

SUPREME COURT OF NIGERIA

FRIDAY 28TH MARCH, 2014. SC. 376/2010

**CORAM:- M. MOHAMMED, J. A. FABIYI, M. U. PETER-
ODILI, M. D. MUHAMMAD, K. M. O. KEKERE-EKUN, JJSC**

CHIEF SAIPEREMOR PREYE AMAREMOR APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL LAW - Accident - Defence - Inconsistencies in - Appellant's 3 separate statements reveal inconsistencies which ruled out event of accident - Hence they were rightly rejected by trial court and CA (H1)

MURDER - Ingredients - Proof - Prosecution must establish that deceased died - As a result of act of accused - Which act was intentional - With knowledge that death or grievous bodily harm was probable (H2)

CRIMINAL PROCEDURE - Proof - Number of witnesses - Prosecution has no duty to call all known material witnesses - Provided it calls those necessary to prove its case beyond reasonable doubt (H3)

MURDER - Evidence - Testimony of relation - Weight - Blood relation of deceased is not precluded from testifying for prosecution - As court considers the truthfulness of the witnesses - Touching on his credibility (H4)

APPEALS - Concurrent findings - Charge - Proof - Trial court and CA having by overwhelming evidence - Found the charge proved beyond reasonable doubt - Supreme Court will not interfere (H5)

FACTS

Accused/appellant was arraigned before the High Court of Bayelsa State for murder under section 319 of the Criminal Code Law of Eastern Nigeria 1963 applicable in Bayelsa State. From the case presented by prosecution/respondent, appellant (an armourer with the National Intelligence Agency) had while being summoned

by PW1 for a meeting in a village compound, unlawfully and without reason shot twice in the air and once at the deceased' chest with his service Beretta Pistol. The deceased immediately shouted that appellant has killed him. The deceased was rushed to a hospital where he was confirmed dead by a medical doctor. In his defence, appellant admitted killing the deceased but raised the defence of accident. He claimed that the shooting was an accidental discharge. But in another defence, appellant claimed that he hit his leg on a stone and fell down. That it was in the process that his fingers accidentally touched the trigger of the pistol which exploded in quick succession twice, hitting the deceased.

Appellant said he subsequently reported himself to the police and handed over the gun and the remaining rounds of ammunition to them. His statements (Exhibits A and J) were taken by the police. At the trial, respondent called PWs 1-6 in proof of his case. PW4 was however withdrawn by respondent. Appellant called one witness in his defence. Appellant in his own testimony before the court made inconsistent statements different from his earlier statements before the police as regards the shooting that killed the deceased. After the trial, the court rejected the defence of accident raised by appellant and held that respondent proved his case beyond reasonable doubt. Appellant was therefore convicted of murder and sentenced to death accordingly. Aggrieved, appellant went up to the Court of Appeal on an appeal. The appeal was dismissed leading to the filing of appeal in Supreme Court by appellant.

ISSUES FOR DETERMINATION

"1. Whether the defence of accident availed the Appellant by virtue of the provisions of S.24 of the Criminal Code.

2. Whether the essential elements of murder and the guilt of the Appellant were established beyond reasonable doubt as laid down by S.138(1) of the Evidence Act.

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

CRIMINAL LAW - Accident - Defence - Inconsistencies in

1. A very careful examination of the line of defence of acci-

dent put up by the Appellant in his three separate statements and his evidence in chief quoted above in this judgment, has revealed inconsistencies which ruled out any event of accident in them. While in Exhibit 'J' the Appellant described the shooting event as an accidental discharge which resulted in shooting the deceased who later died in the hospital took place during a weapon check, in Exhibit 'A' the story was that the shooting event took place when he stumbled on a stone when his service pistol fall off from his waist and as he bent down to pick it up, unknowingly his finger touched the trigger and the pistol exploded hitting the deceased on the chest leading to the death of the deceased. The version of the shooting event on the other hand in the evidence of the Appellant before the Court that as he was picking the pistol from the ground, his fingers touched the trigger and the pistol exploded in quick succession twice before he heard the deceased shouting. All these claims of alleged accidental discharge from the Appellant's service pistol cannot be true because even if it happened as the Appellant claimed the pistol exploding on the ground would not have resulted in striking the deceased in the chest who was standing. As the shots from the exploded pistol on the ground could only have gone horizontally along the ground to meet its possible target on the feet of those standing, the story of the Appellant on the event of shooting on 24th November, 2001 when the deceased was hit by a bullet through and through on his chest, is a mere cock and bull story not worth being considered as a defence under Section 24 of the Criminal Code. In any case, taking into consideration the clear evidence from the prosecution witnesses 1, 2 and 3 on the circumstances in which the shooting event took place on 24th November, 2001 resulting in the death of the deceased from a single bullet wound in his chest, the two Courts below were definitely correct in their decisions rejecting the rather frivolous defence of accident claimed by the Appellant. (p. 1050 A)

