

SUPREME COURT OF NIGERIA
11TH JULY, 2008. SC. 218/2007
CORAM:- A. I. KATSINA-ALU, A. M. MUKHTAR,
I. F OGBUAGU, P. O. ADEREMI,
C. M. CHUKWUMA-ENEH, JJSC

ALHASSAN MAI YAKI APPELLANT
V.	
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Murder - Proof - To secure conviction - Prosecution must prove three coexisting ingredients - Which include death of the deceased (H1)

CRIMINAL LAW - Defences - Accidents - Mens rea - Definition - Presupposes that though accused committed the offence - He should be acquitted for lack of criminal intention - Burden of negating defence of accident - Remains on the prosecution (H2)

CRIMINAL PROCEDURE - Accidents - Culpable homicide punishable with death - Defence of accidental discharge - Where not timely raised - Nor supported by reliable testimony - The defence is not proved (H3)

CRIMINAL PROCEDURE - Murder - Contradictions - In the evidence of prosecution witnesses - Where not material - Appellant's appeal will be dismissed (H4)

FACTS

Before the Potiskum High Court of Yobe State, Appellant was charged under s. 221 (a) of the Penal Code with the offence of culpable homicide punishable with death (murder). He was alleged to have caused the death of the deceased at the Texaco Filling Station sometime in 2004, by shooting him on the head. Appellant and Sgt. Ibrahim Bello (DW2) were police escorts accompanying the Luxurious Bus that parked at a place near the Texaco Filling Station. The deceased being the security man watching over the Station, told the

passengers to go further and urinate whereas appellant had already told them to urinate within the Filling Station premises. This counter instruction seemed to have provoked appellant who then corked his rifle, shot the deceased on the head, and he died.

Appellant seeking to establish the defence of accident gave a 2nd statement different from his 1st statement to the police. He said that a group of men holding iron and sticks were beating the passengers. That the group were struggling to collect DW2's gun for urinating at their site. It was as he went to assist DW2 in the struggle that appellant's hand touched the trigger of DW2's gun which went up and killed the deceased. The trial court found appellant guilty as charged and sentenced him to death. His appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"(1) Whether the prosecution proved the charge of murder of Habu Usman against the Appellant (Alhassan Mai Yaki) beyond reasonable doubt and

(2) Whether the appellant adduced credible and satisfactory evidence in support of his defence of accidental discharge."

HELD (Unanimously dismissing the appeal per **ADEREMI JSC**)
Murder - Proof - To secure conviction

1. From plethora of judicial authorities, it is now well settled that to secure a conviction on a charge of murder, the prosecution must prove:-

(1) that the deceased had died.

(2) that the death of the deceased had resulted from the act of the appellant; and

(3) that the act or omission of the accused which caused the death of the deceased was intentional with the full knowledge that death or grievous bodily harm was its probable consequences.

These three ingredients must co-exist and where one of them is absent or tainted with some doubt, the charge cannot be said to have been proved. (p. 3089 A)

CRIMINAL LAW - Defences - Accidents - Mens rea

2. The defence of accident is clearly defined in Section 48 of the

Penal Code which is applicable to this case; that section says:-

“Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the course of doing a lawful act in a lawful manner by lawful means and with proper care and caution.”

Suffice it to say that Section 48 of the Penal Code is in pari materia with Section 24 of the Criminal Code applicable generally to the southern part of the geographical entity called Nigeria. If I may go further, I wish to say that the provisions of Section 48 of the Penal Code and Section 24 of the Criminal Code are in line with the rules of English Law relating to MENS REA under which a person should not be convicted of an offence unless he has a guilty mind. Going by the wording of the said section 48 of the Penal Code, it is quite clear to me that the defence of accident presupposes that the accused physically committed the offence with which he is charged, but having regard to the facts which he admits, all the same he should be acquitted because his conduct in the commission of the offence was an accident. For an accident is generally regarded as the result of an unwilling act and is understood to be an event without the fault of the person alleged to have caused it. It follows from the above that where an accused person raises the defence of an accident as in the present appeal, the onus still remains on the prosecution to prove its case beyond reasonable doubt by leading credible and admissible evidence to negate the defence and of course convince the trial court that the defence does not avail the accused person. (p. 3091 A)

Defence of accidental discharge

3. As I have said, if the defence of accidental discharge were successfully set up in the present case, it would certainly relieve the appellant of criminal responsibility as it would constitute a negation of any deliberate act or omission on his (appellant) part. See CHUKWU V. THE STATE (1992) 1 NWLR (pt.217) 253. For the defence to avail an accused person, it must be raised timeously. In his evidence before the trial court, the appellant never admitted that he pulled the trigger of his rifle and consequently shot the head of the deceased. In his first statement to the Police, he said he suddenly heard a gun shot; he would not know who released the gun shot; of course, he never

admitted he shot the deceased. But in his (appellant) second statement, he said in the course of his trying to rescue D.W.2 Sgt. Bello he (appellant) accidentally touched the trigger of D.W.2's rifle and the shot was let go. These are inconsistent statements and the evidence of the appellant thus became tainted. That defence was not even raised timeously by the appellant; and he (appellant) was even very economical as to the truth of the matter in his second statement. This again makes his testimony unreliable. Can it then be said, in law that the defence was successfully set up? My answer, from the evidence on record, is in the negative. (p. 3093 E)

Murder - Contradictions

4. The appellant made a spirited effort to save the day for himself by contending that there were contradictions in the evidence of the prosecution witnesses. I have carefully gone through the record; there is no material contradiction in the evidence of the prosecution adduced to prove the murder case.

In the final analysis, and for all I have been saying, this appeal is devoid of any merit. It must be dismissed and I hereby accordingly dismiss it. I affirm the judgment of the court below which itself has accorded approval to the judgment of the trial court. (p. 3094 B)

NOTABLE POINTS OF INTEREST

MUKHTAR JSC

1. Defence of accident was not made out

I refuse to agree that it was accidental because there was mens rea, and an obvious intention to deal with, main or kill the deceased. As an experienced policeman he should have been wary about struggling with the people, with the gun in a precarious position. The appellant should have been more careful. For an accused to avail himself of the defence provided by section 48 of the Penal Code, the absence of mens rea must be clearly established by the accused.

In the light of the above discussion, I am satisfied that the lower court was right in upholding the judgment of the trial court that the defence of accident was not made out by the appellant. (p. 3097 B)

OGBUAGU JSC

2. Accidents - Meaning - Approved legal test

It seems to me that under this provision, the act leading to the accident must be a lawful act done in a lawful manner. It seems also to me that under Section 24 of the Criminal Code, there is no such restriction. For an event to qualify as accidental under Section 24 of the Criminal Code, it must be a surprise to the ordinary man of prudence, that is, a surprise to all sober and reasonable people. The test as settled, is always objective. The section does not deal with an “act”, but an “event” and an event within the meaning of the section, is what apparently follows from an act. B

In fact, in the case of *Thomas v. The State* (1994) 4 SCNJ. (Pt.1) 102 at 109, Wali, JSC., stated that the test is always that if the act even though unlawful, is not such that would, from the view of a reasonable man, cause death or grievous bodily harm though death resulted therefrom, the person charged, can only at most, be convicted of manslaughter. C D

In *Adelumola's case* (supra), it was held that a willed deliberate act, negatives the defence of accident. (p. 3100 G)

3. When a contradiction may be fatal

A contradiction to be fatal to the prosecution's case, must go to the substance of the case and not be of a minor nature. It is settled that if every contradiction however trivial to the overwhelming evidence before the court, will vitiating a trial, nearly all prosecution cases will fail. Human faculty, it is said, may miss details due to lapse of time and error in narration in order of sequence. See the case of *Sele v. The State* (1993) 1 SCNJ. (Pt. I) 15 at 22-23, citing several other cases therein. I hold that the alleged contradiction, did not and do not touch on the substance of the case and therefore, it will not vitiate a conviction since the totality of the evidence of the P.W.3 both in chief and under cross-examination, was believed and preferred by the trial court. (p. 3103 B) E F G

4. Courts' consideration of all available defences - Implications

It is settled that the courts must consider all defences in the Records of Proceedings i.e. the defences must be available on the evidence before the court or put up by the accused, expressed or implied. I H

have perused the records including the said statements of the appellant and his evidence at the trial, I have not seen therein, where the appellant or his witness or even the evidence of the prosecution witnesses, where the plea or defence of self-defence or provocation was ever raised except in the address or submissions of the learned counsel for the appellant in their said Brief. But assuming there was such evidence, then, it will be that the appellant on that ground, “visited” the crowd or mob that were not armed with any gun, with a Police rifle or gun loaded with bullets which led to the death of the deceased. That certainly, will not be right or reasonable in the circumstance and such a plea or defence, cannot avail the appellant. I so hold. (p. 3106 G)

5. Defence of accident does not avail for deliberate act

It is settled, that an accused person as in the instant case, cannot take refuge on a defence of an accident for a deliberate act even if he did not intend the eventual result. The shooting of the deceased by the appellant, was deliberate and not by accident although the learned counsel for the appellant in their Brief, has admitted that the act was deliberate when the appellant according to him, acted in self-defence. I hold that the defence of accidental discharge by the appellant, is porous and an after- thought. Like a drowning man clinging on a straw, he made those inconsistent and contradictory statements and also in his evidence in court. He only thereby, established in my respectful view, that he is unreliable and must bear the consequences of his callous and irresponsible action which has sent the deceased to his grave. (p. 3107 G)

CHUKWUMA-ENEH

6. Definition of an accident

In considering the defence of accident in the case of Paul Onye v. The State (1984) 10 SC 81 at 86 under Section 24 of the Criminal Code, Oputa JSC defined it thus “An accident is the result of an unwilling act and means an event without the fault of the person alleged to have caused it.

