosterior (sic) (posterior) aspect of the right ear into the head. No exit point was seen.....”.*

C (the underlining mine)

Unfortunately, if not regrettably, this simple and clear evidence of the Medical Doctor, has in the Appellant’s said brief, been put thus:

*“PW I the medical doctor who performed the post mortem said that D the deceased was “shot in the posterior aspect of the right ear with no exit point”. See p. 13 line (sic) 19-21”*.

(the underlining mine)

My humble understanding of the said evidence of the PW1, is that  
E there was a penetrating wound seen in the right ear which went/got into the head of the deceased. The evidence of the said two (2) eye-witnesses -PW3 and P.W.5, is that the deceased was shot in the left ear. But the P.W.1, saw that the wound caused by the bullet from the gun, penetrated  
F up to the right ear into the head and that there was no point in the head from where the bullet went out. - i.e. that the bullet was stuck in the head of the deceased or the penetrating wound did not go beyond or outside the head. Period!

**It is submitted in the Appellant’s Brief, that the prosecution,**  
G **should have brought a ballistician to explain, how a bullet “allegedly shot in the left ear ended up going in through the right ear and staying in the brain”.**

**With the greatest respect, I do not agree. Afterwards, P.W.I,**  
H **was never cross-examined. The learned counsel for the Appellant - Dr. Opaigbeogu, told the trial court, that he had no questions for the P.W.I. The effect is, or this means, that he accepted, in its entirety, the evidence of the P.W.1 as true and correct See the case of Okasi &**



anor. v. The State (1989) 2 SCNJ. 183; (1989) 1 NWLR (pt.100) 642. Any wonder the said evidence, was not made a subject-matter of address in the trial court by the said learned counsel.

**I note however, that this issue, was canvassed in paragraph 3.1.1 (as has also been done in this Court) in the court below under Issue 2.1 of the Appellant which reads thus:**

*“Whether the essential elements of murder and the guilt of the Appellant were established beyond reasonable doubt as laid down by S.138(1) of the Evidence Act before he was convicted for murder and sentenced to death”.*

At pages 128 to 129 of the Records also partly reproduced at the said paragraph 3 of the Appellant’s Brief, the court below, stated as follows:

*“In the instant case, the main question to be resolved by the court was whether or not the appellant fired the gun that hit the deceased on the head. The description of the exact spot or part of the head where the bullet penetrated the head is immaterial. All that need to be established are whether it was the appellant that fired the gun and if so, whether the bullet fired from the gun hit the deceased on the head and resulted in his death. All these questions were satisfactorily answered in the instant case. The so-called inconsistencies referred to in the appellant’s brief are therefore very immaterial”.*

(the underlining mine)

**I agree . I see no inconsistencies in the prosecution’s evidence to talk of their being material enough to entitle the appellant, to an acquittal under Section 24 of the Criminal Code as reproduced.** I have hereinabove, referred to and reproduced the finding of the court below, as regards this issue.

Now, it seems to me, that the contention of the Appellant in his Brief inter alia, is that the alleged inconsistencies in the direction of the bullet, were indicative of the defence of accident. That the inconsistencies, are material because, the bullet entering through the back of the right ear of the deceased, shows that the Appellant, did not shoot him deliberately. But that if the shooting was deliberate, the bullet, could only have gone in

through the left ear. As rightly submitted in the Respondent's Brief, the above reasoning, is very faulty considering the facts as led in the evidence of the prosecution witnesses at the trial. I will add with respect, that the said reasoning, is grossly misconceived.

B Now, the evidence of the prosecution witnesses - P.W.3, P.W.4 and P.W.5, are overwhelming and are damning. The P.W.6 (the IPO - Investigating Police Officer) under cross-examination at page 32 of the Records, as regards the Appellant alleging that the deceased tore his uniform, swore to the effect, that the allegation was untrue.

C Q: How was the uniform of the accused when you saw him?

Ans: The uniform was in order when I met the accused.

It was not suggested to him in any further cross-examination, that he the P.W.6, was lying or that he was not a truthful witness.

D Part of the evidence of the P.W.4 at page 19 of the Records, are as follows.

“..... *On our way back and at a place very near to the Ohafia Army Barracks, the road was narrow. There was a taxi cab which packed on the left but on its own right hand side. I slowed down. The Accused jumped down and the other person who was in front asked him to set into the vehicle for us to go on. I had not passed the taxi cab when the accused jumped down. I was concentrating on my driving. I heard the Accused struggling with the people and suddenly I heard a sound of gun shot. After the gun shot, the Accused jumped back into our vehicle and I ran away*”.

(the underlining mine)

At page 20, lines 5 to 9, he swore as follows:

G “.....*The Accused fired the gun shot. The victim was the driver of the Taxi Cab. I heard only one gun shot. The struggle I refer to is quarrelling. The Accused fired the gun shot and ran inside the vehicle*”.

