

SUPREME COURT OF NIGERIA
FRIDAY 17TH JANUARY, 2014. SC. 268/2009
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, S. GALADIMA, N. S. NGWUTA,
K. M. O. KEKERE-EKUN, JJSC**

CHARLES EGBIRIKA APPELLANT
V.
THE STATE RESPONDENT

APPEALS - Grounds - Particulars of - Where particulars of a ground are inconsistent with main complaint in the ground - The particulars must be discountenanced (H1)

APPEALS - Issues - Proliferation of - Is frowned upon by appellate courts - As an issue may be distilled from more than one ground - But it is improper to formulate more than one issue from a ground (H2)

MANSLAUGHTER - Proof - Shosimbo v. State - It is not necessary to prove any intent to kill or do grievous bodily harm - Provided there is proof that unlawful act of accused - Caused some harm to deceased - Which harm caused his death (H3)

CRIMINAL PROCEDURE - Tainted witness - Meaning - Is a witness who may or may not be an accomplice - But who by evidence he gives - May be regarded as having some purpose of his own to serve (H4)

EVIDENCE - Prosecution witness - Testimony of - Admissibility - The courts rightly relied on testimony of PW 1 - Which was unshaken under cross exam - As there is no sufficient ground to allege that he is tainted witness (H5)

CRIMINAL PROCEDURE - Proof - Burden of - Under EA s. 135(1) onus is on prosecution to establish his case beyond reasonable doubt - And if he discharges the onus - Burden of proving reasonable doubt shifts to accused by virtue of EA s. 135(3) (H6)

CRIMINAL PROCEDURE - Proof - Evidential burden - Onus may be placed on either prosecution or defence - But where burden placed on a party in respect of an issue is not discharged - The issue would be resolved against the party (H7)

MANSLAUGHTER - Proof - Direct evidence - Testimony of PW1 as to what he saw and heard during the incident - And appellant's extra judicial statement - Point to the fact that deceased died as a result of gunshot wound inflicted by appellant (H8)

FACTS

Accused/appellant was charged before the High Court of Ogun State Abeokuta, for the offence of manslaughter contrary to section 235 of Criminal Code Law Cap 29 Laws of Ogun State. He pleaded not guilty to the charge. Prosecution/respondent's case is that appellant fired gunshot at Saidi Ojodu (the deceased) thereby causing his death. Appellant was among a team of policemen on duty at a location in Abeokuta town on the fateful night. From the evidence, appellant had conducted a search on a boy allegedly in possession of firearm. Thereafter, the patrol vehicle of the policemen was stoned by some boys among who was the deceased. As a result of this, the policemen went after the boys. In the process, the deceased threw a stone at appellant who was at the forefront of the chase.

Following this, appellant cocked his rifle and shot the deceased who later died as a result of gunshot wound he sustained. Appellant was arrested and his extra judicial statement taken. At the trial, respondent called four witnesses including PW1 (a member of the team of policemen on duty on the fateful night), who gave a vivid account of all that transpired at the crime scene. In his defence, appellant raised an issue of accidental discharge when he was trying to apprehend the stone throwing youths. He called no witness in support of his case. In his judgment, the learned trial Judge convicted appellant for manslaughter and sentenced him to five years imprisonment. Appellant was dissatisfied and he appealed unsuccessfully to the Court of Appeal Ibadan Division. Further dissatisfied, appellant appealed to Supreme Court.

ISSUE FOR DETERMINATION

1. Whether the prosecution proved a case of manslaughter against the appellant sufficient to warrant a conviction by the trial court?

HELD (Unanimously dismissing the appeal per **KEKERE-EKUN JSC**)

APPEALS - Grounds - Particulars of

1. The law is settled that the particulars of a ground of appeal must not be an independent complaint from the ground of appeal itself but should be ancillary to it. Where the particulars of a ground are inconsistent with the main complaint in the ground, the particulars must be discountenanced. Particular (b) under ground 1 of the Notice of Appeal is hereby struck out for being incompetent. (p. 132 D)

APPEALS - Issues - Proliferation of

2. With regard to the formulation of two issues from Ground 1 of the notice of appeal, it is by now well settled that the proliferation of issues for determination is always frowned upon by the appellate courts. While an issue for determination may be distilled from more than one ground of appeal, it is improper to formulate more than one issue from a single ground of appeal. A ground of appeal must also be predicated upon the decision appealed against. (p. 132 F)

MANSLAUGHTER - Proof

3. The position of the law is that no matter how reckless the conduct of the accused might be, so long as the killing that resulted from his act was not intended, the act would not fall within the provision of Section 316 of the Criminal Code and therefore would not constitute murder. See also *Shosimbo v. The State* (1974) All NLR 603; (1974) 10 SC 69 wherein it was held that in establishing the offence of manslaughter, it is not necessary to prove any intent to kill or do grievous bodily harm provided there is proof that the unlawful act of the ac-

cused caused some harm to the deceased, which harm caused his death. (p. 141 E)

CRIMINAL PROCEDURE - Tainted witness - Meaning

4. Learned counsel for the appellant urged us to disregard the evidence of PW1 on the ground that he is a tainted witness. It has been held that a tainted witness is a witness who may or may not be an accomplice but who by the evidence he gives (whether as witness for the prosecution or for the defence) may be regarded as having some purpose of his own to serve.
C (p. 145 B)

EVIDENCE - Prosecution witness - Testimony of - Admissibility

5. It is significant that the testimony of PW1 was unshaken under cross-examination.
D

No question was put to him to suggest that he had any interest to serve other than to state what he knew of events of the fateful day. The mere fact that he was a member of the team ordered to chase the young boys is not sufficient ground for alleging that he is a tainted witness or that he was not competent to testify. His evidence was cogent and credible and the two lower courts were right to place reliance on it. Thus the cause of death and the fact that the death occurred as a result of the act of the appellant were proved beyond reasonable doubt.
F (p. 145 D)

CRIMINAL PROCEDURE - Proof - Burden of

6. The duty of the prosecution is to establish its case against the accused person beyond reasonable doubt as enjoined by Section 135 (1) of the Evidence Act 2011 (as amended). Section 135 (3) of the Act provides that if the prosecution proves the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt shifts to the defendant. The position of the law is that the legal burden of proving its case against the accused person beyond reasonable doubt rests squarely on the prosecution and never shifts.
H (p. 146 A)

CRIMINAL PROCEDURE - Proof - Evidential burden

7. However the burden of introducing evidence on an issue, known as the evidential burden, may be placed by law on either the prosecution or the defence depending on the facts and circumstances of the case. Where the evidential burden placed on a party in respect of a particular issue is not discharged, the issue would be resolved against the party without much ado. (p. 146 C) B