In Chukwu v. The State (supra) Karibi-Whyte, JSC has in the same vein defined accident as some sudden and unexpected event

taking place upon the instant not as a result of the act intended by the accused. These definitions clearly encompass the defence of accidental discharge as pleaded by the appellant here. This is even more so by the definition of accident as per Stephens CR. 143 to the effect that:-

“An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought in the circumstances in which it is done, to take reasonable precautions against it.” (p. 3112 C)

7. Enough of raw killings by the police in the guise of accidental discharge

I must however admonish here that enough is enough of the type of raw killings which the police have timidly termed as deaths from accidental discharges. Our law reports are replete with such cases. Even then who otherwise is being fooled as it were, by such warped defence to obvious cases of culpable homicide, certainly not the courts nor any longer the public they are paid to protect. It is time the police did a volte-face to this type of crimes if they have to start the process of salvaging their steadily waning image in this country. (p. 3117 C)

REPRESENTATION

G.S. Pwul Esq. for the appellant with him, PH. Kyelek, Esq.
A.T. Kehinde, Esq. for the respondent with him, I.S. Kogo Esq., D.C.L.
Ministry of Justice, Yobe State, M.B. Ngheda P.S.C., Esq. and I.J. Agantem Esq.

CASES REFERRED TO

IBRAHIM V. THE STATE (1991) 4 NWLR (pt.186) 399
NASAMU V. THE STATE (1979) 6-9 S.C. 153
ATANO V. A-G BENDEL STATE (1988) 2 NWLR (pt.75) 201
DANIELS V. THE STATE (1991) 8 NWLR (pt. 212) 715
FRED DAPERERE GIRA V. THE STATE (1996) 4 NWLR (pt.443) 375
NWAEZE V. THE STATE (1996) 2 NWLR (pt.428) 1
The State v. Okwuje (1976) 6 UI.L.R. (Pt. I) 159
Ojo v. The State (1973) 11 S.C 331; (1973) 11 S.C. (Reprint) 199

State v. Ukwunuenyi & Anor. (1989) 7 S.C. (Pt. I) 64; (1989) 7 SCNJ. 34

Gabriel v. The State (1989) 12 S.C. 129; (1989) 5 NWLR (Pt. 122) 457; (1989) 12 SCNJ 33 at 38

Njoku v. The State (1993) 7 SCNJ. (Pt.1) 36 at 41

^B Grace A. Akpabio & 2 Ors. v. The State (1994) 7- 8 SCNJ. (Pt. III) 429

STATUTES REFERRED TO

^C Penal code ss. 48, 221 (a)

Criminal Code s. 24

LEAD JUDGMENT BY ADEREMI JSC

^D This is an appeal against the decision of the Court of Appeal (Jos Division) holden at Jos, which has, in a considered judgment delivered on the 25th of April, 2007, dismissed the appeal against the judgment of the Yobe State High Court sitting at Potiskum in Potiskum Judicial Division.

^E In the court of first instance (High Court sitting at Potiskum) the appellant was charged with causing the death of Habu Usman of Potiskum at the Texaco Filling Station on the 7th day of June, 2004 by shooting him (Habu Usman) on the head with his (appellant) rifle in the cause of struggles with others with the knowledge that the death of the deceased would be the probable consequence of his act. The case proceeded to trial before the court of first instance and after concluding evidence on both sides and sequel to taking the final addresses of counsel on both sides, the trial judge, in a reserved judgment delivered on the 21st of June, 2005, convicted the appellant of ^F the offence and consequently sentenced him to death. In so doing, ^G the trial judge held inter alia:-

“From the entire case, I tried to see what defences are available to the accused other than the only single defence of accident but I could not find any. I must therefore say that the accused was negligent in his conduct. Generally, in a criminal trial, it is not enough for the prosecution to suspect a person of having committed a criminal offence, there must be evidence which identified the person accused with the offence and that it was his act which caused the offence. In ^H

the instant case, evidence abound (sic) and in fact that was conceded to even by counsel for the accused that a human being died; one Habu Usman that it was the act of the accused that caused the death. What was disputed by counsel was the intention or necessary mens rea which according to counsel for the accused, was lacking. However, in my considered view, having considered the entire circumstances of this case particularly taking into account the nature of the weapon used, the force applied and the part of the body affected by the act of the accused, I am not left in any doubt that the accused actually intended killing the deceased and no more and he thus succeeded.” B C

Dissatisfied with the judgment of the trial court, the appellant appealed therefrom to the court below (Court of Appeal). That court dismissed the appeal and in so doing, it held inter alia: -

“Considering that the appellant is a policeman who has been trained to handle a gun, the shooting of the gun by the appellant directly on the head of the deceased will only infer that the appellant has by this singular act intended to cause the death of the deceased and the learned trial judge had rightly found so D E

In the instant case, the appellant having failed to adduce evidence to show that the act of the shooting of the deceased was accidental, the only inference was that the act itself was intentional, the defence of accidental discharge will thus not avail the appellant in the instant case and I so hold.” F

Again, dissatisfied with the judgment of the court below, he appealed to this court via a Notice of Appeal which has incorporated into it nine grounds of appeal. The appellant and the respondent filed their respective briefs of argument.

When this appeal came before us for argument on 17th April 2008, Mr. Pwul, learned counsel for the appellant, referred to, adopted and relied on his client’s brief of argument and while referring us to the evidence of DW2 - Sgt. Ibrahim Bello - who was described as a key witness and who gave evidence of accidental discharge by the appellant; he submitted that the evidence of accidental discharge be believed and consequently, the appeal be allowed. Mr. Kehinde, learned counsel for the respondent, referred to, adopted and relied on the respondent’s brief of argument filed on 12th December, 2007, H

he urged that the concurrent findings of the two courts below be not disturbed, the judgment of the court below be affirmed while the appeal be dismissed.

As I have said, both the appellant and the respondent did exchange their briefs of argument after filing same. Distilled from the
B nine grounds of appeal by the appellant and as set out in his brief of argument are five issues which are in the following terms:

(1) Whether the lower court was right in upholding the judgment of the trial court that the defence of accident was not made out
C by the appellant.

(2) Whether the lower court was right when it declined to interfere with the findings of the trial court on the ground that the trial court had properly evaluated the evidence before it when in fact the trial court did not properly evaluate the evidence.

D (3) Whether the lower court was not in error when it failed to set aside the conviction of the appellant by the trial court in view of the manifest irreconcilable material contradictions in the evidence of the prosecution's witnesses.

E (4) Whether the lower court was right in raising the presumption of withholding evidence against the appellant for failure to call the other policemen passengers and drivers as defence witnesses.

(5) Having regard to the entire evidence before the trial court, whether the lower court was right in its conclusion that none of the defences raised by the appellant before the trial court availed him.
F

For their part, the respondent identified four issues from the said nine grounds of appeal for determination and, as contained in their brief of argument, they are as follows: -

G (1) Whether the learned justices of the Court of Appeal were right by declining to interfere : with the findings of the trial court on the ground that the trial court had properly evaluated the evidence before it.

(2) Whether the learned justices of the Court of Appeal were right in upholding the trial court's decision that none of the defences
H raised by the appellant can avail him.

(3) Whether the learned justices of the Court of Appeal were right in upholding the trial court's decision that the defence of accident is not available to the appellant.

(4) Was the appellant (sic) conviction rightly upheld in the face of contradiction in the evidence of the prosecution.

I have had a close study of the two sets of issues identified by the appellant and the respondent for determination in this appeal. A marriage of the two sets leaves me in no doubt that two cardinal or fundamental issues are thrown up by the said two sets and they are:- B

(1) Whether the prosecution proved the charge of murder of Habu Usman against the Appellant (Alhassan Mai Yaki) beyond reasonable doubt and

(2) Whether the appellant adduced credible and satisfactory C evidence in support of his defence of accidental discharge.

The appellant had argued in his brief of argument filed on 23rd August, 2007 that from the totality of the testimonies of the witnesses that testified before the trial court, there is no evidence linking the appellant with the murder of Habu Usman; there was no proper evaluation of the evidence of D.W.1 and D.W.2. It was also his argument that the evidence of PW.3 - Abubakar Musa - contradicts his statement to the Police which statement was admitted in evidence as Exhibit D; and that similarly PW4 - Abdullahi Hassan - contradicted himself in that his viva voce evidence before the trial court is at variance with this statement to the Police tendered and admitted as Exhibit "E". It cannot therefore be said that the case was proved beyond reasonable doubt it was further argued while relying on the decision in UWAKEWEGHINYA V. STATE (2005) NWLR (Pt. 930) 227. On the portion of the judgment of the trial court where it was held that the failure of the appellant to call the other Policemen, drivers and passengers who were eye witnesses raised a presumption that the testimonies of these persons would have been disadvantageous to the appellant which finding was upheld by the court below. G It was again argued that it was never demonstrated or even suggested before any of the two lower courts that the appellant withheld these people from coming to testify; the lower court, it was then submitted was in error when it raised the presumption of withholding evidence against the appellant, adding that the error led to miscarriage of justice. On the issue of defence of accidental discharge, the appellant submitted that the defence was not given a thorough consideration having regard to the evidence led; adding that the facts are H

consistent with the defence of accident raised by the appellant.