(the underlining mine)

H Under cross-examination at page 21 of the Records, the following appear, inter alia.

Q: Did you see the Accused fire the shot?

Ans: I did not see the Accused fire the deceased, but the Accused admitted he fired the shot. That is why I took the Accused to the army

barracks.

(the underlining mine)

This evidence underlined by me, was not challenged in cross-examination of this witness. It was never suggested to him in cross-examination that he lied or that he was not a reliable witness or that he was not a witness of truth. Of significance and importance, is that at no time and no where in the Records, did the Appellant, deny the evidence of this witness that he admitted to the P.W.4 of firing the said shot.

The P.W.3 at pages 15, and 16 of the Records, swore inter alia, as follows:

“At Ndi Uduma Awoke junction a passenger wanted to disembark and the deceased driver stopped and cleared on the right hand side outside the tar mark. At this moment as van (sic) was coming on the opposite direction from Arochukwu. The van stopped after passing us, about 5 metres before our car. All of a sudden, the accused who was dressed in police uniform came out of the van and moved towards us. At the time the deceased driver had gone into his seat in the car to move. The accused came to the deceased and asked him why he parked his car there. The deceased tried to explain but the Accused was pointing to the deceased. And as the deceased was still explaining the Accused pulled out his pistol from the scabbard and threatened to shoot the deceased driver. All of a sudden the Accused pointed the pistol behind the left ear of the deceased driver and fired. Blood was rushing out from the nose and ear of the deceased. We all jumped out from the car and I saw a car from Arochukwu, I then explained what happened to the driver of that car. The driver picked me on her vehicle and we pursued the Accused who had jumped into their own vehicle and moved away. My intention was to come to the police station Ohafia to report to the police. There were three persons in the Van carrying the Accused. After the shooting the Accused entered into their own Van and asked the driver to move”.

(the underlining mine)

Under cross-examination, the following appear at page 17 lines 1 to 28 of the Records:

“Q: Are you saying that an oncoming vehicle from Arochukwu

*could pass easily?*

*A: Yes that is what I have said.*

*Q: Were there no other vehicle passing at the time the deceased packed his car at Ndi Uduma Awoke?*

B      *A: Other vehicle (sic) had passed before the Van in which the Accused was came out. (sic).*

*Q: Deceased driver blocked the way with his vehicle?*

*A: The deceased driver completely cleared from the road away from the tar mark.*

C      *Q: The Accused and deceased quarreled for some time before the shooting?*

*A: The deceased did not quarrel with the Accused at all but the deceased was explaining that he did not pack wrongly.*

D      *Q: Accused and deceased even fought?*

*A: No they did not fight. The deceased was sitting on his seat in the car.*

*Q: Deceased and Accused were exchanging punches?*

E      *A: No It was the Accused who tried to punch the deceased on the face.*

*Q: What was the reaction of the deceased when the Accused was punching him on the face?*

*A: The deceased did nothing.*

F      *Q: Did you not see when the deceased held the Accused gun?*

*A: The deceased did not at any time touch the Accused gun.*

*Q: Do you remember what you told the deceased when he held the Accused gun?*

*A: I did not tell the deceased anything at the time”.*

G      (the underlining mine]

She denied that the uniform of the Appellant, was torn. At page 18 lines 4 to 9 of the Records, the following appear, inter alia:

H      “Q: Did you observe that the uniform worn by the Accused was torned? (sic)

*A: I did not observe the uniform torn at the place of shooting, but at the army barracks I saw that the uniform was torn and I think it was deliberately torn by the Accused himself.*

I note that this evidence, was not challenged at all, during the said cross-examination. The effect in law, is also trite that it is accepted as true and correct. What was challenged specifically or pointedly, was the position of the vehicle - either of the van conveying the Appellant or the Taxi Cab.

See “Q: You have lied to the court about the position of the vehicle?”

A: What I have said is the truth”.

I note that the P.W.3 at page 15 lines 9 to 12 of the Records, had testified about the two vehicles, and as had been partly reproduced hereinabove, thus:

“.....At Ndi Uduma Awoke junction a passenger wanted to disembark and the deceased driver stopped and cleared on the right hand side outside the tar mark - At this moment as Van (sic) was coming on the opposite direction from Arochukwu. The Van stopped after passing us, about 5 metres before our car”.