MANSLAUGHTER - Proof - Direct evidence

8. It was also argued that there was no eyewitness to the incident and the appellant's conviction was based on circumstantial evidence, which was not cogent or sufficient to warrant a finding of guilt against him. Learned counsel for the respondent however was of the view that the evidence of PW1 and Exhibit 1 (the appellant's extra judicial statement), which the trial court relied on qualify as direct evidence of what transpired at the time of the shooting. I am inclined to agree with learned counsel for the respondent that the evidence led by the prosecution was not circumstantial. PW1 testified as to what he saw and heard during the incident, as a member of the team and one of those actually involved in chasing the suspects along with the appellant. The appellant's extra judicial statement (Exhibit 1), which formed part of the prosecution's case also gave a vivid account of what transpired on the day. There was no doubt as to the fact that the deceased died as a result of a gun shot wound inflicted by the appellant; that during the pursuit of the stone throwing youths the deceased had thrown a stone, which hit the appellant; that the shot was fired after the team leader had warned the appellant not to shoot. The two lower courts were therefore justified in relying on the said evidence in reaching their conclusions. The appellant failed to raise any doubt in the case made out against him by the prosecution. (p. 149 A) C
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NOTABLE POINT OF INTEREST
GALADIMA JSC

1. Manslaughter – Definition of

“Manslaughter” is defined in section 317 of the Criminal Code Law Cap.29, Laws of Ogun State of Nigeria 1978 thus:

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

- B In line with this definition, any unlawful killing of another, which is not excused by law and does not qualify as murder, because of the absence of mens rea for the offence of murder, in the circumstances of the case, is manslaughter. (p. 151 A)

C **REPRESENTATION**

OLAKUNLE AGBEBI ESQ., for the Appellant
ABIMBOLA AKEREDOLU ESQ., A.G. Ogun State with J. K. OMOTOSHO, D.D.P.P. Ogun State, for the Respondent

D **CASES REFERRED TO**

- Globe Fishing Ltd. v. Coker (1990) 7 NWLR (pt. 162) 265
Honika Sawmill (Nig.) Ltd. v. Hoff (1994) 2 NWLR (pt. 326) 252
Briggs v. C.L.O.R.S.N. (2005) 12 NWLR (pt. 938) 59
E Egbe v. Alhaji (1990) 1 NSCC (Vol. 21) (pt. 1) 306
Agbetoba v. Lagos State Executive Council (1991) 4 NWLR (pt. 188) 664
Igago v. State (1990) 14 NWLR (pt. 534) 1
Iweka v. S.C.O.A. (2000) 7 NWLR (pt. 664) 325
F Aigbedion v. State (2000) 7 NWLR (pt. 666) 686
Oguonzee v. State (1997) 8 NWLR (pt. 518) 585
State v. Ogunbanjo (2001) 1 SCNJ 86
Ejeka v. State (2003) 7 NWLR (pt. 819) 408
G Egwim v. State (1999) 13 NWLR (pt. 635) 338
Maiyaki v. State (2008) 15 NWLR (pt. 1109) 173
Onye v. State (1984) 10 SC 81
Chukwu v. State (1992) 1 NWLR (pt. 217) 255

H **STATUTES REFERRED TO**

Criminal Code Law Cap 29 Laws of Ogun State of Nigeria 1978, ss. 24, 235, 315, 316, 317
Constitution of the Federal Republic of Nigeria 1999, ss. 33(2), 36(1)(4)(5)

Evidence Act 2011 (as amended), s. 135(1)(3)

LEAD JUDGMENT BY KEKERE-EKUN JSC

This is an appeal against the judgment of the Court of Appeal, Ibadan Division (the lower court) delivered on 29th April 2009 dismissing the appellant's appeal and affirming the conviction and sentence passed on him by the High Court of Ogun State of Nigeria, sitting at Abeokuta (the trial court) delivered on 30th March, 2005. B

The appellant was arraigned before the trial court on 7/6/2003 on a single count of manslaughter contrary to Section 235 of the Criminal Code Law Cap 29 Laws of Ogun State of Nigeria 1978. C He pleaded not guilty to the charge. At the trial the prosecution called four witnesses. The appellant testified on his own behalf and did not call any witness. In a considered judgment delivered on 30/3/2005 the trial court found the appellant guilty of manslaughter and sentenced him to five years imprisonment. He was dissatisfied with the decision and appealed to the lower court, which court on 29/4/2009 affirmed the conviction and sentence and dismissed the appeal. Still dissatisfied the appellant has appealed to this court vide his notice of appeal filed on 14/7/2009 containing two grounds of appeal. The E grounds of appeal shorn of their particulars are:

1. That the learned Court of Appeal erred in law and in fact and thereby occasioned a miscarriage of justice when it upheld the decision by the learned trial court convicting the appellant of the offence of manslaughter and sentenced him to 5 (five) years imprisonment with hard labour without taking proper consideration of the prevailing circumstances and thereby failing to properly consider the defence of accident proffer (sic) by the appellant. F

2. The learned Court of Appeal erred in law in upholding the conviction of the appellant of the offence of manslaughter when it held that the doubt arising from the prosecution's case at the trial court amounted to "*fanciful possibilities*" and thereby failed to resolve the doubt as to how the appellant's service rifle discharged in favour of the appellant. H

Pursuant to an order of this court made on 29/4/2010 the appellant was granted leave to argue a fresh issue on appeal. However, he did not file a separate ground of appeal to cover the issue. Nor did he file an amended Notice of Appeal incorporating the fresh

issue. I shall comment on the implications of this procedure anon.

The parties duly filed and exchanged briefs of argument in compliance with the rules of this court. OLAKUNLE AGBEBI ESQ. settled the appellant's brief filed on 19/5/2010. Therein he distilled two issues for determination:

B 1. Whether the prosecution proved a case of manslaughter against the appellant sufficient to warrant a conviction by the trial court? (Grounds 1 & 2)

C 2. Whether the incident of the night of the 10th of November 2002 involving the deceased and his cohorts did not amount to an incident of riot as envisaged by Section 33 (2) of the Constitution of the Federal Republic of Nigeria 1999 the effect of which absolves the appellant completely considering the circumstances of the case? (Ground 1)

D The respondent also formulated two issues for determination in its brief of argument filed on 22/10/10 and settled by AKIN OSINBAJO ESQ" the erstwhile Hon. Attorney-General of Ogun State. They are almost identical to the issues formulated by the appellant. I do not deem it necessary to reproduce them. At the hearing of the
E appeal on 24/10/2013 OLAKUNLE AGBEBI ESQ. adopted and relied on the appellant's brief and urged the court to allow the appeal, set aside the conviction and sentence of the appellant and enter a verdict of discharge and acquittal. ABIMBOLA AKEREDOLU ESQ"
F the Hon. Attorney General of Ogun State adopted and relied on the respondent's brief and made some brief submissions in further adumbration of the arguments therein. They will be addressed as appropriate in the course of the judgment. She urged the court to dismiss the appeal.

G Before going into the merits of the appeal, it is necessary at this stage to consider the issues for determination formulated by the appellant. At a glance, it can be seen that two issues have been formulated from Ground 1 of the notice of appeal. In respect of issue 2 above, learned counsel for the appellant stated thus at page 26
H paragraph 7.03 of his brief:

"My Lords, although this argument was proffered at the court below as a separate ground of appeal, it was not considered because the appellant did not seek leave to raise a fresh issue on appeal. The appellant herein has however sought leave to argue this issue as a

fresh issue arising from Ground I of the grounds of appeal now before your Lordships.”