In its own brief, the respondent submitted that to secure a conviction on murder charge contrary to Section 221 (a) of the Penal Code, the prosecution must prove the ingredients of the offence beyond reasonable doubt. After reviewing the evidence led at the trial and the entire circumstances of the case particularly taking into account the nature of the weapon used, the force applied and part of the body of the deceased affected by the act of the accused, it was submitted that the accused knew or would have reason to believe that death would be the likely consequence of his action. Evidence of PW3 and PW4 amply supports this contention it was again argued. On the defence of accidental discharge, it was submitted that there was no dispute that the appellant was carrying a gun on that day, no dispute that it was the bullet from the appellant's gun that killed the deceased; there is no evidence of any struggle to collect the gun from the appellant either by the deceased or any person or group of persons that defence (accident) is therefore not available to him (appellant) and the trial judge was therefore right in his consideration of the defence of accident and by a similar token, the court below was right in upholding the decision of the trial court on that defence. On the issue of contradiction in the evidence of the prosecution witnesses, particularly the evidence of P.W.3 and P.W.4; after reviewing the testimonies of the aforesaid two witnesses, it was submitted that contradiction, if any, between the testimonies of P.W.3 and PW4 was not material and substantial as to affect the case of the prosecution; reliance was placed on such cases as (1) *IBRAHIM V. THE STATE* (1991) 4 NWLR (Pt.186) 399, (2) *NASAMU V. THE STATE* (1979) 6-9 S.C. 153 and (3) *ATANO V. A-G BENDEL STATE* (1988) 2 NWLR (Pt.75) 201. It was finally urged on us to dismiss the appeal and uphold the judgment of the court below.

As I have said above, the two cardinal issues for determination in this appeal are (1) whether the prosecution has proved beyond all reasonable doubt the charge of murder against the appellant and (2) whether from the evidence available, the defence of accidental discharge will avail the appellant. The appellant was charged at the court of trial (Yobe State High Court of Justice) with culpable homicide punishable with death in that he was alleged to have caused the death

of one Habu Usman of Potiskum Town on the 7th of June 2004 by doing an act to wit -shooting the head of the deceased with his (appellant) rifle. ***From plethora of judicial authorities, it is now well settled that to secure a conviction on a charge of murder, the prosecution must prove: -***

(1) that the deceased had died. B

(2) That the death of the deceased had resulted from the act of the appellant; and

(3) that the act or omission of the accused which caused the death of the deceased was intentional with the full knowledge that death or grievous bodily harm was its probable consequences. C

See (1) DANIELS V. THE STATE (1991) 8 NWLR (Pt. 212) 715; (2) FRED DAPERRE GIRA V. THE STATE (1996) 4 NWLR (Pt.443) 375 and (3) NWAEZE V. THE STATE (1996) 2 NWLR (Pt.428) 1. D
These three ingredients must co-exist and where one of them is absent or tainted with some doubt, the charge cannot be said to have been proved. See (1) OBUDU V. THE STATE (1991) 6 NWLR (Pt.198) 433, (2) OGBA V. THE STATE (1992) 2 NWLR (Pt.222) 164. E

P.W.3 - one Abubakar Musa, an artist while giving evidence said a luxurious bus in which the appellant was travelling together with some other passengers stopped at their place of business near the Texaco Petrol Station and he said others said the bus should not park there as the passengers of such buses always alighted from their vehicles and urinate around the area. But the appellant, to his hearing, asked all the passengers to alight from the vehicle and urinate there. The deceased, by name Mallam Habu, who was a security man at the filling station told the passengers to go further and urinate. The appellant, he said, stepped back and shot at the security man - Mallam Habu. The other escort in the luxurious bus immediately shot into the air to scare away people while the passengers ran into the bus and they all immediately left in the bus leaving the dead body there. He was emphatic that it was the appellant that shot the deceased. He was not shaken under cross-examination. P.W.4 - one Abdullahi Hassan, a fuel dealer selling fuel at Texaco Petrol Station who was also present at the scene on 6th June, 2004 corroborated F G H

the evidence of P.W.3 in all material respect when he said the appellant along with others alighted from a luxurious bus and were urinating when the security man - Habu Abubakar - the deceased told the passengers not to urinate at that place; the appellant, he continued his evidence, urinated there and cocked his rifle and shot the security man - Habu Abubakar. He reported the incident to the owner of the Texaco Petrol Station who came out with him to have a look at the dead body of Habu Abubakar. He was emphatic that Habu Abubakar was shot on his head. He like P.W.3 said he made statement to the Police. He was not shaken under cross-examination. With his evidence, the prosecution closed its case. D.W.1 was Alhassan Mai Yaki - the appellant, said on their journey in the luxurious bus from Lagos to Maiduguri, the driver stopped at Texaco Petrol Station Potiskum at the instance of the passengers who said they wanted to pray. Continuing, he said as the passengers alighted from the vehicle and while some were performing their ablution, he saw some group of men who were holding iron and sticks beating the passengers; his colleague escort - Ibrahim Bello also urinated at the same site and some people went and grabbed him along with his gun. He claimed he was about five to seven feet away from where Bello was standing struggling with the men and shouting that they wanted to snatch his gun. He (appellant) claimed he rushed to where Bello was and while hanging his (appellant) gun, he held on to Bello's gun struggling with the men and, according to him, unfortunately his hand touched the trigger and it went off. He admitted that that boy died as a result. He claimed he did not kill the boy intentionally. He said he made a statement to the police. D.W.2 - Sgt. Ibrahim Bello - the second escort corroborated the evidence of D.W.1 as to his (D.W.1) coming to rescue him from the people and in the process an accidental discharge occurred. He also made a statement to the Police. When they left Potiskum, they did not stop at Damagun it was Damaturu where they stopped and made a report. Under cross-examination D.W.2 said and I quote him: -

"It is correct that the accused person was the one who shot the deceased. The accused was in the process of rescuing me when he shot."

As I have said earlier in this case, the defence of the appellant

is that Habu Abubakar died as a result of accidental discharge from his gun. ***The defence of accident is clearly defined in Section 48 of the Penal Code which is applicable to this case; that section says: -***

“Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the course of doing a lawful act in a lawful manner by lawful means and with proper care and caution.”

Suffice it to say that Section 48 of the Penal Code is in pari materia with Section 24 of the Criminal Code applicable generally to the southern part of the geographical entity called Nigeria. If I may go further, I wish to say that the provisions of Section 48 of the Penal Code and Section 24 of the Criminal Code are in line with the rules of English Law relating to MENS REA under which a person should not be convicted of an offence unless he has a guilty mind. Going by the wording of the said section 48 of the Penal Code, it is quite clear to me that the defence of accident presupposes that the accused physically committed the offence with which he is charged, but having regard to the facts which he admits, all the same he should be acquitted because his conduct in the commission of the offence was an accident. For an accident is generally regarded as the result of an unwilled act and is understood to be an event without the fault of the person alleged to have caused it. It follows from the above that where an accused person raises the defence of an accident as in the present appeal, the onus still remains on the prosecution to prove its case beyond reasonable doubt by leading credible and admissible evidence to negate the defence and of course convince the trial court that the defence does not avail the accused person. See (1) CHUKWU V. THE STATE (1992) 1 NWLR (Pt.217) 255 and (2) BELLO & ORS V. A-G OYO STATE (1986) 5 NWLR (Pt.45) 828.

I have set out above the ingredients which the prosecution must prove to earn conviction for murder. From the evidence before the trial judge, it admits of no argument that Habu Usman died and that his death was as a result of the gun shot which resulted from the appellants' act. Whether the death was brought about by the inten-

tional act of the appellant which to his (appellant) knowledge would reasonably cause the death of the deceased (Habu Usman) is what I shall now examine ANON. Let me however quickly say that in our jurisprudence, a man is taken to have intended the natural consequences of his act. But for the defence of accident raised by the appellant, I would not have had any hesitation in coming to the conclusion that the act of the appellant was intentional and therefore, the three ingredients that must co-exist in law to earn conviction were present here. And I would have come to the conclusion that the prosecution had discharged its duty. What is the evidence in support of this defence? D.W.1 - Alhassan Mai Yaki - the appellant said in his evidence before the trial court inter alia: -

"As the passengers alighted from the vehicle and which some were performing their ablution some group of men holding iron and sticks started beating the passengers. Some of the passengers had started praying while others ran into the vehicle. My colleague escort Ibrahim Bello also urinated at the site and the group of people went and grabbed him along with his gun. I was about 5-7 feet away so I rushed to him. I handed my gun and I held his gun struggling with the people and unfortunately my hand touched the trigger and it went up (sic). A boy died as a result."