Finally, part of the material evidence of the P.W.5 at pages 21 to 23 appear as follows:

“He died on 26<sup>th</sup> January, 1985. He died at Ndi Uduma Awoke in Ohafia. I was present when he died. When we got to Ndi Umuma village in the deceased taxi cab there he stopped to drop a woman passenger. There I saw the vehicle in which the Accused was coming from the direction of Arochukwu and they met us where the deceased taxi cab was. The accused person came down and was asking the deceased why he obstructed the road. The deceased replied that he did not obstruct the road. At the time the deceased was standing by the booth of the car. After dropping the woman’s loads he was returning into his Taxi cab. The deceased was on the seat of taxi cab - one of his hands was on the stirring while the other was on the key and the Accused pointed his gun at the ear of the deceased, and released the shot which killed the deceased. After firing the Accused jumped into their vehicle and, they drove away. We stopped an oncoming vehicle which took P.W.3 to the police station to lodge a complaint to the Ohafia police..... The vehicle conveying the Accused had passed the Taxi cab a little bit before the Accused jumped down to warn the deceased.

*I do not know which of the deceased hands hold (sic) the key and which hold the stirring. I saw the Accused fired the deceased to the left ear. There was only a sound of gun shot".*

(the underlining mine)

B Part of his material evidence under cross-examination at page 22 of the Records, appear as follows:

Q: Did the vehicle conveying the Accused stop at where the taxi cab was or did it pass on?

Ans: The vehicle stopped where the cab was.

C Q: Did you see when the Accused and the deceased driver were struggling for the key?

Ans: The Accused tried to take the key away but the deceased refused.

D Q: Did you hear what the deceased told the Accused about the gun the Accused was holding? Ans: I did not hear about it".

At page 23, thereof, the cross-examination continued partly, thus:

E *"Q: Did you not see when the Accused and the deceased were struggling for the gun in Accused possession?"*

*Ans: They did not struggle for the gun".*

*"Q. I put it to you that the deceased struggled with the Accused for the possession of the gun.*

F *Ans. No.*

*Q: I put it to you that the Accused did not deliberately shoot the deceased.*

*Ans: Accused shot the deceased deliberately"..*

G I have taken pains to go this far because, this is a murder case involving a 24 (twenty four) year old police constable at the time of the incident. From his first statement to the Police under caution at page 63 of the Records and as noted by the court below at pages 118 and 119 of the Records, he was enlisted into the Nigeria Police on 5<sup>th</sup> October, 1982. H He had his training at the Police Training School, Enugu for a period of three (3) months and passed out in January, 1983. Before his passing out, he went to "Range" for rifle practice and fired with Mark Four (IV) Rifle. His first posting out was as Orderly to a DPO (Divisional Police Officer)

-Mr. Daniel Paul S.P. (Superintendent of Police), at Uwani. He did some “beat duties” and in November, 1984 he was posted as an Orderly to a Magistrate. On the date of the incident, he was sent to escort the driver of his Worship to deliver some bags of cement from Enugu to Arochukwu. He was armed with a berreta pistol and seven rounds of ammunition. I note that he was barely three years in the Police Force, married, but yet without any issue before the date of the incident. I also note that he testified after about five (5) years from the date of the incident - i.e. on 4<sup>th</sup> May, 1990 and that his evidence, are very materially in conflict or at variance, with his earlier statements to the Police. See and C/F (compare) pages 38 to 43 with pages 64 and 65 of the Records. At page 64, the Appellant stated at lines 30 and 31, that as the deceased was trying to disarm him, that his finger touched the trigger of the pistol and it fired. But in his evidence in chief at page 39 of the Records, he swore that while he and the deceased were struggling for the pistol, that it exploded. He had admitted that the pistol “*is very dangerous*” (sic) and that even if it drops on the ground, it would “*discharge*”.

It is now settled, that where such variance or inconsistency appears or exists, the witness shall be treated as unreliable. See Asuquo William v. The State (1975) 9 -11 S.C. 139; Adere v. The State (1975) 9-11 S.C. 115; Stephen v. The State (1986) 5 NWLR (pt. ... ) 975 @ 1000 and Oladejo v. The State (1987) 3 NWLR (pt.... ) 419 @ 427-428

**I am, satisfied that the Appellant, regrettably, lied and lied in his evidence at the trial. I am however, aware and this is settled, that an accused person telling lies, is of no effect. See Okpere v. The State (1971) 1 ANLR 105 where per Incuriam, it was stated that it has never been the law, that the mere fact that an accused person told lies, by itself, is sufficient to convict him with an offence connected with mendacity nor does the fact that an accused person has told lies, relieve the prosecution of its duty of proving the guilt of the offence with which he is charged, beyond reasonable doubt.**

In spite of the above, it is also settled that the character of a witness for habitual veracity, is an essential ingredient in his credibility. For it is said, that for a man who is capable of uttering a

deliberate falsehood (as in the instant case leading to this appeal), is in most cases, capable of doing so under the solemn sanction of an oath. If therefore, it appears that he has formally said or written the contrary of that which he has now sworn, his evidence should not have much weight with a jury (I add a court without jury), and if he has formerly sworn the contrary, the fact is almost conclusive against his credibility. See R. v. Leonard Harris 20 CAR 144 @ 147. I agree.