MURDER - Ingredients - Proof

2. From a long line of the decisions of this Court, it is settled

beyond controversy that to secure a conviction on a charge of murder under Section 319 of the Criminal Code, the prosecution must prove -

(i) that the deceased had died,

(ii) that the death of the deceased was caused by the accused, and

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

In other words, in a murder charge, the prosecution is required to prove beyond reasonable doubt not only that the act of the accused person could have caused the death of the deceased but that it actually did. If there is any possibility that the deceased died from other causes than the act of the accused, then the prosecution has failed to establish the case against the accused person.

In the present case the evidence of prosecution witnesses 1, 2 and 3 who were eye witnesses to act of the Appellant of shooting the deceased with a Baretta pistol in his chest, which act of shooting resulted in causing the death of the deceased almost instantly at an Ughelli Hospital, is not only direct and credible but was also accepted and relied upon by the trial Court and affirmed by the Court below. The evidence which is overwhelming, had clearly established that the Appellant caused the death of the deceased and that the deceased died as a result of the act of the Appellant to the exclusion of all other possibilities. The cause of death of the deceased was from the bullet fired deliberately by the Appellant from his service Baretta pistol resulting in taking the life of the deceased.
(p. 1053 A)

CRIMINAL PROCEDURE - Proof - Number of witnesses

3. On the Appellant's complaint of the failure of the prosecution to call PW4, the law is trite that the prosecution has no duty to call and field all known material witnesses so long as it calls and fields all material witnesses that it may consider necessary for proof of its case beyond reasonable doubt.

(p. 1054 C)

MURDER - Evidence - Testimony of relation - Weight

4. It was also further canvassed for the Appellant that the evidence of the three eye witnesses for the prosecution PW1, PW2 and PW3 who were described as brother, cousin and nephew of the deceased should be treated with caution being in the class of evidence of persons interested and which ought to require corroboration.

It must be stressed that there is no law which precludes a blood relation of a deceased person from testifying for the prosecution. What a Court must consider as an abiding fact is the truthfulness of the witness touching on his integrity, veracity and knowledge on the matter.

In the present case, the evidence of PW1, PW2 and PW3 as the eye witnesses to the shooting event that led to the death of the deceased was quite cogent and free from element of falsehood or bias and was therefore rightly accepted and relied upon by the trial Court and affirmed by the Court below.

(p. 1054 E)

APPEALS - Concurrent findings - Charge - Proof

5. Learned Counsel to the Appellant also strenuously submitted that the charge against the Appellant was not proved beyond reasonable doubt. It must be stressed that proof beyond reasonable doubt is not proof to the hilt as stated in *Miller v. Minister of Pension* (1947) 2 All E.R. 372.

The trial Court having found that the charge against the Appellant had been proved beyond reasonable doubt and the Court below having affirmed that finding on appeal, I find no reason to disturb these findings.

On the final note, this appeal being one from concurrent findings of fact by the two Courts below supported by overwhelming credible evidence which is not perverse and not reached as a result of wrong approach to evidence or caused miscarriage of justice or violated some principles of substantive and procedural law, I find no reason whatsoever to disturb these concurrent findings. (p. 1054 H)

REPRESENTATION

Appellant not represented

Chief F. F. Egele (Hon. Attorney General of Bayelsa State) with
A. N. Opkuma (Director Public Prosecution Ministry of Justice, Bayelsa
B State) and Diepreye Omubo (Principal State Counsel, Ministry of
Justice, Bayelsa State), for the Respondent