As I have said earlier, the appellant said he made statement to the Police. Indeed, the appellant made two written statements to the Police. In the first one he made on the 7th of June 2004, the appellant said inter alia: -

"On reaching Potiskum town in Yobe State at about 07.20 hours some Muslim passengers inside the vehicle pleaded to the driver in order to pray and he driver stopped near Texaco filling station along Maiduguri Road. Immediately the vehicle stopped the passengers went out to urinate at the other side of the road. However, one of the escorts also went to urinate, by then there were some people sitting on top of an un-completed building numbering about ten. So they went and brought some sticks and started beating the passengers saying that why are they urinating at that place. Meanwhile, five out of the men went and attacked Sgt. Ibrahim Bello who was also urinating struggling to disarm him.. So I quickly rushed for (sic) his rescue as well as Sgt. Jimoh Adenugba. In fact, during this develop-

ment, I heard a sound of gun shot while there was a heavy cram (sic) in which it became difficult for me to know the person who fired that rifle/gun."

The appellant made a second statement to the Police on the 8th of June 2004; in it he said inter alia: -

"On the 7/6/04 at about 0720 hours when I saw some youths attacking Sgt. Ibrahim Bello in order to collect his rifle. I went there to rescue him from the hands of the youths. When the youths were struggling to snatch the rifle from him accidentally my hand touched the trigger of his rifle and fired somebody as I was trying to separate them. I did not intentionally mean to fire anybody. It was an accidental discharge."

In the first statement he made to the Police on the 7th of June 04, he never raised the defence of accidental discharge. Again, in his second statement made on the 8th of June, 2004, all he said was that his hand accidentally touched the trigger of the rifle of Sgt. Ibrahim Bello who incidentally is DW2. He did not say that he accidentally touched the trigger of his own (appellant) rifle. D.W.2 also testified before the trial court confirming that the appellant came to his rescue when he was attacked by the mob and, according to him, it was at that moment that an accidental discharge occurred. He did not mince his words in saying that the appellant shot the deceased on the head.

As I have said, if the defence of accidental discharge were successfully set up in the present case, it would certainly relieve the appellant of criminal responsibility as it would constitute a negation of any deliberate act or omission on his (appellant) part. See CHUKWU V. THE STATE (1992) 1 NWLR (pt.217) 253. For the defence to avail an accused person, it must be raised timeously. In his evidence before the trial court, the appellant never admitted that he pulled the trigger of his rifle and consequently shot the head of the deceased. In his first statement to the Police, he said he suddenly heard a gun shot; he would not know who released the gun shot; of course, he never admitted he shot the deceased. But in his (appellant) second statement, he said in the' course of his trying to rescue D.W.2 Sgt. Bello he (appellant) accidentally touched the trigger of D.W.2's rifle and the shot was let go. These are in-

consistent statements and the evidence of the appellant thus became tainted. That defence was not even raised timeously by the appellant; and he (appellant) was even very economical as to the truth of the matter in his second statement. This again makes his testimony unreliable. Can it then be said, in law that the defence was successfully set up? My answer, from the evidence on record, is in the negative. The appellant made a spirited effort to save the day for himself by contending that there were contradictions in the evidence of the prosecution witnesses. I have carefully gone through the record; there is no material contradiction in the evidence of the prosecution adduced to prove the murder case.

In the final analysis, and for all I have been saying, this appeal is devoid of any merit. It must be dismissed and I hereby accordingly dismiss it. I affirm the judgment of the court below which itself has accorded approval to the judgment of the trial court delivered in the High Court of Yobe State delivered on 21/6/05 wherein it convicted and sentenced the appellant for culpable homicide punishable with death contrary to Section 221 (a) of the Penal Code.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Aderemi JSC in this appeal. I agree with it and, for the reasons which he has given I also dismiss the appeal and affirm the judgment of the Court below.

MUKHTAR JSC

The criminal charge against the appellant that culminated into this appeal was that of culpable homicide punishable with death, in that he caused the death of one Habu Usman by shooting him on the head with a rifle. After a thorough appraisal of the evidence before the trial court, the learned judge found the accused guilty as charged as follows:-

“On the whole the prosecution having established a case of

culpable homicide punishable with death under section 221(a) of the Penal Code, this accused shall be and is hereby convicted of the offence as charged under section 221 (a) of the Penal Code.”

The accused appealed to the Court of Appeal, but the court dismissed the appeal and affirmed the decision of the High Court of Justice of Yobe State. Dissatisfied, the appellant has again appealed to this court on nine grounds of appeal, from which learned counsel distilled five issues for determination. The issues are set out in the lead judgment, so are facts that led to the death of the deceased, which I am of the view I need not repeat here. However, as I would like to highlight issues (4) and (5), I will reproduce them hereunder. They read:-

“4. Whether the lower court was right in raising the presumption of withholding evidence against the Appellant for failure to call the other policemen, passengers and drivers as defence witnesses. D

5. Having regards to the entire evidence before the trial court, whether the lower court was right in its conclusion that none of the defences raised by the Appellant before the trial court availed him.”

These issues are in pari materia with the following issues in the respondent’s brief of argument:-

“Whether the learned justices of the Court of Appeal were right in upholding the trial court’s decision that the defence of accident is not available to the appellant. E

Whether the learned justices of the Court of Appeal were right by declining to interfere with the findings of the trial court on the ground that the trial court had properly evaluated the evidence before it.” F

It is a fact that the appellant raised and maintained the defence of accident in the trial court, but this was rejected by the court as it found ‘that it could not avail the appellant. Now, what was the basis upon which the claimed accident was predicated? An eye witness to the incident P.W.3 gave the following testimony inter alia:-

“On the 6/6/2004 I could remember in the morning at about 8.00 a.m one Luxurious Bus came and parked at a place near our place of business and we told them this is not a place to park as they used to urinate around the area. The accused then told all the passengers to come out of the vehicle and urinate there. The security H

man there told them to go further and urinate. The name of the security man is Mallam Habu. Then this man pointing at the accused, just stepped back and short (sic) at the security man. The other escort opened fire sporadically in the air to scare people away and they ran away with their vehicles leaving me there (sic) on the dead body.”

B Again, P.W.4 another eye witness testified thus:-

“On the 6/6/2004 I could remember as I was at Texaco at my fuel site when a Luxurious Bus came, the accused along with others came down and were urinating. The security man Habu Abubakar and also he is known as Habu Hassan told the passengers that they should not urinate here. The accused urinated and coked (sic) his rifle and shot the security man..... The deceased was shot on his head.”

D When cross-examined the witness reiterated his earlier evidence, that the appellant shot the deceased in his (P.W.4) presence. The appellant in a bid to establish the defence of accident gave the following evidence:-

“As the passengers alighted from the vehicle and while some were performing their abolution some group of men holding iron, and sticks started beating the passengers. Some of the passengers had started praying while others ran in to the vehicle. My colleague escort Ibrahim Bello also urinated at the site and the group of people went and (sic) grapped him along with his gun, and were struggling. Ibrahim Bello was shouting you want to collect my gun. I was about 5-7 feet away so I rushed to him. I hanged my gun and I held his gun struggling with the people and unfortunately my hand touched the trigger and it went up. A boy died as a result.”

H Most unlikely story, I would say, for how could the appellant's hand by merely touching the trigger, without pulling it, result in firing, and killing someone. That is working on the supposition that the gun was already cocked, and ready for shooting. If that was the case then there was an element of negligence. This evidence of the defence on what actually happened on the day of the incident contradicts the evidence of the eye witnesses, who did not give evidence of the presence of people with sticks and cudgels etc. at the scene. It is instructive also to note that the time of the day when it happened is material in considering the likelihood of the crowd that gathered at

the Texaco filling station. It was at around 7.20 a.m.. The law makes the defence of accident a legal defence, as is stated in section 48 of the Penal Code, which provides thus:-

“Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the course of doing a lawful act in a lawful manner by lawful means and with proper care and caution”

By the very interpretation of the above provision, it is clear that the shooting in this case must have been accidental, not intentional or premeditated. I refuse to agree that it was accidental because there was mens rea, and an obvious intention to deal with, maim or kill the deceased. As an experienced policeman he should have been wary about struggling with the people, with the gun in a precarious position. The appellant should have been more careful. For an accused to avail himself of the defence provided by section 48 of the Penal Code, the absence of mens rea must be clearly established by the accused. See *Samson Uzoka v. The State* 1990 6 NWLR part 159 page 680 and, *Stephen v. The State* 1986 5 NWLR part 46 page 776.

In the light of the above discussion, I am satisfied that the lower court was right in upholding the judgment of the trial court that the defence of accident was not made out by the appellant. The grounds of appeal Nos. (1) and (7) covering the issue discussed therefore fails and it is dismissed.

On the evaluation of the evidence by the trial court and the refusal of the lower court to interfere with the findings, I think the learned trial judge properly evaluated the evidence before him in that he adhered to the principles of law on evaluation of evidence laid down in a plethora of authorities, that is to consider each set of evidence adduced by parties by determining their credibility and ascribing probative value to them.