The application referred to was granted on 29/4/2010. The appellant was given 21 days to file a fresh notice of appeal. It was duly filed on 19/5/2010. It is identical to the original notice of appeal referred to earlier. It is worthy of note that the appellant’s Issue 2 for the determination of the appeal is derived from particular (b) Under Ground 1 of the notice of appeal. Ground 1 in its entirety reads:

“Ground One

That the learned Court of Appeal erred in law and in fact and thereby occasioned a miscarriage of justice when it upheld the decision of the learned trial court convicting the appellant of the offence of manslaughter and sentenced him to 5 (five) years imprisonment with hard labour without taking proper consideration of the prevailing circumstances and thereby failing to properly consider the defence of accident proffer (sic) by the appellant.

Particulars of Error

a. The learned Court of Appeal did not consider the fact that the appellant was carrying out his lawful duty and was in lawful possession of the firearm which accidentally discharged while the appellant was in hot pursuit of the deceased to arrest him.

b. The learned Court of Appeal failed to consider the fact that the facts stated in paragraph (a) above occurred moments after a report of a person being in possession of firearms had been investigated by the team of police men including the appellant. It is the evidence of all the witnesses that some of the individuals (especially one of those involved in the firearms allegation investigated by the appellant PW1 and their colleagues) perpetuated physical assault on the appellant and his colleagues in the performance of their lawful duty and conducted themselves in a riotous manner by hauling missiles at the policemen (including the appellant) at about 11.00 pm in the night.

c. The learned Court of Appeal failed to consider the fact that the corking (sic) of the appellant’s gun was a reflex action of self preservation and was done during the incident that occur (sic) on the night of 10th of November, 2002 and therefore falls under the provision of Section 24 of the Criminal Code (cap 29) Laws of Ogun State of Nigeria, 1978.” (Emphasis supplied)

There is no doubt that particular (b) constitutes an independent complaint which ought to be the subject of a separate ground of appeal, as it does not relate to the ground of appeal under which it is formulated, which complains of failure of the court below to consider the defence of accident. The appellant's contention is that there was an accidental discharge of his firearm. This is a completely different situation from a riot situation envisaged by Section 33 (2) (c) of the 1999 Constitution, which provides:

"33 (2) A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law of such force as is reasonably necessary -

(c) for the purpose of suppressing a riot, insurrection or mutiny."

Under Section 33 (2) (c) of the 1999 constitution (as amended) a killing, which occurs under any of the circumstances stated therein would be justified whereas a defence of accident relies on the involuntariness of the act. ***The law is settled that the particulars of a ground of appeal must not be an independent complaint from the ground of appeal itself but should be ancillary to it. Where the particulars of a ground are inconsistent with the main complaint in the ground, the particulars must be discountenanced.*** See *Globe Fishing Ltd. V. Coker* (1990) 7 NWLR (Pt.162) 265; *Honika Sawmill (Nig.) Ltd. V. Hoff* (1994) 2 NWLR (Pt.326) 252; *Briggs Vs C.L.O.R.S.N.* (2005) 12 NWLR (Pt.938) 59. ***Particular (b) under ground 1 of the Notice of Appeal is hereby struck out for being incompetent.***

With regard to the formulation of two issues from Ground 1 of the notice of appeal, it is by now well settled that the proliferation of issues for determination is always frowned upon by the appellate courts. While an issue for determination may be distilled from more than one ground of appeal, it is improper to formulate more than one issue from a single ground of appeal. A ground of appeal must also be predicated upon the decision appealed against. As far back as 1990 this court in *Egbe V. Alhaji & Ors.* (1990) 1 NSCC (Vol. 21) (Part I) 306 @ 332 held:

"Issues for determination in the appeal must be consistent

and fall within the scope of the grounds of appeal filed. The issues cannot be formulated to be wider than the grounds of appeal from which they derive their existence. Indeed the grounds of appeal must relate to the decision and should be a challenge to the validity of the ratio of that decision.”

Also in Agbetoba V. Lagos State Executive Council (1991) 4 B NWLR (Pt.188) 664; (1991) 6 SCNJ 1 @ 12, Karibi-Whyte, JSC stated:

“This court has consistently and in several decisions advised counsel formulating issues for determination arising from grounds of appeal to avoid prolixity and keep closely within the confines of the grounds of appeal relied upon. The idea is to formulate an issue as encompassing more than one ground of appeal. It is not only undesirable but also confusing to split a ground of appeal into more than one issue. The practice of splitting grounds of appeal is likely to confuse consideration of principal issues with subsidiary issues”.

See also Leedo Presidential Hotel Ltd. v. B.O.N. (Nig.) Ltd. (1993) 1 NWLR (Pt.269) 334 @ 347 A - C; Iweka v. S.C.O.A. (2000) 7 NWLR (pt. 664) 325; Mozie v. Mbamalu (2006) 15 NWLR (1003) 417 NWLR (Pt.1221) 181.

In the instant case, the appellant's Issue 1 is distilled from grounds 1 and 2 of the notice of appeal while Issue 2 is also distilled from ground 1. In other words the appellant has formulated two issues from a single ground of appeal. As there is no separate ground of appeal upon which issue two can be predicated, the said issue is incompetent. It is accordingly struck out. The appellant's issue 1, which is derived from grounds 1 and 2 of the notice of appeal is sufficient to dispose of this appeal.

A brief summary of the facts that led to this appeal is appropriate at this stage. On the night of 10/11/2002 at about 10.20 pm the appellant was among a team of policeman on “Operation Fire-for-Fire Stop and Search Duty”. In the course of their duty at Quarry Road, around Agbeloba Area, Abeokuta the appellant had cause to search a boy alleged by his companion to be in possession of a firearm. However nothing was found on him and they were allowed to go. Later that night, the team of policemen was stoned by some people including one Saidi Ojodu (the deceased), who was the person earlier alleged by his companion to be in possession of a firearm. The

windscreen and side mirror of the patrol vehicle were broken. Following this, the team leader ordered that those throwing stones should be arrested.

While the team was in hot pursuit of the culprits, the deceased threw a stone, which hit the appellant who was at the front of the chase. The appellant then cocked his rifle and intensified the chase. In the process, a shot was fired from his rifle and the deceased fell down in a pool of his own blood. He later died. In his defence, the appellant denied firing his gun deliberately and claimed that it accidentally discharged when he was changing it from his right hand to his left in the process of trying to apprehend the suspect Saidi Ojodu (deceased) during the chase.