CASES REFERRED TO

- C Nnamah v. State (2005) 9 NWLR (pt. 929) 147
Oforlete v. State (2000) 12 NWLR (pt. 681) 415
Ibeh v. State (1997) 1 NWLR (pt. 484) 660
Ibikunle v. State (2005) 1 NWLR (pt. 907) 387
Babuga v. State (1995) 5 NWLR (pt. 395) 350
D Iromantu v. State (1964) All NLR 311
Adekunle v. State (2006) All FWLR (pt. 332) 1452
Maiyaki v. State (2008) 15 NWLR (pt. 1109) 173
Agbo v. State (2006) 6 NWLR (pt. 997) 545
Umaru v. State (1990) 3 NWLR (pt. 138) 363
E Chukwu v. State (1992) 1 NWLR (pt. 217) 255
Adelumola v. State (1988) 1 NWLR (pt. 73) 683
Bello v. A-G Oyo State (1986) 5 NWLR (pt. 45) 828
Iromantu v. State (1964) 1 All N.L.R. 311
F Opara v. State (2006) 9 NWLR (pt. 986) 508

STATUTES REFERRED TO

Criminal Code, ss. 24, 319

Evidence Act, s. 138(1)

G

LEAD JUDGMENT BY MOHAMMED JSC

On 24th November, 2001, the Appellant was in his home town
Buluo-Orua Town in Sagbama Local Government Area of Bayelsa
State for his late Aunt's funeral. The appellant who was an armourer
H with the National Intelligence Agency of the rank equivalent of an
Assistant Commissioner of Police, came home with his service pistol,
a Baretta which the regulations of his Agency forbade him to carry
on such private journeys as attending funeral. That morning, a group
of people had gathered to embark on a journey to a neighbouring

Community with Appellant who joined to a waiting group armed with his pistol. On getting to the compound the Appellant brought out his pistol and shot twice towards the river and turned to the deceased and shot him in the chest. The deceased was heard to have shouted - "*Yé etein neyol saniperemor etein neyo!*," meaning in English Language - you have shot me o! Saiperemor has shot me!" B
Thereafter, the deceased was rushed to the Ufor hospital, Ughelli where he was confirmed dead by a Doctor.

At the trial Court, the Appellant was charged for the murder of the deceased Chief Tuomor Obiri under Section 319 of the Criminal Code Law of Eastern Nigeria, 1963 applicable in Bayelsa State. C
In the course of the trial, 3 eye witnesses gave evidence for the prosecution. A medical Doctor, PW5 also gave evidence as to the cause of death of the deceased while the investigating Police Officer PW6 in his evidence tendered the Appellant's pistol used in the shooting incident and some caution statements of the Appellant. A prosecution witness who was billed to give evidence as PW4, was withdrawn by the prosecution. The Appellant on his part gave evidence in his own defence and also called one witness who gave evidence in support of the defence of the Appellant. D
E

The case of the prosecution was that as the people who gathered for the journey to a neighboring Community were waiting to set out, the Appellant on coming shot twice towards the direction of the river with his pistol before turning towards the deceased and fired the 3rd shot into the chest of the deceased who slumped down and later died in the hospital. F

The Appellant's case was that as he was walking towards the entrance of the compound where people were waiting, he stumbled on a stone and his service pistol fell off his waist. He bent down to pick up the pistol and as he did so his finger touched the trigger and it exploded in quick succession twice. The Appellant then said he muzzled up the pistol and removed the magazine. That it was at that point that he heard the deceased shouting before he fell down and later died at the hospital. The Appellant later reported himself to the Police Station where he also surrendered, his Baretta pistol with nine remaining rounds of ammunition before he was detained. G
H

After hearing the evidence placed before the trial Court by the prosecution and the evidence of the Appellant and his lone wit-

ness in support of the Appellant's defence, the learned trial Judge made the following findings at pages 233 -234 of the record thus -

"From the facts of this case and issues canvassed respectively by the learned Counsel for the deceased and the learned Counsel for the prosecution, in their addresses, I am of the humble opinion that the live issue which calls for determination is:

Whether or not the accused Chief Saiperemoh Priye Amaremo - is guilty of the murder of late Chief Toumor Obiri by intentionally shooting the deceased with his service pistol at Bulou-Orua Town on the 24th day of November, 2001."