What I am saying therefore, is that with the massive evidence of P.W.1, P.WS 3, 4 and 5 and the watery or hollow defence of accident, coupled with the said admission of the Appellant to the P.W.4 that he fired the shot that immediately, and untimely killed and sent the deceased to the world beyond, the learned trial Judge stated and held at page 59 lines 4 to 14, of the Records as follows:

*“The medical evidence is clear that the deceased died of penetrating gun shot wound in the head . The doctor saw a penetrating wound due to gun shot in the inferm posterior aspect of the right ear into the head of the deceased. This piece of evidence corroborated the evidence of 3' prosecution witness and that of 5<sup>th</sup> prosecution witness which states that the accused pointed his gun at the ear of the deceased and released the shot which killed the deceased.*

*The accused is therefore directly linked with the shooting to death of the deceased”.*

(the underlining mine)

I cannot fault this finding which is borne out from the material evidence of the P.WS', 1, 3, 4 and 5 - some of which, I have also reproduced in this Judgment. As also found as a fact by the learned trial Judge, and as admitted not only by the Appellant under cross-examination at page 41 lines 23 and 24 of the Records and as submitted by his said learned counsel during his address at page 45 lines 16 to 18 that “there is no evidence of provocation or self defence, but there is evidence of accidental killing”. I agree with the learned trial Judge who stated at page 59 lines 22 to 24 of the Records, thus:

*“..... .The mere refusal by the deceased to surrender the ignition*



key cannot amount to such a provocation that will warrant his being shot dead by the accused”.

Of course, at page 61 lines 1 to 20, the learned trial Judge found as a fact and held as follows:

“I believe the evidence of the third prosecution witness and the 5<sup>th</sup> B prosecution witness who testified that the accused fired at the deceased at the left ear while the deceased was sitting on his seat in the vehicle.

I also believe the evidence of the investigating police officer (P.W.6) that he saw the deceased on his seat in the car motionless with his head dropping. I am satisfied from the evidence before me and the C circumstances of this case that the deceased did not at any time hold the accused’s dress or struggle to take possession of the accused’s gun. The claim by the accused that the gun exploded while they were struggling for its possession is a ruse. The death of the deceased was not accidental. D

The pistol was expected to be in the Scarbald but the accused said he did not travel with the scarbald. Is it normal for the accused to travel with the pistol without the scarbald? I do not think so. However the third prosecution witness saw the accused pull out the pistol from the scarbald”. E

(the underlining mine)

Again, the above, are findings of fact which are borne out in the Records. They cannot be faulted by me. I agree with the said findings and conclusions. The court below affirmed the said decision. I have no F hesitation in all the circumstances of the case, in resolving this issue against the Appellant. Grounds 1 and 2 of the grounds of Appeal and Issue 1 fail woefully and they are accordingly dismissed.

ISSUE 2 It is submitted in the Appellant’s Brief at page 7, that the G Appellant submitted three (3) issues for determination by the court below. That while Issues 1 and 2 were determined by that court, Issue 3 which it is stated raised a fundamental issue as to whether the Appellant’s conviction and sentencing to death, was done in accordance with the law, the court below failed to determine the same. That the said issue, goes to H the subtractum of the entire case. Pages 76 and 118 of the Records, are referred to. Page 76, is where the said issue formulated, appears and Page 118, is where the court below, reproduced the said issue.

I note that the court below, at the said page 118, stated as follows:

*"As I consider the three issues formulated in the appellant's brief adequately cover those formulated in the respondent's brief, the issues formulated in the appellant's brief will be adopted in resolving the questions raised in the appeal".*

(the underlining mine)

I agree that the complaint in respect of this ground 7 and in respect of the said issue, has merit and it is justified in that the same, was not dealt with nor was it determined by the court below. But whether the failure to do so, led to a miscarriage of justice, is another matter.

Although, I note that the arguments canvassed in respect of the said issue, was adequately canvassed at the court below, there is no such argument in the Appellant's Brief in this Court. All that appears, is that since the law is that a court must consider all issues raised before it, and the failure to do so, is that -

*"the Appellant who could have been acquitted on the grounds of appeal raised by this issue, suffered a grave miscarriage of justice, particularly as to judgment of the lower court sentencing him to death was affirmed without considering this issue".*

The court is therefore, urged to uphold,

*"the Appellant's arguments on this issue and determine same in favour of the Appellant".*

I have conceded that it is the law firmly settled by this Court in a number of decided authorities. See *The State v. Ajie* (2000) 11 NWLR (pt.679) 434; and *Bamaiyi v. State* (2001) 8 NWLR (pt.715) 285 (sic). It is p.270 @ 285 cited and relied on in the Appellant's Brief, (the two cases are also reported in (2000) 7 SCNJ. 1 and (2001) 4 SCNJ. 103 respectively. It is that it is the duty of a court, to deal, consider and pronounce on all material issues properly before it. See also the recent case of *Chief Okotie-Eboh v. Chief Manager & 2 ors* (2004) 12 SCNJ. 139 @ 161; (2004) 11-12 S.C. 174; (2004) 20 NSCQR. 214.