In support of the now sole issue for determination, OLAKUNLE AGBEBI ESQ., learned counsel for the appellant referred to Section 317 of the Criminal Code of Ogun State, which creates the offence of manslaughter and submitted that in order to secure a conviction the prosecution must prove the following elements beyond reasonable doubt:

1. The death of the deceased by the voluntary but negligent act of the accused; and

2. The absence of intent to cause such death or grievous bodily harm due to the circumstances of the act.

He submitted that to establish a charge of manslaughter, it must be proved not only that the act of the accused person could have caused the death of the deceased but that it did in fact cause the death. He submitted that since the appellant was being tried for manslaughter, which in his view, connotes negligence on his part, the prosecution had a duty to establish the nature of the negligence alleged. He referred to *R. V. Abengowe* (1936) 3 WACA 85. He submitted that there was no evidence of any act of negligence by the appellant in the events that led to the death of the deceased. He submitted that having regard to the prevailing circumstances on the night of the incident, rather than being negligent it was in fact prudent for the appellant to cock his gun and have it at the ready, as it was obvious that the stone throwing youths were up to no good. He submitted that the appellant was in legal possession of the firearm and was constitutionally empowered to use it for the purposes of law enforcement.

He submitted further that as a law enforcement officer it is within the scope of his duties to pursue and apprehend fleeing offenders. He stated that from the accounts of PW1 (a member of the team) and the appellant, the stone throwing youths including the deceased had damaged the police vehicle and were fleeing from the scene. He argued that the prosecution failed to lead evidence to prove (i) the proper way to handle a firearm whilst in pursuit of an offender; (ii) whether there was a procedure or protocol for handling firearms in such circumstances, which was not adhered to; and (iii) whether the appellant was negligent in the handling of his firearm. He submitted that these omissions raised a reasonable doubt as to the appellant's guilt, which ought to have been resolved in his favour.

Learned counsel submitted that the burden of proving the death of the deceased is the same, whether the offence is murder or manslaughter. He submitted that in the instant case there was no direct evidence in proof of the offence. He submitted that Exhibit 1 cannot be construed as being a confessional statement, as contended by PW3 because, while the appellant admitted carrying the rifle, which discharged accidentally, he never admitted unlawfully killing the deceased. He submitted that in circumstances such as the instant case great care must be taken before convicting on circumstantial evidence in order not to fall into serious error based on the fallibility of inference and mere unfortunate coincidence of circumstances.

On how to treat circumstantial evidence he referred to the textbook, *Wills on Circumstantial Evidence*, 7th edition at page 324 and the case of *Emperor v. Browruny* 39 I.C. 322 cited therein; also *Ijiofor V. The State* (2001) 22 WRN 1 @ 15 per Ejiwunmi, JSC. He submitted that the trial court must narrowly examine the circumstantial evidence available before convicting an accused person because where the circumstantial evidence is capable of any reasonable hypothesis other than that of the guilt of the accused, the court will not regard it as having the sufficient probative value to form the basis of a conviction. He referred to *Aigbedion v. The State* (2000) 7 NWLR (pt. 666) 686. He submitted that if the facts established are equally consistent with innocence and guilt, the accused is entitled to be acquitted.

He submitted that in the instant case there was no eyewitness account as to whether the death of the deceased was as a result of

the voluntary but negligent act of the appellant. He referred to the record of proceedings and the evidence of the prosecution witnesses. He noted that PW1, a police constable was at the scene of the incident but by his own admission did not see what transpired. He noted further that PW2 a relative who identified the corpse, PW3 who was assigned to investigate the case and PW4, a process server were not witnesses to the event. He submitted that PW1 being a member of the team should be regarded as a tainted witness who had a personal interest to serve i.e. to avoid probable sanction himself, and urged us to hold that his testimony was unreliable and ought not to have been considered in reaching a decision in the case. He submitted that in the absence of expert examination of the gun to ascertain whether it was in good working condition; expert opinion as to the improbability of the gun malfunctioning as alleged by the appellant; the operational procedure to be followed in such circumstances as transpired on the fateful day; medical evidence of the cause of death, among others, the prosecution could not be said to have discharged the burden of proof beyond reasonable doubt.

Another complaint on behalf of the appellant was that the learned trial Judge wrongly placed the burden of proof on the appellant when he held at pages 50 - 51 of the record that the appellant failed to lead evidence to show how the gun malfunctioned or how it simply discharged without any fault of his. He submitted that the authority of *Oguonzee v. The State* (1997) 8 NWLR (Pt. 518) 585 relied upon by the learned trial Judge cannot stand in the face of the provisions of Section 36(1), (4) and (5) of the 1999 Constitution. Rather he referred us to the case of: *The State v. Ogunbanjo* (2001) 1 SCNJ 86 @ 102 and submitted that mere presence at the scene of a crime or the mere opportunity to commit the crime does not constitute sufficient, cogent and unequivocal evidence to sustain a conviction for manslaughter. He submitted that the burden would only shift to the appellant after the prosecution has established that the appellant was negligent in the handling of his service rifle. He urged us to resolve this issue in the appellant's favour.

In reaction to the above submissions, AKIN OSINBAJO ESQ. the erstwhile Hon. Attorney General of Ogun State who settled the respondent's brief referred to the definition of manslaughter as contained in Section 317 of the Criminal Code, to wit:

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

He submitted that in line with the above definition any unlawful killing of another, which is not excused by law and which does not qualify as murder simply because the mens rea for the offence of murder was not present in the circumstances of the case, is undoubtedly manslaughter. He referred to the case of Ejeka v. The State (2003) 7 NWLR (pt.819) 408 @ 423 F - G wherein this court per Tobi, JSC stated thus:

“Manslaughter is an unintentional killing of a human being. Such a killing is not pre-meditated but accidental in the sense that it was not intentional.”

He submitted that in the circumstances of this case there was no lawful justification for the killing of the deceased who at the time of the killing was retreating and running away. In reaction to the contention that the appellant was not negligent and that there was no evidence to show that the death of the deceased was as a result of his voluntary but negligent act, learned counsel submitted that negligence in a given case might be inferred from the circumstances of the case. He referred to: Egwim v. The State (1999) 13 NWLR (Pt.635) 338 @ 353 paragraph E-F. He submitted that once the trial Judge found that the appellant had no lawful justification to kill the deceased, he rightly inferred negligence in the act of the appellant who shot a man who was retreating and was right in convicting the appellant for the offence of manslaughter. He noted that the lower court at page 133 of the record agreed with the finding of the learned trial Judge in this regard. He queried why the appellant did not un-cock his rifle if, as he stated, he had no intention to fire, when in fact he was in close proximity to the deceased.

He referred to the defence of accident as raised by the appellant under Section 24 of the Criminal Code Law of Ogun State, which provides:

“... a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or for an event which occurs by accident”.

He submitted that the test to be applied in determining whether or not the act of shooting in the circumstances of this case was an accident or not is objective and not subjective. He contended

that given the facts of this case it could not be said that the shooting of the deceased occurred independently of the exercise of the appellant's will or that it occurred by accident. He referred to the case of *Maiyaki v. State* (2008) 15 NWLR (Pt.1109) 173 @ 204 F & 215 B - D wherein this court held that -

B *"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*
C *done, to take reasonable precautions against it."*

He noted that the court further held that the word 'accident' as used in Section 24 of the Criminal Code refers to the result of an unwilling act and means an event without the fault of the person alleged to have caused it. He submitted that it is a sudden and unexpected event taking place upon the instant not as a result of the act intended by the accused person. He also relied on: *Igago v. The State* (1990) 14 NWLR (pt. 534) 1 @ 24; *Onye v. The State* (1984) 10 SC 81; *Chukwu v. State* (1992) 1 NWLR (Pt. 217) 255 per Karibi-Whyte JSC.