It is instructive to note that in the instant case (a criminal one) that needs to be proved beyond reasonable doubt, the learned trial judge did a proper evaluation as can be seen on page 32 of the printed record of proceedings which reads as follows:-

“.....In the instant case, evidence abound, and in fact this was conceded to even by counsel for the accused that a human being

died, one Habu Usman and that it was the act of the accused that caused the death. What was disputed by counsel was the intention or necessary mens rea which according to counsel for the accused was lacking. However, in my considered view having considered the entire circumstances of this case particularly taking into account the nature of the weapon used, the force applied and the part of the body affected by the act of the accused, I am not left in any doubt that the accused knew or had reason to believe that death would be the likely consequence of his action. The evidence of P.W.3 and P.W.4 in my view provided adequately that the accused actually intended killing the deceased and no more and he thus succeeded. By virtue of section 220(a) of the Penal Code, the offence of culpable homicide punishable with death is committed by a person who causes death by doing an act with the intention of causing death or such bodily injury as is likely to cause death. The prosecution must prove that:

a) the act by which death was caused was done by the accused; and

b) the act was done by the accused with the intention of causing death.

This is what the prosecution exactly did in the case at hand. To prove a case beyond reasonable doubt does not mean to prove such a case beyond all shadow of doubt, Section 138 of the Evidence Act. I therefore find from the whole of the evidence adduced that the prosecution has indeed proved the third ingredient of the offence as well. Consequently, the offence as charged has been proved against this accused."

The Court of Appeal was right when as per the lead judgment it held as follows:-

"Having examined and considered all the issues I am satisfied that the lower court had correctly assessed the evidence that was before it and rightly convicted the appellant."

In the light of the above discussion, the appeal therefore has no merit and must fail. This is an appeal against concurrent findings of fact, which many authorities say should not be disturbed, unless they are not based on credible evidence, are perverse and have led to miscarriage of justice. See Igwe v. State 1982 9 S.C. 174, Sobakin v. State 1981 5 S.C. 75, and Isibor v. State 2002 4 NWLR part 758

page 741.

It is in this wise that I agree completely with the reasoning and conclusion of my learned brother Aderemi, JSC in his lead judgment. I also dismiss the appeal in its entirety.

B

OGBUAGU JSC

This is an appeal against the decision of the Court of Appeal, Jos Division (hereinafter called “the court below”) delivered on 25th April, 2007, dismissing the appellant’s appeal to it and affirming the conviction and sentence of the appellant by the Yobe State High Court sitting in Potiskum and delivered on 21st June, 2005. Dissatisfied, with the said decision, the appellant, has appealed to this court on nine (9) grounds of appeal. I note that in the respondent’s Brief under “INTRODUCTION”, it is stated that:-

D

“This is an appeal against the decision of the Yobe State High Court of Justice presided over by His Lordship, Hon. Justice I. W. Jauro, holden at Potiskum..... The learned trial Judge found the appellant guilty immaterial.”

It is thereafter that it is stated that the appellant, appealed to the court below where his appeal was dismissed hence this further appeal to this court. It cannot be over-emphasized that this being the apex court of appeal in this country, learned counsel, should and ought to vet their Briefs filed in this court.

E

The appellant formulated five (5) issues for determination ‘while the respondent, formulated four (4) issues for determination. When the appeal came up for hearing on 17th April, 2008, the learned counsel for the appellant - Pwul, Esqr., appearing with Kyelek, Esqr., adopted their Brief and submitted that case of accidental discharge, was made out by the defence. He urged the court, to allow the appeal and to enter an Order of discharging and acquitting the appellant.

F

Kehinde, Esqr., - learned counsel for the respondent appearing with three other learned counsel, adopted the respondent’s Brief. He urged the court to sustain the concurrent findings of the two lower courts. He submitted that there was no struggle between the deceased and the appellant before the appellant shot the deceased. He

H

referred to the observation of Mukhtar, JSC., in his/her concurring contribution in the case of John Agbo v. The State (2006) 1 S.C. (Pt.II) 73; (2006) 6 NWLR (Pt.977) 545, about Policemen using their guns. He finally urged the court to dismiss the appeal and affirm the decisions of the two lower courts. Thereafter, judgment was reserved till to-day.

The facts of this case briefly stated, are that on the 7th June, 2004, the appellant, a Policeman, was on board a luxurious bus with the D.W.2 as security escorts on its way to Maiduguri. The bus stopped at a Texaco Filling Station in Potiskum. The appellant and the passengers on board the bus, alighted to urinate. They started urinating in a place said to be prohibited. The deceased, a security man at the said filling station, asked the appellant and the other passengers not to urinate there. The appellant then shot the deceased on the head and he died on the spot. The defence of the appellant is that the passengers were attacked by a crowd often, men holding iron and sticks who started beating the passengers. That five of the men/youths held the D.W.2 and tried to disarm him. That he went to the rescue of his said colleague when his hand touched the trigger of the gun of D.W.2 and it fired somebody. That he did not intentionally shoot the deceased. Four witnesses testified for the prosecution, while the appellant and one other witness -D.W.2, testified for the defence, After addresses of learned counsel for the parties, the learned trial Judge - Jaur, J., in his considered judgment, convicted the appellant and sentenced him to death. His appeal to the court below, was dismissed, hence the instant appeal.

How, Section 48 of the Penal Code, Laws of Northern Nigeria, 1963, provides as follows:-

"Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the course of doing a lawful act, in a lawful manner, by lawful means and proper care and caution."

It seems to me that under this provision, the act leading to the accident must be a lawful act done in a lawful manner. See the case of Abdulbaki v. Katsina N.A. (1961) NNLR 12. It seems also to me that under Section 24 of the Criminal Code, there is no such restriction. For an event to qualify as accidental under Section 24 of the

Criminal Code, it must be a surprise to the ordinary man of prudence, that is, a surprise to all sober and reasonable people. The test as fettered, is always objective. See the cases of Bayo Adelumola v. The State (1988) 1 NWLR (Pt.73) 683 at 692-693; (1988) 3 SCNJ 68 at 76 - 77 - per Oputa, JSC., and Audu Umaru v. The State (1990) 3 NWLR (Pt.138) 363 at 370 CA. The section does not deal with an “act”, but an “event” and an event within the meaning of the section, is what apparently follows from an act. See Umaru v. The State (supra).

In fact, in the case of Thomas v. The State (1994) 4 SCNJ. (Pt.1) 102 at 109, Wali, JSC., stated that the test is always that if the act even though unlawful, is not such that would, from the view of a reasonable man, cause death or grievous bodily harm though death resulted therefrom, the person charged, can only at most, be convicted of manslaughter.

In Adelumola’s case (supra), it was held that a willful deliberate act, negatives the defence of accident. See also the case of The State v. Nwabueze (1980) 1 NLR 41 at 44. Oputa, JSC., in the case of Paul Onye v. The State (1984) 10 S.C. 81 at 86, cited and relied on in the appellant’s Brief, stated *inter alia*, as follows:-

“An accident is the result of an unwilled act and means an event without the fault of the person alleged to have caused it.”

See also the case of Bello & Ors. v. Attorney-General of Oyo State (1986) 5 NWLR (Pt.45) 828, cited and relied on by the parties in their respective Briefs.

It need be emphasized and this is settled, that where an accused person raises the defence of accident, the onus, remains on the prosecution to prove its case beyond reasonable doubt by leading evidence and admissible evidence to negative the defence and convince the court that the defence, does not avail the accused person. Where the prosecution fails to discharge that onus, the accused person, is entitled to an acquittal. See the cases of Sholuade v. The Republic (1966) 1 All NLR 133, Dangari v. The State (1968) 1 All NLR 246 at 256, also cited and relied on in the appellant’s Brief; Esangbedo v. The State (1989) 7 S.C. (Pt.1) 36; (1989) 4 NWLR (Pt. 113) 57; (1989) 7 SCNJ 10 and Makeri v. The State (1994) 3 NWLR (Pt.330) 55 at 63-64 C.A.

I note that P.W.s 1 and 2, are Policemen who are/were not

eye witnesses but only took respectively, the two statements of the appellant. P.W.3 an artist and an eye witness to the incident testified at page 10 of the records inter alia, as follows:-

B *“On the 6/6/2004, I could remember in the morning at about 8.00 a.m. one Luxurious Bus came and parked at a place near our place of business and we told them this is not a place to park as they used to urinate around the area. The accused then told all the passengers to come out of the vehicle and urinate there. The security man there told them to go further and urinate. The name of the security man is Mallam Habu (i.e. the deceased). Then this man (pointing at the accused) just stepped back and shot at the security man. The other escort opened fire sporadically in the air to scare people away and they ran away with their vehicles leaving me there on (sic) (meaning and) the dead body.”*

D During cross-examination, the learned counsel for the appellant, called for his statement to the Police which was tendered without objection by the prosecution. Nothing useful came out of the cross-examination as his evidence, was not challenged as being false.

E P.W.4, another eye witness at page 11 of the records, testified inter alia, as follows:-

F *“On the 6/6/2004, I could remember as I was at Texaco at my fuel site when a Luxurious Bus came, the accused along with others came down and were urinating. The security man Habu Abubakar and also he is known as Habu Hassan told the passengers that they should not urinate here. The accused urinated and cocked his rifle and shot the security man. I reported to the master of what happened. We came with the master, owner of the filling station to the scene where we met the dead body. That is all I know. The deceased was shot on his head.....*

Under cross-examination, he stated inter alia, as follows:-

“..... I was together with the deceased when the deceased approached the accused. I saw what happened as the accused shot the deceased in my presence.”