In the determination of the above issue, the learned Judge found it necessary to also determine some ancillary or incidental questions which questions include the following, namely:

1. Whether or not the service pistol of the accused fell after he stumble on a stone at the entrance to the venue of the wake keep ceremonies.

2. Whether the accused fired three shots or only two shots on that day.

3. Whether there was deliberate or intentional shooting of the deceased by the accused.

4. Whether the shooting incident of 24th November, 2001 at Bulou-Orua was an accidental discharge.

5. Whether the accused was negligent in the handling of his service pistol on the date of the incident.

6. Whether the accused could be convicted of the lesser offence of manslaughter if the shooting incident was accidental and not intentional.

7. Whether having regard to the facts of this case, it was necessary for the prosecution to establish motive on the part of the accused.

8. Whether the prosecution case is infested with material contradictions as alleged by the defence or at all.

9. What are vital ingredients or necessary elements to be established in a case of murder."

The learned trial Judge after carefully resolving the ancillary and incidental questions, proceeded to resolve the main issue as follows -

"On the substantive issue of whether or not the accused Chief

Saipremoh Priye Amaremor - is guilty of murder of late Chief Tuomor Obiri, I wish to say that, in view of all that I have said in this judgment, the prosecution has proved beyond reasonable doubt that Chief Saipremoh Priye Amaremo intentionally killed Chief Tuomor Obiri (the deceased) at Bulou-Orua village, Sagbama Local Government Area of Bayelsa State on 24th day of November, 2001." B

The learned trial Judge after very carefully considering and ultimately rejecting the defence of accident under Section 24 of the Criminal Code put up by the Appellant and after having been satisfied that the Appellant had not even attempted to put up a defence of insanity, proceeded and convicted the Appellant of the offence of murder and sentenced him to death in accordance with the law on 22nd December, 2005. C

In exercise of his constitutional right of appeal against his conviction of murder and the sentence of death passed upon him by the trial High Court of Bayelsa State, the Appellant appealed to the Court of Appeal Port-Harcourt Division by a Notice and Grounds of Appeal dated 31st January, 2006. After giving the Appellant a hearing in his appeal, the Court of Appeal in its judgment delivered on 15th March, 2010, dismissed the Appellant's appeal and affirmed his conviction for murder and the sentence of death. The Appellant is now on a further appeal against his conviction and sentence by a Notice and Grounds of Appeal dated 28th May, 2010 and filed on 1st June, 2010, containing 5 distinct grounds of appeal from which the following two issues for the determination of the appeal were distilled in the Appellants brief of argument. D E F

"1. Whether the defence of accident availed the Appellant by virtue of the provisions of S.24 of the Criminal Code. (Grounds 1, 2, and 3)" G

2. Whether the essential elements of murder and the guilt of the Appellant were established beyond reasonable doubt as laid down by S.138(1) of the Evidence Act. (Grounds 4 and 5)"

The learned Appellant's Counsel after quoting the provisions of Section 24 of the Criminal Code referred to the case of Nnamah v. The State (2005) 9 NWLR (Pt. 929) 147, where this Court defined accidental event as one that is not intended by the actor. It is not foreseen by him and is not reasonably foreseeable. The Appellant, according to Counsel, is raising his defence on the last leg of Section H

24 of Criminal Code for ‘an event which occurs by accident’, which supports the evidence in chief of the Appellant at the trial Court where he testified on the event by saying at page 100 of the record -

“Just at entrance of the family compound, as I was walking briskly, I stumbled on a stone and my service pistol fell off from my waist because it was not in the holster; I immediately bent down to pick it up. As I was picking up my fingers touched the trigger and it exploded in quick succession twice, I muzzled up, that is faced the gun up, and removed the magazine and tucked it into my breast pocket and returned the pistol to my waist.”