E Learned counsel argued that the act of the appellant was deliberate and he could therefore not take refuge under the defence of accident. He referred to: *Ademola v. The State* (1988) 1 NWLR (pt. 73) 683; *Uzoku V. The State* (1990) 6 NWLR (pt.159) 680. He
F was of the view that allowing the defence of accident to avail the appellant would be stretching the defence too far because from the evidence when he cocked his rifle he was cautioned and ordered not to shoot by his superior, but still proceeded to shoot. He submitted that while the court has a duty to consider all defences open to an
G accused person, the defences must be available on the evidence before the court or put up expressly or implied by him. He submitted that the appellant did not raise the defence of accident in his statement to the police. He cited the case of: *Akpabio V. State* (1994) 7 NWLR (Pt 359) 635 @ 697 B-C.

H With regard to the submission that the circumstantial evidence relied upon by the trial court in this case was not cogent enough, learned counsel observed that the learned trial judge placed great reliance on the evidence of PW1 and Exhibit 1, being the appellant's extra judicial statement. He submitted further that the evidence of

PW1 and that of the appellant qualifies as direct evidence of what transpired at the time of the shooting. He therefore argued that the prosecution's case was not based on circumstantial evidence alone as contended in the appellant's brief. He submitted further that assuming without conceding that the prosecution's case was based on circumstantial evidence, the circumstantial evidence before the court was cogent, direct and strong enough to warrant the appellant's conviction. He referred to: Mohammed V. The State (2007) 12 NWLR (pt.1050) 186 @ 204 and maintained that the evidence of PW1 and Exhibits 1 and 2 are sufficient for the appellant's conviction. He reiterated the fact that the prosecution is not required to prove its case beyond the shadow of a doubt.

He referred to: Shande V. The State (2005) 1 NWLR (pt. 907) 218 @ 239.

On the submission that there was no evidence that the gun the appellant carried on the day of the incident was in good condition, he submitted that it was never the respondent's case at the trial court that the gun fired accidentally. He stated that it was the appellant who testified that the gun discharged accidentally. He submitted that in the circumstances any evidence to establish that the gun malfunctioned ought to have been given by the appellant and that he was at liberty, if he deemed it necessary, to invite an expert to testify to that effect, which he failed to do. He contended that the alleged malfunction of the gun was a fact within the appellant's exclusive knowledge, which ought to have made him even more careful in handling it and certainly not cocking it. He argued further that it is presumed that he must have carried out a thorough examination of the gun when he took it from the armoury. He submitted that the lower court rightly concluded that the learned trial judge did not misdirect himself both in his judgment and in his reliance on the case of Oguonzee v. The State (1997) 8 NWLR (pt. 518) @ 585.

He submitted that all the hypothetical issues raised in the appellant's brief regarding the proper or improper handling of the appellant's gun do not arise in this case. He urged the court not to disturb the concurrent findings of the two lower courts.

In response to the submission that there was no evidence of the cause of death or the fact that it was the gunshot wound that caused the death of the deceased, he referred to the medical report

issued in respect of the death of the deceased, which was tendered before the trial court as Exhibit 2. He noted that in the said Exhibit 2 the doctor opined that the death of the deceased was caused by “hemorrhagic shock secondary to gunshot injury to the right side of the chest”. He submitted that this evidence was uncontroverted as the medical report was admitted without objection. He rejected the argument that the learned trial judge called upon the appellant to establish his innocence and that the lower court fell into the same error. He submitted that all that the trial court did was to review the appellant’s evidence on the issue of accidental discharge and gave reasons, backed by judicial authorities, why the defence did not avail him. He submitted further that the learned Justices of the lower court simply stated that the appellant ought to have gone further to establish his defence of accidental discharge. He maintained that both lower courts showed that they were aware of their duty to consider the defences raised by the appellant, no matter how foolish they might be, and to determine whether they availed him or not.

On the submission of learned counsel for the appellant that judge erroneously placed reliance on the case of Oguonzee V. The State (supra), he submitted that in so far as the decision of the Court of Appeal in the case had not been over-ruled, it remained a good precedent for the trial court and the learned trial judge was right to have placed reliance on it. He submitted further that the learned Justices of the lower court did not find any reason to over-rule themselves and that the decision could not be faulted simply by the argument contained in learned counsel’s brief.

In conclusion he submitted that once the prosecution had established that the killing of the deceased by the appellant was not justifiable and the court found it to have been proved, the appellant was rightly convicted for the offence of manslaughter. He urged the court not to disturb the concurrent finding of the two lower courts and resolve the issue against the appellant and in favour of the respondent.

An appropriate place to start is a consideration of some of the relevant sections of the Criminal Code Cap. 29 Laws of Ogun State of Nigeria 1978. Section 315 of the Criminal Code provides:

“Any person who unlawfully kills another is guilty of an offence, which is called murder or manslaughter, according to the cir-

circumstances of the case.”

Section 316 sets out the circumstances in which an unlawful killing would amount to murder. Section 317 provides:

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

In a review of the above provisions this court in: *Apugo v. The State* (2007) 2 NCC 30 @ 41 E held per Onnoghen, JSC:

“From the above provisions of Section 315 of the Criminal Code it is very clear that for a killing to amount to manslaughter it must not only be unauthorised or unjustified or not excused by law, it must also result from the direct or indirect act of the accused person. In short the death must be caused by the unlawful act of the accused person.”

In the case of *Uyo V. A.G., Bendel State* (1986) 1 NWLR (pt. 17) 418; (1986) All NLR 126 this court referred to and relied upon the dictum of the West African Court of Appeal (WACA) in *R. v. Oledinma* (1940) 6 WACA 202 that:

“To establish a charge of murder or manslaughter, it must be proved not merely that the act of the accused could have caused the death of the deceased but that it did”

The position of the law is that no matter how reckless the conduct of the accused might be, so long as the killing that resulted from his act was not intended, the act would not fall within the provision of Section 316 of the Criminal Code and therefore would not constitute murder. See Omini V. The State (1999) 12 NWLR (pt.630) 168 @ 182 A. ***See also Shosimbo v. The State*** (1974) All NLR 603; (1974) 10 SC 69 ***wherein it was held that in establishing the offence of manslaughter, it is not necessary to prove any intent to kill or do grievous bodily harm provided there is proof that the unlawful act of the accused caused some harm to the deceased, which harm caused his death.*** See also: *R. V. Church* (1965) 2 ALL ER 72.

Relying on the authority of *R. V. Abengowe* (1936) 3 WACA 85, learned counsel for the appellant has argued that negligence is an essential ingredient of the offence of manslaughter and that in the circumstances of this case the prosecution did not allege or prove any form of negligence in the handling of the appellant’s firearm. It is pertinent to note that while negligence might be a feature in some

cases of manslaughter it is not so in every case. For instance the death of the deceased might occur in a situation where the act of the accused was deliberate but not intended to cause grievous harm or death, as for instance where in the course of an argument the accused hits the deceased who loses his footing, slips and hits his head on a hard object and dies. In such a situation there is no element of negligence but death has occurred as a result of the act of the accused. The killing in the circumstance is unlawful, not being justified in law. Depending on the facts of the case, the defence of accident might however avail the accused if the requirements of Section 24 of the Criminal Code are satisfied.