H In the Brief of the appellant at page 16, paragraph 4.3.0, it is stated that the statement of D.W.3 - Exhibit D” is contradictory with his said evidence in court, in that he said twice in the said statement, that he was inside one shop taking his breakfast, but that in his evi-

dence, he claimed to be in front of his shop. I note that the statement was under cross-examination. But with respect, the learned counsel, did not refer to the entirety of his evidence under cross-examination. It was first suggested to him after he stated that he was at the place where the incident took place as his shop was there, that, he was painting at the time the incident took place. It was also suggested to him that he was in a different shop taking his breakfast when the incident took place a suggestion which he denied and stated that he would be surprised to hear such a suggestion. *A contradiction to be fatal to the prosecution's case, must go to the substance of the case and not 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 prosecution cases will fail. Human faculty, it is said, may miss details due to lapse of time and error in narration in order of sequence. See the case of Sele v. The State (1993) 1 SCNJ. (Pt. I) 15 at 22-23, citing several other cases therein. I hold that the alleged contradiction, did not and do not touch on the substance of the case and therefore, it will not vitiate a conviction since the totality of the evidence of the P.W.3 both in chief and under cross-examination, was believed and preferred by the trial court. See also the cases of Jizuramba v. The State (1976) 3 S.C. 89; (1976) 3 S.C (Reprint); Akpunenye v. The State (1976) 11 S.C. 269; (1976) 9-10 S.C (Reprint) 240; and Wankey v. The State (1993) 5 NWLR (Pt. 295) 542; (1993) 6 SCNJ. (Pt. II) 152 at 161, citing some other cases therein, just to mention but a few.*

The learned counsel for the appellant, also faulted the evidence of the P.W.4 which he submitted is contradictory. This incident took place on 6th June, 2004. The P.W.3 and P.W.4 testified on 21st February, 2005. What I have stated in respect of P.W.3 as regards an alleged contradiction, also applies to the P.W.4. As will later be demonstrated in this judgment, in the appellant's Brief, it is submitted that the appellant acted under self-defence and provocation. The appellant, who is the chief actor so to speak, raised the defence of accidental discharge, as an after thought.

I note that the appellant, made two statements to the Police. The first statement is/was made on the very day of the incident -i.e. on 7th June, 2004, when the facts were very fresh in his memory. It

is Exhibit “A” at pages 35 and 36 of the records. It reads inter alia, as follows:-

“..... Immediately the vehicle stopped, the passengers went out to urinate at the other side of the road. However, we the escorts also went to urinate, by then there were some people sitting on top of an uncompleted building numbering about ten. So the ten went and brought some sticks and started beating the passengers saying that why are we urinating at that place. Meanwhile, five out of the men went and attacked Sgt. Ibrahim Bello who was also urinating, struggling to disarm him. So I quickly rushed for his rescue as well as Sgt. Jimoh Adenugba. In fact during this development. I heard a sound of gun shot while, there was a heavy crown (sic) (meaning crowd) in which it becomes difficult for me to know the person who fire (sic) that rifle/gun. In this situation every of the passengers rushed and entered the vehicle. In the process the public around (sic) started stoning at the vehicles and destroyed the wind screen and side mirrors While at the “A” Division Damaturu, the D.P.O. told me that there was a report ‘made that someone was shot dead at the scene of the incident in Potiskum.....’”

(the underlining mine)

From this statement, there was no question of “accidental discharge” to the appellant’s knowledge. According to him, the information about somebody being shot dead at the scene, was told to him by the said D.P.O. at “A” Division in Damaturu. That he did not know about this fact.

I also note that, in his “Additional Statement” made by him on the following date - 8th June, 2004, he stated inter alia, as follows:-

“..... On the 7/6/04 at about 0720 hours when I saw some youths attacking Sgt. Ibrahim Bello in order to collect his rifle, I went there to rescue him from the hands of the youths. When the youths were struggling to snatch the rifle from him, accidentally my hand entered the trigger of his rifle and fired somebody as I was trying to separate them. I did not intentionally mean to fire anybody. It was an accidental discharge.”

The above, need no interpretation. The story has now changed that it was his act of “*his hand entering the trigger of the D.W.2’s rifle*

and fired somebody as he was at the same time separating them.” In fact, in the statement, he showed that they were on the run after the incident. They avoided the Potiskum Mopol Base and finally stopped at State Headquarters in Damaturu.

In his testimony at the trial court at page 14 of the records, on 29th March, 2005, he stated on Oath, *inter alia*, as follows:-

“..... My colleague escort, Ibrahim Bello also urinated at the site and the group of people went and grapped him along with his gun, and were struggling. Ibrahim Bello was shouting you want to collect my gun. I was about 5-7 feet away so I rushed to him. I hanged my gun and I held his gun struggling with the people and unfortunately my hand touched the trigger and it went up. (sic) A boy died as a result. I pray the court to discharge and acquit me as I did not shoot intentionally.”

(the underlining mine)

From the foregoing, Pwul, Esqr., I believe, will now appreciate the terrible inconsistency of the case of his client - the appellant and his obvious unreliability in the extreme. Learned counsel for the appellant, with respect, complicated and worsened the case or defence of the appellant at pages 26 and 28 of their Brief under (b) Self defence (which submissions bind the appellant). After reproducing Section 222 (2) of the Penal Code, learned counsel stated as follows:-

“In the present case, the appellant was one of the escorts on board a Luxurious Bus. The D.W.2, the appellant and the passengers had been attacked by a group of persons with iron, rods and sticks. Some of the passengers sensing the danger ran back to the bus. D.W.2 was caught up in a struggle. To free himself and his gun he shouted for help. The appellant who ran to his rescue, was himself obviously in danger of being killed by the mob in that situation of extreme danger and fight, the appellant and the D.W.2. as security escorts. As if that was not enough the same mob attacked D.W.2 and struggled to snatch his gun. It is unthinkable that the appellant would be provoked by this brazen an unwarranted attack on his colleague, a Policeman in the Nigeria Police., on official duty to protect passengers. The appellant was bound to lose his control and reasoning temporarily in this sudden and provocative Act of the mob. _ In this stage of

provocation, the appellant triggered the gun of D.W.2 which was the subject of struggle and the deceased fell victim. The lower court was wrong not to have considered, and uphold this defence"

[the underlining mine]

B I note that both in his said statements to the Police and in his evidence in court, the appellant, never raised the defence of self-defence. The implication, inference and gravity of the above, can well be imagined or appreciated. I had noted earlier in this judgment, that at the hearing of this appeal, Pwul, submitted that *"the case of C accidental discharge was made out by the defence."* So, the defence is no longer accidental discharge, but in addition or is it in the alternative, it is a case of self-defence and provocation. In other words, *"The appellant was bound to lose his control and reasoning temporarily in this sudden and provocative act of the mob. In this D stage of provocation, the appellant triggered the gun of D.W.2 which was the subject of struggle and the deceased fell victim."*

In the instant case, there is the evidence of D.W.2 who under cross-examination at page 10 of the records, on Oath testified *inter alia*, as follows:-

E "..... it is *correct* that the accused person was *the one who shot the deceased. The accused was in the process of rescuing me when he shot"*

This evidence, rubbishes so to say and contradicts in my view, F the after thought defence that it was an accidental discharge and supports the prosecution's case that the shooting, was wicked and deliberate. There is the evidence that the passengers of the bus, were asked *not to urinate* at that spot or area by the security man at the said filling station. The appellant in fact, encouraged the passengers G to go ahead and urinate there.

It is settled that the courts must consider all defences in the Records of Proceedings, i.e. the defences must be available on the evidence before the court or put up by the accused, *expressed or implied*. See the cases of *The State v. Okwuje* (1976) 6 UI.L.R. (Pt. I) 159; *Ojo v. The State* (1973) 11 S.C 331; (1973) 11 S.C. (Reprint) 199; *The State v. Ukwunuenyi & Anor.* (1989) 7 S.C. (Pt. I) 64; (1989) 7 SCNJ. 34; *Gabriel v. The State* (1989) 12 S.C. 129; (1989) 5 NWLR (Pt. 122) 457; (1989) 12 SCNJ 33 at 38; *Njoku v. The*

State (1993) 7 SCNJ. (Pt.1) 36 at 41 and Grace A. Akpabio & 2 Ors. v. The State (1994) 7- 8 SCNJ. (Pt. III) 429, citing some other cases thereon, just to mention but a few. I have perused the records including the said statements of the appellant and his evidence at the trial, I have not seen therein, where the appellant or his witness or even the evidence of the prosecution witnesses, where the plea or defence of self-defence or provocation was ever raised except in the address or submissions of the learned counsel for the appellant in their said Brief. But assuming there was such evidence, then, it will be that the appellant on that ground, “visited” the crowd or mob that were not armed with any gun, with a Police rifle or gun loaded with bullets which led to the death of the deceased. That certainly, will not be right or reasonable in the circumstance and such a plea or defence, cannot avail the appellant. I so hold.

It is firmly settled that provocation, revenge or annoyance, are not enough. See the case of Nkemdilim v. The State (1985) 5 S.C. 1. Act of savage temper, rules of a plea of provocation. See the case of Sadiku v. The State (1972) 2 S.C. 169; (1972) 12 S.C. (Reprint) 111. The learned trial Judge at page 32 of the records, stated inter alia, as follows:-

“.....However, in my considered view having considered the entire circumstances of this case particularly taking into account the nature of the weapon used, the force applied and the part of the body affected by the act of the accused (appellant), I am not left in any doubt that the accused knew or had reason to believe that death would be the likely consequence of his action. The evidence of P.W.3 and P.W.4 in my view provided adequately that the accused actually intended killing the deceased and no more and thus he succeeded.”