This evidence which Counsel said was not challenged under cross-examination, the implication was that the prosecution had accepted the truth of the contents of the Appellant’s evidence, if the case of *Oforlete v. State* (2000) 12 NWLR (Pt. 681) 415 at 436, were taken into consideration. Learned Counsel submitted that the evidence of the Appellant under cross-examination by the prosecution at pages 130 - 131 of the record were only aimed at establishing that the Appellant was negligent or reckless the manner in which he had handled the said pistol. This evidence, argued the learned Counsel, is supported by the evidence of DW2, the defence witness called by the Appellant and that as such the Court below suffered a misdirection when it said that the evidence of the DW2 supported the case of the prosecution. Learned Counsel further argued that as the witness PW6 did not find out or know how many rounds of ammunition were fired but only tendered 9 live rounds and 2 spent shells, those exhibits supported the evidence of the Appellant and his witness DW2 of the version of what transpired to warrant raising doubt in the case of the prosecution to justify the doubt being resolved in favour of the Appellant as the case of *Ibeh v. State* (1997) 1 NWLR (Pt. 484) 660. Learned Counsel observed that as even the prosecution eye witnesses agreed that the event was a surprise to all and sundry, on the authority of the case of *Ibikunle v. State* (2005) 1 NWLR (Pt. 907) 387 at 409 - 410, the Appellant’s defence of accident had been established particularly with the case of *Babuga v. State* (1995) 5 NWLR (Pt. 395) 350 - 351; that on the evidence of the Appellant and his witness, his defence under Section 24 of the Criminal Code had been established having regard to the case of *Iromantu v. State* (1964) All NLR 311, since the prosecution had failed to dislodge that defence.

However, on this first issue of whether or not the defence of accident was available to the Appellant, the learned Attorney General of Bayelsa State for the Respondent, promptly submitted and answered the question in the negative having regard to the evidence of PW1, PW2 and PW3 who were eye witnesses to the event of the shooting that resulted in the death of the deceased; that even the evidence of the Appellant himself and his only one witness DW1, also confirmed the shooting event which led to the death of the deceased as confirmed by the evidence of the Doctor, PW5 who examined the corpse of the deceased and found that the deceased died of a single penetrating wound between the ribs. In other words, according to the learned Attorney General, the deceased died from a through to through gun shot wound released from the service pistol of the Appellant; that in the extra judicial statements of the Appellant Exhibits 'A,' 'C' and 'J,' the Appellant admitted shooting the deceased to death but pleaded accidental discharge which he gave in different versions particularly in the evidence of the Appellant in Court where he denied using a Baretta pistol which he personally handed over to the Police upon shooting the deceased and for the first time he claimed that his gun went off twice in quick succession; that having regard to the evidence of the prosecution, the defence of accidental discharge claimed by the Appellant, can hardly find a place this case. Learned Counsel to the Respondent relying on the case of Adekunle v. The State (2006) All FWLR (Pt. 332) 1452 at 1472 also reported in (2006) 14 NWLR (Pt. 1000) 717, argued that having regard to the clear evidence of how the Appellant fired his pistol at the deceased on the day of the event, the defence of the Appellant that the pistol got fired while he was muzzling or picking it up, was rightly rejected by the Court below because his story is hardly believable.

With regard to the time of raising the defence of accident by the Appellant, learned Respondent's Counsel pointed out that it was not timeously raised and that his evidence in chief was not reliable it being inconsistent with his various statements to the police; that relying on Maiyaki v. The State (2008) 15 NWLR (Pt. 1109) 173 at 197, the Appellant's defence of accident cannot succeed in this appeal. With regard to the identity of the pistol used by the Appellant on the day of the incident, the claim of the Appellant that it was a Browning pistol that was used and not Baretta pistol, had been put to rest by

the evidence of PW6 and Exhibit 'H' brought by the Appellants employers that it was a Baretta pistol No. E00080 that was officially issued to the Appellant which also was in evidence as Exhibit 'D'; that the Appellant not having raised objection to the admission of Exhibit 'D' at the trial, it is too late to attempt to raise it in this Court, taking
 B into consideration of the case of *Agbo v. The State* (2006) 6 NWLR (Pt. 997) 545. Learned Attorney General therefore urged this Court to apply its decision in *Maiyaki v. The State* (2008) 15 NWLR (Pt. 1109) 173 at 200A and resolve this issue on the defence of accident
 C in the negative.

What I have to determine in this issue is whether having regard to the circumstances in which the deceased Chief Tuomor Obiri met his death in a penetrating through and through bullet wound on 24th November, 2001, the defence of accident was available to the
 D Appellant.