The case of *R. V. Abengowe* (supra) is not on all fours with this case because in that case the accused person was specifically charged with “*manslaughter by negligence*”. In *Ejeka V. The State* (2003) 7 NWLR (Pt. 819) 408 @ 423 F, this court per Tobi, JSC held:

“Manslaughter is an unintentional killing of a human being. Such a killing is not pre-meditated but accidental, in the sense that it was not intentional.”

The duty of the prosecution in this case was to prove that there was no lawful justification for the killing of the deceased. The trial court reviewed the evidence led by both the prosecution and the defence, particularly the testimonies of PW1 and the appellant (DW1) and came to the conclusion that the prosecution had established its case beyond reasonable doubt. In order to appreciate the finding of the lower court, it is relevant at this stage to reproduce in extension some portions of the judgment of the lower court. At pages 129 - 131 of the record the court stated:

“In the instance (sic) appeal, it is necessary to re-examine the relevant evidence since the appellant is complaining that there is no evidence to prove that he committed the offence of manslaughter. The relevant evidence adduced at the trial court are that of PW1 and DW1 as well as Exhibits 1 and 2. PW1 testified as contained at pages 16 - 19 as follows:

“Myself and others were assigned to Operation Fire For Fire Stop and Search Duty on the aid day. While on duty at the point we saw two boys approaching. One of the boys on moving close to the accused person informed him that he suspected his companion to be

in possession of unlawful weapon, firearms. The accused person informed the team leader of what he was told and the team leader directed that the boys be brought for searching. The two boys were searched with the accused person being the one that searched the boys suspected to be in possession of firearms; however nothing was recovered from either of them and the accused asked them to go away. Later we saw stones being thrown from the direction taken by the boys who was (sic) alleged to have firearms in his possession. The stones broke the windscreen and side mirror of the patrol vehicle.

This led to the instruction from the team leader that we should effect the arrest of one or two of the person (sic) throwing stones as they started running away immediately they broke the windscreen and side mirror of the patrol vehicle. We complied with the direction and ran after the boys in order to arrest them. In the process the deceased picked up a stone and threw it at the accused person. The deceased was one of those throwing stones. His name was Saidi Ojodu. The stone hit the accused person and the accused thereafter started chasing the deceased. He corked (sic) his rifle in the process. The team leader at this point shouted “don’t fire” twice. By this time both the team leader and myself were running after the accused person but before we could catch up with him, we heard the sound of a gun shot. On catching up with the accused, we saw the deceased lying down in a pool of his blood. The team leader then asked the accused his reason for firing but he remained mute. When we got to the station, the DPO ordered that the accused person be disarmed. This was down (sic) and the bullets inside his magazine were counted and found to be 29 instead of 30. I believe the deceased assaulted the accused by throwing the stone that hit him at him.”

DW1 testified as contained at pages 27, 28, 29 and 30 as follows:-

“Myself and the leader of the team each booked for an AK 47 rifle and 30 rounds of live ammunitions. In the course of the attack, the windscreen on the patrol vehicle was broken. Likewise the side mirror. The patrol vehicle was an Isuzu Pick Up van and we stood behind it in order to avoid the stones. At this point the team leader said we should be at alert and he corked (sic) his rifle while I too corked (sic) mine. After pursuing them for about 75 yards, I was close enough to grab the deceased of his shirt; it was while I was

changing my rifle from the right hand to the left hand in order that I could grab the deceased with my right hand that the said rifle accidentally discharged. I was alone with the deceased at this point. Initially I thought that someone had shot at me from the bush but on seeing the deceased slump and on examining him, I discovered that he was hit by the accidental discharge from my rifle. I then started to cry and it was at this point that the team leader and PW1 arrived at the scene. The team leader asked for what happened but I was not in a condition to speak.

I joined the Police Force on 1/7/79. I was 23 years 3 months and 70 days in the Force prior to the occurrence of the incident. I have been handling guns since 1979 when I was a constable. PW1 was there when myself and the team leader corked (sic) our rifles. While running I held my rifle in the middle.

This is how I am supposed to hold it when it is not intended to be put to use. The bullet from my gun hit the deceased on his left side on the back. I have been using an AK 47 rifle for more than a year prior to the incident. No other gun was fired apart from the shot discharged by my rifle. I did not deliberately shoot the deceased. I did not need to have pursued him if I wanted to shoot him deliberately. I would have picked him up with the rifle.” (Emphasis supplied).

On proof of the fact that the act of the appellant caused the death of the deceased, the trial court at page 42 of the record held thus:

“Suffice it to say that the medical practitioner opined in Exhibit 2 that the death of Saidi Ojodu was caused by “hemorrhagic shock secondary to gun shot injury to the right side of the chest”. The evidence of the accused person had earlier been reviewed. He definitely did not controvert or deny the fact that the deceased whom he later knew to be Saidi Ojodu sustained an injury on being hit by the discharge from the AK 47 rifle he (i.e. accused person) had with him while pursuing the aid Saidi Ojodu on 10/11/2002. Given the testimonies of PWs 1 and 2 highlighted above, coupled with Exhibit 2, I cannot but say that the fact of the death of Saidi Ojodu due to gun shot injury has been established beyond reasonable doubt by the prosecution to (sic) and this I so find.” (Emphasis supplied).

The above finding was affirmed by the lower court when it

held that the post mortem examination report (Exhibit 2) having been admitted in evidence without cross-examination or objection, the medical doctor's conclusion that the deceased died as a result of the fatal gunshot fired by the appellant was strong and reliable. There is no appeal against this specific finding of the two lower courts. Indeed the appellant himself in the underlined portion of his testimony reproduced above admitted that it was the shot from his rifle that hit the deceased and that no other gun was fired during the incident. B

Learned counsel for the appellant urged us to disregard the evidence of PW1 on the ground that he is a tainted witness. It has been held that a tainted witness is a witness who may or may not be an accomplice but who by the evidence he gives (whether as witness for the prosecution or for the defence) may be regarded as having some purpose of his own to serve. See Oguonzee v. The State (1998) 5 NWLR (pt. 551) 521 @ 554 F, Ishola v. The State (1978) NSCC 499 @ 509, Omotola & Ors. v. The State (2009) 2 - 3 SC 7: (2009) 7 NWLR (Pt. 1139) 148. ***It is significant that the testimony of PW1 was unshaken under cross-examination.*** C D

No question was put to him to suggest that he had any interest to serve other than to state what he knew of events of the fateful day. The mere fact that he was a member of the team ordered to chase the young boys is not sufficient ground for alleging that he is a tainted witness or that he was not competent to testify. His evidence was cogent and credible and the two lower courts were right to place reliance on it. Thus the cause of death and the fact that the death occurred as a result of the act of the appellant were proved beyond reasonable doubt. E F G

The next consideration is the contention of the appellant that the burden was on the prosecution to prove that he was negligent in the handling of his firearm on the fateful day and that the burden was wrongly placed on him to establish his innocence. It is contended that if the lower court had properly reviewed the circumstantial evidence upon which the trial court based the appellant's conviction it would have found facts and circumstances consistent with the appellant's innocence. It must be pointed out at this stage that it was the appellant who raised the issue of the malfunction of his rifle in his H

defence. The case of the prosecution was that the appellant shot and fatally wounded the deceased and that there was no lawful justification for the killing having regard to the facts and circumstances of the case.