I have no doubt in my mind that the prosecution, proved their case beyond reasonable doubt. It is settled, that an accused person as in the instant case, cannot take refuge on a defence of an accident for a deliberate act even if he did not intend the eventual result. See the cases of Oghor v. The State (1990) 3 NWLR (Pt.139) 484 at 502 CA., per Kolawole, JCA., (of blessed memory) and the English case of R v. Larkin (1944) 29 CAR 18 at 23- per Humphreys, J. The shooting of the deceased by the appellant, was deliberate and not by accident although the learned counsel for the appellant in their Brief,

has admitted that the act was deliberate when the appellant according to him, acted in self-defence. I hold that the defence of accidental discharge by the appellant, is porous and an after- thought. Like a drowning man clinging on a straw, he made those inconsistent and contradictory statements and also in his evidence in court. He only thereby, established in my respectful view, that he is unreliable and must bear the consequences of his callous and irresponsible action which has sent the deceased to his grave. The appellant, has joined his fellow Policemen who use the guns issued to them for the protection of innocent Nigerians, to snuff out the life of the deceased and when apprehended, they turn round to hide under the cover of “accidental discharge.” He deserves what he has gotten.

In concluding this judgment, I note that there is also the concurrent judgments and findings of fact by the two lower courts. On the decided authorities, this court, cannot disturb or interfere with the same. See the case of Dogo & 4 Ors. v. The State (2001) 1 S.C. (Pt.II) 30; (2001) 3 NWLR (Pt.699) 192 at 208, 210; (2001) 1 SCNJ. 315.

I had the privilege of reading before now, the leading judgment of my learned brother, Aderemi, JSC. I agree with his reasoning and conclusion that the appeal is devoid of any merit. It fails. I too dismiss it and affirm the decision of the court below affirming the judgment of the trial court.

F —————

CHUKWUMA-ENEH JSC

This appeal is against the decision of the Court of Appeal (Jos Division) delivered on 25/4/2004 dismissing the appeal filed by the accused/appellant against the decision of the Yobe State High Court given on 18/10/2004. The appellant has been convicted and sentenced to death for the crime of culpable homicide punishable with death brought under Section 221 of the Penal Code.

The appellant being dissatisfied with the decision has raised nine grounds of appeal in his Notice of Appeal filed against the decision in this matter. In consequence thereof parties have filed and exchanged their respective briefs of argument. The instant appellant in his brief of argument has distilled five issues for determination as

follows:-

“1. Whether the lower court was right in upholding the judgment of the trial court that the defence of accident was not made out by the appellant. (Grounds 1 and 7)

2. Whether the lower court was right when it declined to interfere with the findings of the trial court on the ground that the trial court had properly evaluated the evidence before it when in fact the trial court did not properly evaluate the evidence. (Grounds 2 and 6)

3. Whether the lower court was not in error when it failed to set aside the conviction of the appellant by the trial court in view of the manifest irreconcilable material contradictions in the evidence of the prosecution’s witnesses. (Grounds 3 and 4) ,

4. Whether the lower court was right in raising the presumption of with holding evidence against the appellant for failure to call the other policemen, passengers and drivers as defence witnesses. (Ground 5)

5. Having regards to the entire evidence before the trial court, whether the lower court was right in its conclusion that none of the defences raised by the appellant before the trial court availed him. (Grounds 8 and 9)

The respondent on its part has filed a respondent’s brief of argument and therein has distilled four issues for determination as follows:-

“Whether the learned Justices of the Court of Appeal were right by declining to interfere with the findings of the trial court on the ground that the trial court had properly evaluated the evidence before it. (Grounds 2 and 6)

Whether the learned Justices of the Court of Appeal were right in upholding the trial court’s decision that none of the defences raised by the appellant can avail him. (Grounds 1 and 8)

Whether the learned Justices of Court of Appeal were right in upholding the trial court’s decision that the defence of accident is not available to the appellant. (Grounds 7 and 5)

Was the appellant conviction rightly upheld in the face of contradiction in the evidence of the prosecution witnesses. (Grounds 3 and 4)”

I will not quibble over detailing the facts of this case which for

purposes of dealing only with the important question of defence of accident as raised by the appellant in this matter are sufficient as educed even in the charge itself as preferred at the trial against the appellant, as per p.23 of the record. The charge against the accused reads:

B *“That you Alhassan Mai Yaki on or about the 7th day of June, 2004 at about 0730 hours around Texaco Filling Station at Potiskum Local Government Area which is within the jurisdiction of the Yobe State High Court of Justice did commit culpable homicide punishable with death in that you caused the death of one Habu Usman of Potiskum town by doing an act to wit you shot on his head with your rifle in the cause of struggles with others with the knowledge that his death would be the probable consequence of your act and you thereby committed an offence punishable under section 221 of the Penal Code.”*

D Even then the facts of the matter are as succinctly stated in p. 102, first paragraph of the judgment of the court below and I quote as follows:

E *“On the 7/6/2004, the appellant, a policeman, was on board a luxurious bus with the D.W.I as security escort on its way to Maiduguri. The bus stopped at Texaco Filling Station Potiskum. The appellant and the passengers on board the bus alighted and started urinating in a place said to be prohibited. The deceased, a security man at the filling station, accosted the accused and the other passengers and asked them not to urinate there. The appellant then shot the deceased on the head who died on the spot, the defence of the appellant being that they were attacked by a crowd of men holding iron and sticks who started beating the passengers and held his colleague captive and in an attempt to have him released his hand touched the trigger of the gun his colleague was holding and the deceased died.”*

The foregoing facts will suffice for dealing with the important aspect of the defence of accident as I have contemplated in this short contribution.

H The crux of the appellant’s case on the defence of accidental discharge which I have set out hereinafter, is not hinged upon whether he consciously has caused the prohibited event that has caused the death of the deceased as after all, the prosecution so far the facts found, has conclusively established, on legal evidence that the appel-

lant by his conduct has caused the prohibited event (the appellant has not disputed that fact; he has albeit conceded that fact even by pleading the defence of accident; in other words, it is proved that the deceased has died and that his death was caused by the act of the accused) but on the important question of whether in the circumstances of our law he is presumed to intend the natural and probable consequences of his act to kill or cause grievous harm to the deceased. To ground this third ingredient to the crime of culpable homicide as settled by decided cases, that is to say, whether the act or omission of the accused which caused the death of the deceased as found by the trial court is intentional - that is with the knowledge that death or grievous bodily harm would be the natural and probable consequence of the act or omission has to depend on the circumstances of the crime see: *Ogbe v. The State* (1992) 8 LRCN 362 & *Akpan v. The State* (2008) 8 WRN 130. This is so particularly on the backdrop that the appellant has maintained throughout the trial that the event has occurred by accident. In sum, therefore, it begs the poser as to whether the defence of accident would avail in the context of a crime as in this case where the requisite mental state of voluntariness for the commission of the crime again, as the instant case should be done with a necessary mental element as conceptualised as per the terms: ‘Intentionally’/‘*Mesn Rea*’, “wilfully” or “knowingly” as the case may be, albeit if it is so provided in defining the crime as in the instant crime.

The next vital question that has to be considered in the context of the foregoing discussion is whether upon the appellant’s complaint the accused appellant) is guilty of murder as found by both lower courts. In this regard, the effect of finding the accused guilty of murder means that the presumption that the accused intended the natural and probable consequence of his act to kill or cause grievous harm, the basis of criminal liability in our law has not been displaced by any direct evidence before the trial court. See *Mohammed v. The State* (1991) 5 NWLR (pt.192) 433 at 454 and *Edamine v. The State* (1996) 3 LWR (pt.438) at 539.

Before going into the testimonies of the prosecution witnesses so as to examine the circumstances of the crime vis-a-vis the plea of

accidental discharge let me set forth the provisions of section 48 of the Penal Code, the statutory basis in this case on which the appellant's defence of accident is rested while at the same time advertent to Section 24 of the Criminal Code which deals with similar circumstances in the Southern part of this country; it provides thus:

B *"Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the course of doing a lawful act in a lawful manner by lawful means and proper care and caution."*

C In considering the defence of accident in the case of Paul Onye v. The State (1984) 10 SC 81 at 86 under Section 24 of the Criminal Code, Oputa JSC defined it thus "An accident is the result of an unwilling act and means an event without the fault of the person alleged to have caused it. See, also Chukwu v. The State (1992) 1 D NWLR (pt.217) 255; Bello & Ors v. Attorney General of Oyo State (1986) 5 NWLR (pt.45) 828 and Iromantu v. The State (1964) 1 ANLR 304.