**Regrettably, as I have stated hereinabove, no arguments in respect of the said issue, have been canvassed in the Appellant's Brief in this Court. It is settled, that any issue on which no argument**

**has been proffered, is deemed abandoned.** See *Eholar v. Osanyande* (1992) 6 NWLR (pt.249) 524 @ 534 and recently, *Buhari & 2 ors. v. Chief Obasanjo & 261 ors.* (No.2) (2003) 11 SCNJ. 40 @ 68, 82 just to mention but a few. **I therefore, hold that the Appellant and his learned counsel, having failed or neglected to proffer any meaningful or any argument in respect of this issue, it is deemed by me, as having been abandoned. The said issue 2 is accordingly struck out and in fact, dismissed by me.**

But assuming I am wrong, with profound humility to the learned counsel for the Appellant, in my respectful view, the said issue is not material to the determination of whether the Appellant was guilty in respect of the offence of murder in which he was charged and convicted. The sentence for such an offence which is regarded and treated in law as a capital offence, is death either by hanging or by firing squad. The issue seems to me with respect, to be merely academic and the courts do not bother themselves with such an issue. Any wonder, the court below, ignored it although it did not state the reason for not considering and pronouncing on it.

Assuming again, I am still wrong in my above view, on the ground that a court, is entitled to look at a document or documents in its file - See *West African Provincial Ins. Co. Ltd, v. Nigerian Tobacco Co. Ltd.* (1987) 2 NWLR (pt.56) 299 @ 306; *Chief Agbaisi & ors. v. Ebikorefa & ors.* (1997) 4 NWLR (pt.502) 630; (1997) 4 SCNJ. 147 @ 180 and *Agbahomovo & ors. v. Edueyegbe & 6 ors.* (1999) 3 NWLR (pt.594) 170 @ 182; (1999) 2 SCNJ. 94, I will deal with the issue, since this proposition of the law, also applies to the Record of Appeal before the court. See *Funduk Engineering Ltd. v. Mcarthus & ors.* (1995) 2 NWLR (pt.392) 640 @ 652; (1995) 4 SCNJ. 240. In any case, and as rightly submitted in the Respondent's Brief at page 10, this Court, can take up the said issue and determine it. See the cases of *Odunaya v. The State* (1972) 8 - 9 S.C. 290 @ 296: (it is also reported in (1972) 8-9 S.C. 173 @ 177 (Lawbreed Ltd. H Reprint) and *Ukwunnenyi & anor. v. The State* (1989) 4 NWLR (Pt. 114) 131 @ 142. It is also reported in (1989) 7 SCNJ. 341; (1989) 7 S.C. (Pt. 1) 64 by *Layi Babatunde & Co.*). See Civil case - *Katto v. CBN* (1999)

6 NWLR (Pt. 607) 390 @ 407 (1990) 5 SCNJ. 1.

The learned counsel for the Appellant at page 81 of the Records, referred to page 1 of the Records where the information appears charging the Appellant with murder contrary to Section 319 (1) of the Criminal Code. It is submitted that the section, does not create the offence of murder, but that it is merely its punishment section. He/she cited and relied on the case of Festus Amayo v The State 2001 18 NWLR (Part 745) “251 pp. 251 -252” “per Onu, JSC” which he/she reproduced thus:

*“The Appellant was charged for the offence of murder contrary to section 319(1) of the Criminal Code.....sub-section (1) of Section 319 does not create the offence of murder; rather it provides for the punishment for murder..... The proper section is 316 of the Criminal Code of Eastern Nigeria”.*

The case is also reported in (2001) 12 SCNJ. 374.

I observe that at pages 251 - 252 of the Report, appear part of the Index of the case. The above pronouncement credited to Onu, JSC, is in fact, that of Ogundare, JSC (of blessed memory) and it is at pages 290 to 291 of the Report. The learned Justice concluded his contribution/ Judgment as follows:

*“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.”.*

(the underlining mine)

As can be seen from the above, Mrs. Essien most conveniently, omitted this last/concluding part of the said judgment. **Without wasting any more time on this issue, since the defence counsel at the trial did not raise any objection as to the charge/information, by virtue of Section 167 of the Criminal Procedure Law, Cap. 31 Vol. II, Laws of Eastern Nigeria, 1963, applicable in the Imo/Abia State, it cannot be raised, either after the trial, or at the court below or in this Court. I so hold.**

For the avoidance of doubt, let me reproduce the provisions of Sections 166 and 167 of the C.P.L. (Criminal Procedure Law) Cap.