Section 24 of the Criminal Code in contention reads -

*"24. Subject to the express provision 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
 E his will, or for any event which occurs by accident."*

The defence being raised under this Section as clearly stated by the learned Counsel to the Appellant in the Appellant's brief of argument was limited or confined only to the second leg of the Section which deals with the question of whether the Appellant could be
 F convicted for causing the death of the deceased which was an event which occurred by accident. Section 24 of the Criminal Code in relation to the part being relied upon by the Appellant, does not deal with an 'act' but with an 'event.' The event within the meaning of the
 G Section is what follows from an act. See *Audu Umaru v. The State* (1990) 3 NWLR (Pt. 138) 363 at 370 and *Chukwu v. The State* (1992) 1 NWLR (Pt.217) 255 at 269. Thus, for an event to qualify as accidental under the Section relied upon by the Appellant in this case, it must be a surprise to ordinary man of prudence. That is to
 H say, a surprise to all sober and reasonable people. In other words the test is always objective. See *Adelumola v. The State* (1988) 1 NWLR (Pt. 73) 683 at 692 - 693, *Aliu Bello & 13 Ors. v. Attorney General of Oyo State* (1986) 5 NWLR (Pt. 45) 828 and *Iromantu v. The State* (1964) 1 All N.L.R. 311, where this Court stated the law that where

a person discharges a firearm unintentionally and without attendant criminal malice or negligence, he will be exempted from criminal responsibility both for the firing and for its consequences.

In the instant case the defence of accident put up by the Appellant is contained in his separate statements to the Police exhibit 'J' made on 24th November, 2001, the very day the event occurred; Exhibit 'A' made on 27th November, 2001 and Exhibit 'B' made on 29th November, 2001 and his evidence in chief where he testified before the trial Court as DW1. In the first statement in Exhibit 'J' the Appellant said -

"I Chief S. P. Amaremo, during weapon check had an accidental discharge that resulted to the shooting of one Chief Tuomor Obiri of Tomobiri Quarters, Bulou-Orua village, a cousin which later resulted to his death as pronounced by a Medical Doctor at Ughelli."

However in Exhibit 'A', the Appellant said -

"At the entrance of the family compound, I stumbled on a stone and the pistol fell off from my waist, I immediately bent down to pick it up and as I was picking it up my finger unknowingly touched the trigger and it exploded and hit one High Chief Tuomor OBIRI (m) a cousin of mine on the chest and saw slumping and vomiting blood profusely."

While explaining his statements made earlier, the Appellant said in Exhibit 'C' as follows -

"I agree that the statement at Sagbama Police Station and that of the C.I.D Yenagoa is contradictory in the sense that I did not clearly state the stage the pistol exploded that as I picked it up to check when it fell down my finger touched the trigger and it exploded. While in Sagbama I simply said the pistol fired during weapon check because I was in state of shock, confused and in a uncomposed state of mind."

When the Appellant came to testify in his defence at page 100 of the record he came with another version of the event as follows -

"Just at the entrance of the family compound, as I was walking briskly, I stumbled on a stone and my service pistol fell off from my waist because it was not in the holster. I immediately bent down to pick it up. As I was picking it up, my fingers touched the trigger and it exploded in quick succession twice. I muzzled up, that is faced the

gun up, and removed the magazine and tucked it into my breast pocket and returned the pistol to my waist. Immediately, I heard Chief Tuomor Obiri shouting in Ijaw language; 'ye-eteineye, saiperemoh ye-eteineye!'"