In Chukwu v. The State (supra) Karibi-Whyte, JSC has in the same vein defined accident as some sudden and unexpected event taking place upon the instant not as a result of the act intended by the accused. In other words, by the import of the provisions of Section 48 an offence in the nature of the instant one cannot be committed accidentally in that "intention" or "mens rea" as an ingredient of the same is not present i.e. it is absent that is to say, in crimes as the instant one requiring intention or mens rea to consummate the offence. These definitions clearly encompass the defence of accidental discharge as pleaded by the appellant here. This is even more so by the definition of accident as per Stephens CR. 143 to the effect that:-

G *"An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought in the circumstances in which it is done, to take reasonable precautions against it."*

H In advertent to the circumstances of this crime so as to determine the circumstances in which the accused killed the deceased whether upon which the defence of accidental discharge is rightly or otherwise predicated, one has to examine the direct evidence of P.W.3

and P.W.4 as the only prosecution's eyewitnesses whose testimonies have served to nail as found by the trial court the accused's case of accidental discharge in this matter and as culled from the record at p.30 L14-19 and I quote:

"P.W.3 stated in evidence that he was there and saw when the incident happened as he saw the accused shot the deceased when the deceased told them urine is prohibited at that place. Learned counsel for the accused tried to discredit the testimony of this witness but in my considered view, the testimony of this witness could not be faulted as he could not be shaken even under cross examination. He maintained that he saw what transpired. To me what is important is whether he witnessed what really took place and he indeed did. P.W.4 whom the counsel for the accused equally tried to discredit his testimony maintained that he equally witnessed what took place only that he was on one side of the road while the incident took place on the other side but he was watchful and indeed had to go closer to get a clear picture of what happened. In my considered view both P.W.3 and P.W.4 are credible witnesses that ought to be and are indeed believed by this court."

Furthermore, the P.W.3 stated in evidence that the accused asked all the passengers in the luxurious bus to come down at the Texaco Filling Station, Potiskum to urinate there. It is at this point that the security man, Mallam Habu (Kaza) told them to urinate afar from the said Petrol Filling Station. The accused then stepped back and shot at the deceased security man on the head killing him instantly. The findings based on the testimonies of the P.W.3 and P.W.4 in this regard are solid and rightly relied upon by the trial court in convicting the accused.

However, contrary to the testimonies of P.W.3 and P.W.4 as found by the trial court the accused has given a totally different story as borne out by the court's review of his testimony as per p.30 LL 20-35 to p.31 LL 1-13 of the record, and I quote:

"The accused was evasive in his testimony as he deliberately avoided saying anything to do with the prohibition of urine at the place when their vehicle parked. He continued his testimony on a group of people numbered about ten beating them. When he was quizzed under cross examination however, he stated that though they

were used to stopping at the filing station, it was only on that day that they were told not to urinate there. And it was this singular act that led to the entire incidence. In fact the accused in his statement exhibit “A” denied even knowing who fired the gun shot. And as God will have it D.W.2 Sgt. Ibrahim Bello in his statement to the police exhibit B “F” gave a vivid picture of what transpired as the incident on that day related to urination and no more. In his testimony before the court Sgt. Ibrahim Bello stated that some group of people numbering about ten (10) came heading to him while he was in kneeling position. The C people pounced on him and he shouted for help. His colleague, the accused, came to his rescue and it was in the process Sgt. Ibrahim Bello rightly said, that Sgt. Alhassan Mai Yaki shot the deceased. This he stated under cross-examination. For the accused to say he does not know who fired the shot therefore in my considered view is a D mere after thought. Caught up in this situation the accused volunteered an additional statement Exhibit ‘C’ where he employed the use of accidental discharge as he now admitted that while trying to rescue his colleague his hand accidentally entered the trigger of his colleague’s gun and it fired killing somebody.”

E I must add that the above review of the evidence by the trial court is balanced leading, as it were, to a proper evaluation of the evidence before it and ultimately to finding the accused guilty of murder. Based on the foregoing circumstances of the crime the trial court has rightly found as per p.32 LL 5-15 of the record that:

F “What was disputed by counsel was the intention of necessary mens rea which according to counsel for the accused was lacking. However, in my considered view having considered the entire circumstances of this case particularly taking into account the nature of G the weapon used, the force applied and the part of the body affected by the act of the accused, I am not left in any doubt that the accused knew or had reason to believe that death would be the likely consequence of his action. The evidence of PW.3 and PW.4 in my view provided (sic) adequately that the accused actually intended killing H the deceased and no more and he thus succeeded.”

Let me observe here as it is settled that the trial court who saw and heard the witnesses is in a better position than this court to assess the credibility of the witnesses and this court cannot therefore say

that it is wrong in accepting the evidence of the prosecution witnesses, that is to say, in preference to the evidence of the defence witnesses. See *Adi v. The Queen* 14 WACA 6.

From these findings, the trial court is satisfied that the prosecution has discharged the onus on it, that is, in proving that the accused has intended the probable consequence of the act, the mens rea of the offence. The court below has confirmed the same and as I have to base my consideration upon the legal evidence before the trial court and I so based it, I see no ground to differ - I too so hold. See *Esangbedo v. The State* (1989) 7 SC (Pt.1) 36 at 40.

The immediate foregoing paragraphs on the review of the evidence of the witnesses for the prosecution and the defence show the two different versions by the prosecution and the defence of the same event. I have lifted the foregoing passages from the record to emphasise the different accounts of the same event - this has enjoined the trial court to make a specific finding as to the true version of the event. And I have to make the point that the finding ejecting the accused's version of the story is consistent with the legal evidence as found by the trial court. And the court below rightly in my view confirmed the finding. The accused's cock and bull story that he accidentally triggered off the gun shot that killed the deceased as can be seen from the circumstances of the case has to collapse under serious cross-examination and so, rightly in my view has been rejected by the trial court. That is to say, that where the accused's story upon which he has erected his defence of accident has been ejected by the two lower courts as here an accused challenging the verdict on that ground as in this case has the uphill task of showing that the finding is perverse or not supported by the evidence or arrived at consequent upon a wrong application of the principles of substantive or procedural law: See *Ogwonzee v. The State* (1988) 4 SC 110 at 124 paras. 10-30; *Maja v. Stocco* 1968) 1 ANLR 141 at 149; *Woluchem v. Gudi* (1981) 5 SC 291 at 295-6 at 26-9. Needless reiterating the point that the accused has not successfully attacked the findings or the verdict on any of the above grounds, that is to say, bearing in mind that this court is principally concerned with whether the decision on appeal is right or wrong and has not occasioned a miscarriage of justice. See *Arisa v. The State* (1988) 7 SC (pt.1) 52 at 63. If I must, let me say

it loud and clear here that the instant verdict has not occasioned any miscarriage of justice. There can be no doubt, therefore, if I may again reiterate at it is incumbent on the prosecution on the defence of accident having been raised by the accused in this case and rightly rejected in my view to show all the same that the accused intended
 B by his conduct to produce the consequence set forth in the defining section of the instant crime preferred against him, this is in consonance with the presumption in our law that the accused intends the natural and probable consequence of his conduct, in this case to kill
 C or cause grievous bodily harm to the deceased. However, the onus to disprove the defence of accident is never on the accused but always on the prosecution. It is settled all the same that the presumption is rebuttable by direct evidence hence I have adverted to the evidence of the witnesses of the prosecution and the defence. See R
 D v. Amponsah and Ors 4 WACA 120, where the court stated the principle thus:

“the presumption of intention was rebuttable if the appellant believed that the assaults would probably not cause or contribute to the death of the deceased.”

E Sequel to this principle and as I have demonstrated above the presumption has not been rebutted or negatived in the instant case and I do not see how the accused could ever believe that shooting the deceased on the head in the circumstances in which this crime is
 F situated would probably not cause the deceased’s death. The two lower courts therefore rightly - in my view have found the accused guilty of murder as the defence of accidental discharge cannot on the peculiar facts of this case avail the appellant. The prosecution has otherwise proved their case beyond reasonable doubt.

G In summary, therefore, to raise the defence of accidental discharge here is quite incomprehensible to me in the scenario in which the death of the accused has occurred having considered the circumstances of this case particularly taking into account the nature of the weapon used in causing it, that is, a gun -a dangerous weapon any
 H day for that matter, the apparent excessive force used in silencing the deceased over a simple innocuous direction by the deceased to the accused and the other passengers to move to another spot to urinate as urinating at a certain spot near the Texaco Petrol Filling Station (in

Potiskum) is prohibited - this is the singular act that has led to this unfortunate incident and even then the part of the accused's body (that is the deceased's head) hit by the bullet discharged from the accused's gun resulting instantaneously in his death speak for themselves. It would be stretching the defence of accident too far to say the least, indeed to a breaking point to suggest that the death of the deceased in the circumstances is accidental and that the act by which it is caused is not done with the intention to kill the deceased instantly or cause him grievous bodily harm. Again, it would be hard if not naive to suggest on the evidence before the trial court that the appellant did not believe that shooting the accused on the head would not cause his death nor grievous harm. Therefore, the conviction of the appellant has met the justice of the case on the prosecution having proved its case beyond reasonable doubt.

I must however admonish here that enough is enough of the type of raw killings which the police have timidly termed as deaths from accidental discharges. Our law reports are replete with such cases. Even then who otherwise is being fooled as it were, by such warped defence to obvious cases of culpable homicide, certainly not the courts nor any longer the public they are paid to protect. It is time the police did a volte-face to this type of crimes if they have to start the process of salvaging their steadily waning image in this country.

It is for the above reasons and the much fuller reasoning and conclusions reached by my learned brother Aderemi JSC in the lead judgment which I have read before now that I agree with him that the appeal is totally devoid of any merit whatsoever and should be dismissed. I dismiss it in its entirety. I abide by the orders in the lead judgment.

G

H