31, Laws of Eastern Nigeria, 1963 applicable in Imo/Abia State.

Section 166 provides as follows:

*“No error in stating the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission”.* B

Section 167 provides as follows:

*“Any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge has been read over to the accused and not later”.* C

(the underlining mine)

The Appellant and his learned counsel, have not stated at any stage from the trial to this Court, that the Appellant was ever misled by the information charging the Appellant under Section 319 (1) of the Criminal Code. As I had noted hereinabove, there is no where in the Records, where the learned counsel appearing for the Appellant, ever took any objection as to the charge or Information or for any formal defect on its face. That being the case or position, I accordingly, ignore and discountenance the complaint under this issue . See also the case of Okaroh v. The State (1990) 1 NWLR (PLUS) 128 @ 136-137; (1990) 1 SCNJ. 124 as to the duty of counsel especially, in murder cases, to promptly take objection to every perceived irregularity relating to evidence or procedure. D E F

At page 12 of the Records, the following appear:

*“Court: Information read and explained to the Accused person. The Accused pleaded not guilty to the charge with consent of counsel this case is adjourned to 2<sup>nd</sup> April, 1987 for hearing”.* G

What is more, the issue is merely academic (and the courts are not concerned with the same) and at best, it is based on technicality which is behind the courts ever since. The said issue is accordingly, struck out by me since again, there is no evidence on the Record, that the Appellant was ever misled as to the charge he was facing and was tried. There was/is therefore, no miscarriage of justice ever occasioned as a result of the said charge/information or any violation of any principle of law or procedure”.

ISSUE 3:

**This issue, in my respectful view, is related to and interwoven with Issue 2, that I have disposed off. It is a repetition by the learned counsel as can be seen from the arguments proffered in respect thereof in the Brief of the Appellant. Going into it, with respect, is a sheer waste of the Court's precious time. The arguments are also academic and again, border on technicality and not on the substance of the case. The issue lacks merit and it is accordingly dismissed.**

**The lone/single issue of the Respondent, is rendered in the Positive/Affirmative by me.**

**In concluding this Judgment, I note that there are Concurrent findings of the two lower courts. It is now settled, that the Court will not normally interfere, unless they are perverse or erroneous in substance or procedural law.** See Sanyaolu v. The State (1976) 6 SC 57; Wankey v. The State (supra) and recently, Dominic Princent & anor. v. The State (2002) 12 SCNJ. 280 (5), 300 - per Iguh, JSC; Amusa v. The State (2003) 1 SCNJ. 518 and Ubani & 2 ors v. The State (2003) 12 SCNJ. E III @ 127-128 just to mention but a few. **I find no reason at all, to disturb/interfere with the decision of the court below.**

In the end result, this appeal lacks merit. It fails and it is accordingly dismissed in its entirety. I hereby affirm the decision of the court below affirming the judgment/decision of the trial court.

**BELGORE JSC**

I read in advance the judgment of my learned brother, Ogbuagu, JAC and I agree this appeal has no merit. I also for the reasons in the said judgment dismiss the appeal.

H

**EJIWUNMI JSC**

I had the opportunity of reading in advance the judgment just delivered by my learned brother Ogbuagu, JSC. In that judgment, he

reviewed the facts and also set down the issues against the judgment of the Court below. I agree with his conclusion that the appeal lacks merit. The main facts that led to the trial and conviction of the appellant have been lucidly set out in the lead judgment and I do not need to review them.

In this appeal, the following are the issues raised for the determination of the appeal in the appellant's brief. They read: -

*"1. Whether the inconsistencies in the prosecution's evidence were material enough to entitle the appellant to an acquittal under S.24 of the Criminal Code.*

*2. Whether failure of the learned Justices to pronounce on one of the issues formulated from the appellant's ground of appeal led to a miscarriage of justice.*

*3. Whether the trial and conviction of the appellant was valid in law having regard to the information upon which he was arraigned."*

With regard to the 1<sup>st</sup> issue the thrust of the argument of learned counsel for the appellant is in the main, the contention made in the lower Court. That contention being that the evidence led by the prosecution is so riddled with inconsistencies that it cannot be said that the case against the appellant was established beyond reasonable doubt. The Court below after due consideration of the argument before that Court said thus, per Akintan JCA (as he then was) at p. 128