A very careful examination of the line of defence of accident put up by the Appellant in his three separate statements and his evidence in chief quoted above in this judgment, has revealed inconsistencies which ruled out any event of accident in them. While in Exhibit 'J' the Appellant described the shooting event as an accidental discharge which resulted in shooting the deceased who later died in the hospital took place during a weapon check, in Exhibit 'A' the story was that the shooting event took place when he stumbled on a stone when his service pistol fall off from his waist and as he bent down to pick it up, unknowingly his finger touched the trigger and the pistol exploded hitting the deceased on the chest leading to the death of the deceased. The version of the shooting event on the other hand in the evidence of the Appellant before the Court that as he was picking the pistol from the ground, his fingers touched the trigger and the pistol exploded in quick succession twice before he heard the deceased shouting. All these claims of alleged accidental discharge from the Appellant's service pistol cannot be true because even if it happened as the Appellant claimed the pistol exploding on the ground would not have resulted in striking the deceased in the chest who was standing. As the shots from the exploded pistol on the ground could only have gone horizontally along the ground to meet its possible target on the feet of those standing, the story of the Appellant on the event of shooting on 24th November, 2001 when the deceased was hit by a bullet through and through on his chest, is a mere cock and bull story not worth being considered as a defence under Section 24 of the Criminal Code. In any case, taking into consideration the clear evidence from the prosecution witnesses 1, 2 and 3 on the circumstances in which the shooting event took place on 24th November, 2001 resulting in the death of the deceased from a single bullet wound in his chest, the two Courts below were definitely correct in their decisions rejecting the

rather frivolous defence of accident claimed by the Appellant.

The next issue placed by the Appellant in his brief of argument for the determination of this appeal is whether the essential elements of murder and the guilt of the Appellant were established beyond reasonable doubt laid down by Section 138(1) of the Evidence Act. Learned Appellant's Counsel referred to the evidence of PW1 whom he described as the deceased's brother, who said the Appellants fired two shots towards the river before turning round to fire the third shot at the deceased. B

Prosecution witnesses 2 and 3 also gave the same evidence but that all the 3 witnesses agreed under cross-examination that what transpired that day was sudden and unexpected. Learned Counsel then regarded the failure of the prosecution to call the 4th eye witness, as an act warranting the drawing up of a presumption that the evidence of that witness would have been against the prosecution. D
Learned Counsel for the Appellant also tried to find a refuge for the Appellant in the Investigation Report of PW6 recommending that the Appellant be charged for manslaughter, as a factor to be taken into consideration in the defence of the Appellant. C

After closely examining the evidence of the Appellant and that of his sole witness DW2, learned Counsel submitted that if prosecution evidence is placed side by side with that of defence, reasonable doubt would have been raised in the evidence of prosecution. E

On the identity of the gun used by the Appellant on 24th November, 2001 which the Appellant claimed in his evidence that it was a 'Browning pistol' while the Appellant's employer's letter Exhibit 'H' stated that it was a 'Baretta pistol' that was allocated to the Appellant, learned Counsel argued that the two Courts below were wrong in relying on Exhibit 'H' rather than on the evidence of the Appellant which was not even challenged in cross-examination. F G

On the question of whether or not three or two shots were fired on 24th November, 2001, learned Appellants Counsel saw no reason why the version of the Appellant that only two shots were fired, was not accepted by the Courts below which caused miscarriage of justice to the Appellant because on the authority of *Koneke v. The State* (1995) 4 NWLR (Pt. 392) 767 at 712, where evidence is capable of two interpretations, that favourable to the Appellant must be adopted to raise doubt in the case of the prosecution. H

On the burden of proof under Section 138 of the Evidence Act, learned Appellant's Counsel contended that since the case of the prosecution was full of inconsistencies, both the guilt of the accused and his innocence must be resolved in favour of the Appellant having regard to the case of *Alguoreghian v. The State* (2004) 3 NWLR (Pt. 860) 367 at 429; that the number of bullets fired and the type of gun used was material to case of the prosecution and failure to resolve them means the prosecution did not prove its case beyond reasonable doubt; that the evidence of the 3 eye witnesses ought to have been treated with caution requiring corroboration as in *Opara v. The State* (2006) 9 NWLR (Pt. 986) 508 at 527. Finally relying on *Nwosu v. The State* (1986) 4 NWLR (Pt. 35) 348 at 359 learned Counsel maintained that the prosecution having failed to prove its case against the Appellant, his appeal deserves to succeed for him to be acquitted and discharged.

For the Respondent, it was submitted on the second issue that the Court below was justified dismissing the Appellant's appeal and in affirming the decision of the trial Court; that there was no doubt on the pistol Exhibit 'D' used in sending the deceased to his grave because Exhibit 'E' was admitted as a Baretta pistol holster. Failure to call ballistic expert by the prosecution was not fatal to its case as was stated in *Iden v. The State* (1994) 8 NWLR (Pt. 365) 719; that the issue of the type of pistol used in the commission of the offence and its materiality, were introduced into this case by the Appellant's Counsel as there was no 'Browning pistol' tendered in evidence in this case and that all the alleged contradictions in the case of the prosecution, were merely the creation of the Appellant which were rightly rejected by the Courts below.