The duty of the prosecution is to establish its case against the accused person beyond reasonable doubt as enjoined by Section 135 (1) of the Evidence Act 2011 (as amended). Section 135 (3) of the Act provides that if the prosecution proves the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt shifts to the defendant. The position of the law is that the legal burden of proving its case against the accused person beyond reasonable doubt rests squarely on the prosecution and never shifts. However the burden of introducing evidence on an issue, known as the evidential burden, may be placed by law on either the prosecution or the defence depending on the facts and circumstances of the case. See: Esangbedo V. The State (1989) NWLR (Pt.113) 57 @ 69 - 70 H – A.; Woolmington V. D.P.P. (1935) A.C. 462. ***Where the evidential burden placed on a party in respect of a particular issue is not discharged, the issue would be resolved against the party without much ado.*** See Esangbedo V. The State (supra) at page 70 B- C. It was explained in Esangbedo’s case (supra) at page 70 E - F that where, for example, a defence of alibi is raised, the ultimate or legal burden remains on the prosecution to establish the guilt of the accused person beyond reasonable doubt. However the evidential burden of eliciting or bringing evidence in respect of his defence of alibi is on the accused. By raising the defence of alibi, the accused person is not seeking to prove his innocence but to raise a doubt as to what might otherwise have been a foolproof case by the prosecution.

It is also appropriate at this stage to consider the defence of accident raised by the appellant. Section 24 of the Criminal Code Cap. 29 Laws of Ogun State of Nigeria 1978 provides:

H “Section 24. Subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will or for an event which occurs by accident. Unless the intention to cause a particular result is expressly declared to

be an element of the offence constituted, in whole or in part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.”

This section of the Criminal Code was interpreted in the case of Adekunle v. The State (2006) 14 NWLR (pt. 1000) 717 where it was held that the test for the defence under the section is whether the prohibited act was or was not done accidentally or independently of the exercise of the will of the accused person. See also: Maiyaki v. The State (supra); Igago v. The State (supra); Onye v. The State (supra).

Applying these principles to the instant case the lower court at page 15 of the record held:

“The defence of the appellant, that it was accidental discharge, is clearly to be proved or established by the appellant. In other words, the onus of proof is on the appellant and not the respondent as erroneously argued by learned counsel for the appellant. The appellant stated that the gun was (sic) automatically discharged by itself and shot the deceased. The appellant should have gone further by proving that the gun was not functional or something caused the gun to trigger by itself which he failed to do when testifying. He should have asked at the onset that he would like to call an expert in rifle functioning i.e. a ballisticsian to examine the AK 47 rifle in particular, but the appellant failed to call any other witness for his defence. It was therefore proper and well considered when the trial Judge reviewed the appellant’s evidence that the appellant unlawfully killed another person. The trial Judge gave sound reasons based on why the defence of accidental discharge was not available to the appellant... it is to be noted that PW1 had clearly stated on oath that the appellant corked (sic) his rifle. The appellant admitted this fact that he and the team leader also corked (sic) their respective rifles when pursuing the stone throwing youth. The fatal question therefore is why corking (sic) a powerful rifle filled with 30 rounds of live fatal ammunition against a youth on whom there was no any weapon found?”

The lower court concluded that the learned trial Judge was

correct when he relied on the evidence of PW1 and DW1 and Exhibits 1 and 2 in holding that the prosecution had proved its case beyond reasonable doubt. The court noted that the appellant had failed to establish any lawful justification for the fatal shot that killed the deceased.

B A careful examination of the portion of the judgment reproduced above shows that the contention of the lower court, and indeed the trial court, was that having raised the issue of accidental discharge arising from the malfunctioning of the rifle, the appellant
C had the evidential burden of introducing evidence that would raise doubt in the prosecution's case. He was not called upon; as contended by learned counsel, to prove his innocence. The prosecution had established that after being hit by a stone allegedly thrown by the deceased, the appellant cocked his gun and intensified the chase
D of the deceased; that the deceased was running away i.e. he was in retreat when the appellant fired the shot that killed him; and that the team leader cautioned him twice not to fire. The prosecution had also established that the killing in the circumstances was unlawful and unjustified. His defence was that it was in the process of changing his
E rifle from his right hand to his left hand that the rifle accidentally discharged. In the face of the established facts, the appellant had the evidential burden of establishing any fact that would raise doubt in the mind of the court as to the case made out by the prosecution. He
F failed to do so.

I agree with the lower court that there is no basis for the contention of learned counsel for the appellant as raised in paragraph 6.40 (a) - (j) of his brief that the prosecution ought to have proved all the scenarios referred to therein before it could be said
G that it had proved its case beyond reasonable doubt. Most of the issues raised in paragraphs (a) - (g) relating to the alleged accidental discharge and alleged malfunction of the rifle were facts within the appellant's knowledge. He had a duty to provide evidence, no matter how minimal, to support his assertions. With regard to the issues
H raised in paragraphs (h) - (j) regarding the cause of death and the whether it was proved that it was the shot from the appellant's gun that killed the deceased, the issue had been resolved earlier in this judgment to the effect that there was no appeal against the findings of the two lower courts as to the cause of death and the fact that it

was the act of the appellant that led to the death of the deceased.

It was also argued that there was no eyewitness to the incident and the appellant's conviction was based on circumstantial evidence, which was not cogent or sufficient to warrant a finding of guilt against him. Learned counsel for the respondent however was of the view that the evidence of PW1 and Exhibit 1 (the appellant's extra judicial statement), which the trial court relied on qualify as direct evidence of what transpired at the time of the shooting. I am inclined to agree with learned counsel for the respondent that the evidence led by the prosecution was not circumstantial. PW1 testified as to what he saw and heard during the incident, as a member of the team and one of those actually involved in chasing the suspects along with the appellant. The appellant's extra judicial statement (Exhibit 1), which formed part of the prosecution's case also gave a vivid account of what transpired on the day. There was no doubt as to the fact that the deceased died as a result of a gun shot wound inflicted by the appellant; that during the pursuit of the stone throwing youths the deceased had thrown a stone, which hit the appellant; that the shot was fired after the team leader had warned the appellant not to shoot. The two lower courts were therefore justified in relying on the said evidence in reaching their conclusions. The appellant failed to raise any doubt in the case made out against him by the prosecution.

Having failed to show that the concurrent findings of the two lower courts are perverse the sole issue for determination in this appeal is hereby resolved against the appellant and in favour of the respondent. The appeal accordingly lacks merit and is hereby dismissed. The judgment of the Court of Appeal, Ibadan Division delivered on 29/4/2009 affirming the conviction and sentence of the appellant for the offence of manslaughter is hereby upheld.