*"The next question to be resolved is whether there were material contradictions and inconsistencies in the evidence led by the prosecution in support of its case. The contradiction and inconsistency raised in the appellant's brief centred around whether the bullet hit the deceased by the left or right ear. The law is settled that it is not every trifling inconsistency in the evidence of the prosecution witnesses that could be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issue in question before the court and thus create doubt in the mind of the trial Judge that an accused is entitled to benefit therefrom. See Okonji v. The State (1987) 1 NWLR (pt.52) 659; The State v. Aibangbee (1999) 3 NWLR (pt.84) 548; Wankey v. The State (1993) 5 NWLR (pt.295) 542; Azu v. The State (1993) 6 NWLR (pt.299) 303; and Theophilus v. The State (1996) 1 NWLR (pt.423) 139."*

And at p. 129

*“The so-called inconsistencies referred to in the appellant’s brief are therefore very immaterial.”*

As the learned counsel for the appellant has not advanced any argument to persuade me that the lower Court was wrong in the conclusion it reached, I must resolve this issue against the appellant.

On issue 2, the learned counsel for the appellant is asking whether the failure of the learned Justices to pronounce on one of the issues for determination formulated from the appellant’s ground of appeal did not lead to a miscarriage of justice. Learned counsel for the appellant as a basis for his contention then stated in the appellant’s brief that of the three issues formulated by the appellant for the determination of the Court, only two of them were considered. Reference was then made to the following cases:  
 The State v. Ajie (2000 11 NWLR (pt.678) 434; Bamaiyi v. The State (2001) 8 NWLR (pt.715) 285, for the proposition that a Court must consider all issues placed before it. In the instant case, learned counsel then submits that a miscarriage of justice occurred when the Court below failed to consider and determine the issue as to whether the appellant’s conviction and sentence to death was done in accordance with the law. Had that been done, this issue would have been fully considered in this appeal. See Okonkwo & Sons v. Miglore (1979) ALL NLR 280; Awote v. Owodunni (No.2) (1987) 2 NWLR (pt.57) 366 at 448.

It would appear however from reading the argument of counsel in respect of Issue (3) in the appellant’s brief that the complaint of the learned counsel on the point is the failure of the Court below to consider and determine the question as to whether the trial and conviction of the appellant was valid in law having regard to the information upon which he was arraigned. Apparently, the charge upon which the appellant was found guilty and convicted of murder was laid contrary to Section 319 (1) of the Criminal Code, whereas he ought to have been charged under S.316 (1) of the Criminal Code. Clearly, it is that section of the Criminal Code, which defines the specific intention to be established to prove a charge of murder. In Festus Amayo v. State (2001) 18 NWLR (pt.745), this Court considered Section 316 of the Criminal Code, which states thus: -



“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 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.”

Now, in the cause of that case, Uwaifo JSC, in the course of his judgment referred to the English case of R. v. Doherty (1887) 16 Cox CC 306 and quoted with approval the following passage from the judgment of Stephen J. who charged the jury thus:

“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, 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.”

It is appropriate to also refer to the reasoning of the High Court of Australia with regard to the provisions of their S.302 of the Queensland Code which is in pari materia with our S.316 of the Criminal Code in R. v. Hughes (1951) 84 E.L.R. 170 thus: -

“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. 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)."*

In that case, the conviction of murder was found to be erroneous and the accused was found guilty of manslaughter only.

But in my humble view, the principle that was established in those cases that the specific intention to cause the death of the person killed or that the offender intended to do the person killed or to some other person grievous harm was not proved beyond reasonable doubt.

However, in the instant case, the evidence established beyond reasonable doubt is that the appellant shot directly at the deceased. It follows therefore that by this proven fact, the appellant was duly found guilty of the murder of the deceased.

I will therefore for the reasons given above and the fuller reasons given in the lead judgment dismiss this appeal.

## G **PATSACHOLONU JSC**

I have read the judgment of my learned brother Ogbuagu JSC and I agree with him. Going through the whole gamut of the case of the Appellant, I have no doubt that there are downright incontestable weighty, and contradictory statements of the Appellant. There is evidence of improvisation to give himself a credible defence in respect of what he did. He tried to weave a story which is not only laughable but is bereft of any credibility. I have said it on numerous occasions that when the evidence

of a witness has reached the state of recklessness or flamboyance or petulance and is so exaggerated that it enters into the realms of fantasy, it should not be accorded any credibility. It is my view that whether the bullets entered through the right or left ear is neither here nor there as long as there is cogent evidence from the facts elicited that the Appellant wanted to show his primitive power as a policeman armed with a gun to shoot to kill or maim. He thought he was above the law hence he pumped bullets into the victim's body, When he jumped out of the vehicle in which he was being conveyed regardless of the plea of his co passengers he made up his mind to deal with this man.

There was a deliberate intention to overawe and at the same time demonstrate that he could kill the driver and get away easily. He was so inebriated with power that he saw himself as having power over life and death of a fellow citizen. The likes of him do not belong to our civilization, therefore the law should take its course and the Appellant must not be in the midst of civilized people - nay he should be sent to the doldrums so that he would be a forgotten history. I too dismiss the appeal.

### MUKHTARJSC

I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Ogbuagu, JSC. The conviction of the appellant by the High Court of Imo State and its affirmation by Court of Appeal has led to this appeal. The appellant having been convicted of murder and sentenced to hanging by the neck wants the conviction quashed.

In his brief of argument the appellant raised the following issues for determination:-

1. Whether the inconsistencies in the prosecution's evidence were material enough to entitle the appellant to an acquittal under Section 24 of the Criminal Code.
2. Whether failure of the learned justices to pronounce on one of the issues for determination formulated from the appellants ground of appeal led to a miscarriage of justice.

3. Whether the trial and conviction of the Appellant was valid in law having regard to the information upon which he was arraigned.

On the first issue supra learned counsel for the appellant has made heavy weather of the inconsistencies in the evidence of the prosecution witnesses. The inconsistencies set out in the appellant's brief of argument are to my mind minor consistencies that have not led to miscarriage of justice. The set down principle of law is that it is not every minor inconsistency or contradiction that will result in a judgment being reversed, or will affect the merit of a case. Before an inconsistency or contradiction in evidence of prosecution witnesses can have such effect it must be material, substantial, and has led to the miscarriage of justice. See *Onisade v. Queen* 1964 1 All N.L.R. 233. *Queen v. Iyanda* 1960 S.C. N.L.R 595 and *Oladele v. State* 1991 1 N.W.L.R. part 170 page 708.

I am aware that the totality of evidence must be devoid of material contradictions and discrepancies that may cast some doubt in the mind of a trial judge. However, proof beyond reasonable doubt, does not mean proof beyond shadow of doubt, as stated by Denning J. in the case of *Miller v. Minister of Pensions* 1947 2 All E.R. page 372 at 373 when he said :-

*"Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice."*

It is my firm belief that the learned trial judge had the above at the back of his mind, as he was evaluating the evidence before him, and the Court of Appeal did the same as it was dealing with the issue.

It is instructive to note that P.W.4 who drove the vehicle the appellant was travelling in gave cogent evidence on the position of the deceased vehicle on the day of the incident, thus :-

*"There was a taxi cab which packed on the left but on its own right hand side. I slowed down to enable me pass the taxi cab on the narrow road. As I slowed down the accused jumped down and the other person who was*

*in the front asked him to get into the vehicle for us to go on....."*

*I heard the accused struggling with the people and suddenly I heard a sound of gun shot. After the gun shot the accused jumped back into our vehicle and ran away."*

It is quite clear from the above piece of evidence that the appellant acted rather irrationally and with no consideration of the consequence of his act. That the deceased packed his vehicle on his own side of the road, leaving room for any other vehicle to pass, shows that he was considerate of other road users, and the action of the appellant on that fateful day to the extent of firing a shot was unwarranted. The other eye witnesses at the scene corroborated the evidence. The learned trial judge believed the evidence of the prosecution witnesses, and rejected the defence of self defence or provocation raised by the appellant, and expressed the following.

*"The mere refusal by the deceased to surrender the ignition key can not amount to such provocation that will warrant his being shot dead by the accused."*

*The lower court resolved the issues of contradictions, discrepancies and the defence in favour of the respondent and found rightly thus:-*

*"All that need to be established are whether it was the appellant that fired the gun and if so, whether the bullet fired from the gun hit the deceased on the head and resulted in his death. All these questions were satisfactorily answered in the instant case. The so called inconsistencies referred to in the appellant's brief are therefore very immaterial."*

Indeed the evidence before the trial court was quite overwhelming and points to the guilt of the appellant. Situations like this whereby policemen rashly bring out their guns, (albeit to merely threaten or frighten citizens) is rapidly becoming rampant. They are meant to use the guns to safeguard the lives of the citizenry they are paid to protect, but the reverse is the case. A policeman will not hesitate to pull the trigger of his gun at the slightest provocation, and would indeed do that with relish and reckless abandon, not caring whether the consequence of his act will be fatal. The incident in the instant case is a locus classicus. A law enforcement agent

who is supposed to bring sanity and order on the road brings out his gun and fires it just because a driver obstructs his right of passage (that is even if there was an obstruction, as the evidence in court is that there wasn't.) In fact the mere fact that he deemed it necessary to bring out a gun from  
B wherever he had kept it is enough act of recklessness, even if no shot was fired, and in this case there is ample evidence that it was. I believe such rash acts must be stopped to prevent innocent human lives from being wasted.

C        My learned brother has dismissed the appeal in his lead judgment, and I completely agree with him. The appeal certainly lacks merit and should be dismissed, and I hereby dismiss it.

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