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother, KEKERE-EKUN, JSC just delivered.

I agree with his reasoning and conclusion that the appeal is

without merit and should be dismissed.

This appeal can at best be described as a typical act of a drowning man clinging to a straw for his dear life, an exercise in futility.

B My learned brother has exhaustively dealt with the only legitimate issue for determination in the appeal thereby leaving me with nothing useful to add.

I accordingly dismiss the appeal for lack of merit. Appeal dismissed.

C _____

GALADIMA JSC

I have had the privilege of reading in draft the Judgment of my learned brother KEKERE-EKUN JSC, just delivered. I am in complete agreement that the appeal lacks merit and it should be dismissed.

The Appellant has failed to show that the concurrent findings of the two lower Courts are perverse.

E The Appellants' first issue, which derived from Grounds 1 and 2 of the Notice of Appeal sufficiently disposes this appeal. It reads as follows:

F *"Whether the prosecution proved a case of manslaughter against the appellant sufficient to warrant a conviction by trial Court? (Grounds 1 and 2)".*

The Respondent's two issues formulated for determination are identical to those two issues formulated by the Appellant. It is however observed that the appellant has formulated more than one issue from a single ground of appeal. This unnecessary proliferation of issues for determination is frowned upon by this Court. As there is no separate ground of appeal upon which the second issue can be formulated, the issue is incompetent and is hereby struck out. The question therefore, is whether the prosecution has proved beyond reasonable doubt that the appellant negligently caused the death of the deceased.

Having regard to the prevailing circumstances on the night the deceased died, I cannot, with due respect, agree with the learned Counsel for the appellant that there was no evidence of any act of negligence by the appellant in the chain of events that led to the

death of the deceased.

“Manslaughter” is defined in section 317 of the Criminal Code Law Cap.29, Laws of Ogun State of Nigeria 1978 thus:

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

In line with this definition, any unlawful killing of another, which is not excused by law and does not qualify as murder, because of the absence of mens rea for the offence of murder, in the circumstances of the case, is manslaughter. In the circumstances of this case, there was no lawful justification for the killing of the deceased, where evidence has shown that at the time of the killing he was fleeing from the scene where the youth including the deceased had thrown stones and damaged the police vehicle.

In *EJEKA v. THE STATE* (2003) 7 NWLR (pt 819) 408 at 427, this Court stated thus:

“Manslaughter is unintentional killing of a human being. Such a killing is not pre-meditated but accidental in the sense that it was not intentional.”

See also: *MAIYAKI v. STATE* (2008) 15 NWLR (Pt 1109) 173 at 204.

Negligent act of the appellant in this case can be inferred from the prevailing circumstances. The learned trial Judge rightly inferred negligence in the act of the appellant who shot the deceased who was retreating. The Court below at page 133 of the record agreed with the finding of the learned trial Judge in this regard. The Appellant who was in close proximity to the deceased should have uncorked his rifle, if as he stated, he had no intention to fire it.

The defence of accident as raised by the appellant under Section 24 of the said Criminal Code Law of Ogun State. States thus. G

“...a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or an event which occurs by accident.”

Applying the objective test to this case in determining whether or not the shooting of the deceased was an accident or not, it cannot be said that the shooting of the deceased occurred independently of the exercise of the appellant’s will or by accident. In *MAIYAKI v. STATE* (supra) at page 204, this Court held as follows:

“An event 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."

B It is in the case of APUGO v. THE STATE (2007) 2 NCC. 32 at 41 this Court per my brother ONNOGHEN JSC, reviewed clearly the provisions of section 315 of the Criminal Code, (supra) when he held thus:

C *"From the above provisions of Section 315 of the Criminal Code it is very clear that for a killing to amount to manslaughter it must not only be unauthorized or unjustified or not excused by Law, it must also result from the direct or indirect act of the accused person. In short the death must be caused by the unlawful act of the accused person."*

D In the earlier case of UYO v. A-G BENDEL STATE (1936) 1 NWLR (pt 17) 418, this Court, referred and relied on dictum of an old West African Court of Appeal (WACA) in R v. OLEDINMA (1940) 6 WACA 202, to the effect that:

E *"To establish a charge of murder or manslaughter, it must be proved not merely that the act of the accused could have caused the death of the deceased but that it did."*

F Agreed, (on the authority of R v. ABENGOWE (1936) 3 WACA 85) while negligence is an essential ingredient of the offence of manslaughter, in some cases, it is not so in every case. For instance where the death of the deceased occurred by the deliberate act of the accused but he did not intend to cause grievous bodily harm or death, in such a situation there is no element of negligence but death had occurred as a result of the act of the accused person.

G My learned brother has given a simple but illustrative instance thus: where in the course of an argument the accused hits the deceased who loses his balance, slips and hits his skull on a hard object and dies; in such a situation, there is no element of negligence but death did occur as a result of the act of the accused, in the circumstance, the killing is unlawful as it is not justified in law. Section 24 of the Criminal Code, dealing with the defence of accident must be satisfied, depending on the fact of each case, before the accused can put up the defence of accident.

H In this case, it was the duty of the prosecution to prove that

there was no lawful justification for the killing of the deceased. See EJEKA v. STATE (supra).

At pages 129 to 131 the learned trial Judge carefully reviewed the evidence led by the prosecution and the defence (the testimonies of PW1 and DW1) respectively and concluded that the prosecution had established its case beyond reasonable doubt; and thus the lower Court affirmed the finding of the trial Court. It held that the post Mortem Examination Report (Exhibit 2) having been admitted in evidence Without cross-examination or objection, the Doctor's finding that the deceased died as a result of the fatal gunshot fired by appellant was established beyond reasonable doubt.

This is what the appellant himself had to say in his vital testimony:

"...The bullet from my gun hit the deceased on his left side on the back. I have been using an AK 47 rifle for more than a year prior to the incident no other gun was fired apart from the shot discharged by my rifle: I did not deliberately shoot the deceased."

I do not agree with the learned Counsel for the appellant that PW1 was a tainted witness whose evidence should be disregarded. The testimony of PW1 was in no way shaken under cross-examination to suggest that he had some purpose of his own to serve other than to state what he knew of what happened that fateful day. This evidence does not suggest that he had any interest to serve other than to state what he knew on that day, even as a member of the team that was instructed to chase away the boys throwing stones at the police vehicle.

On the defence of accidental discharge raised by the appellant under Section 24 of the Criminal Code (supra), the learned trial Judge has rightly held at page 15 of the record that the discharge was not accidental, in the circumstances of this case.

On the whole, this appeal lacks merit, it is hereby dismissed. The decision of the Court of Appeal Ibadan Division at 29/4/2009 which affirmed the conviction and sentence of the appellant for the offence of manslaughter is hereby upheld.

NGWUTA JSC

I read in advance the lead judgment just read by my learned

brother, Kekere-Ekun, JSC and I entirely agree with the reasoning and conclusion that the appeal is devoid of merit.

Accordingly, I also dismiss the appeal and affirm the decision of the Court below. Appeal dismissed.

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