On the requirement of the prosecution to prove its case of murder against the Appellant under Section 138 of the Evidence Act, learned Counsel to the Respondent reiterated that the evidence of the prosecution witnesses accepted by the trial Court and affirmed by the Court below as credible and overwhelming, had proved the case against the Appellant beyond reasonable doubt and urged the Court not to disturb the decisions of the Courts below. The case of *Igbo v. The State* (2006) 6 NWLR (Pt. 977) 545 at 583 was cited in support of this argument in urging this Court to resolve this issue against the Appellant.

From a long line of the decisions of this Court, it is settled beyond controversy that to secure a conviction on a charge of murder under Section 319 of the Criminal Code, the prosecution must prove -

(i) that the deceased had died,

(ii) that the death of the deceased was caused by the accused, and

(iii) that act or omission of the accused which caused the death of the deceased was intentional with the knowledge that death or grievous bodily harm was its probable consequence. See *Ogba v. The State* (1992) 2 NWLR (Pt. 222) 164; *Monday v. Nweze v. The State* (1996) 2 NWLR (Pt. 428) 1; *Gira v. The State* (1996) 4 NWLR (Pt. 448) 375 and *Adekunle v. The state* (2006) 14 NWLR (Pt. 1000) 717 at 737. ***In other words, in a murder charge, the prosecution is required to prove beyond reasonable doubt not only that the act of the accused person could have caused the death of the deceased but that it actually did. If there is any possibility that the deceased died from other causes than the act of the accused, then the prosecution has failed to establish the case against the accused person.*** See *Uguru v. The State* (2002) 9 NWLR (Pt. 771) 90 and *Oforlete Nere v. The State* (2000) 12 NWLR (Pt. 681) 415.

In the present case the evidence of prosecution witnesses 1, 2 and 3 who were eye witnesses to act of the Appellant of shooting the deceased with a Baretta pistol in his chest, which act of shooting resulted in causing the death of the deceased almost instantly at an Ughelli Hospital, is not only direct and credible but was also accepted and relied upon by the trial Court and affirmed by the Court below. The evidence which is overwhelming, had clearly established that the Appellant caused the death of the deceased and that the deceased died as a result of the act of the Appellant to the exclusion of all other possibilities. The cause of death of the deceased was from the bullet fired deliberately by the Appellant from his service Baretta pistol resulting in taking the life of the deceased. See *Nwosu v. The State* (1998) 8 NWLR (Pt. 562) 433 at 444, *Adekunle v. The State* (2006) 14 NWLR (Pt. 1000) 717; and *Maiyaki v. The State* (2008) 15 NWLR (Pt. 1109) 173 at 197.

It is also clear from the evidence put in place by the prosecution that the Appellant admitted shooting and killing the deceased with his Baretta pistol which he surrendered to the police before he was detained on 24th November, 2001. The same Baretta pistol was admitted in evidence as Exhibit 'D' at the trial Court in the presence of the Appellant and his Counsel without any objection. Not only that, the letter from the Appellant's employer, the National Intelligence Agency Exhibit 'H' had unequivocally confirmed that it was a Baretta pistol No. E00080, that was supplied to the Appellant. Therefore the claim of the Appellant that it was a Browning pistol that he used on the day of the incident is mere after thought which does not offer him any defence to the offence of murder committed by him. See *Agbo v. The State* (2006) 6 NWLR (Pt. 997) 545.

On the Appellant's complaint of the failure of the prosecution to call PW4, the law is trite that the prosecution has no duty to call and field all known material witnesses so long as it calls and fields all material witnesses that it may consider necessary for proof of its case beyond reasonable doubt. See *Oduneye v. The State* (2001) FWLR (Pt. 38) 1203 at 1218.

It was also further canvassed for the Appellant that the evidence of the three eye witnesses for the prosecution PW1, PW2 and PW3 who were described as brother, cousin and nephew of the deceased should be treated with caution being in the class of evidence of persons interested and which ought to require corroboration. This complaint has no basis in law having regard to the case of *Nkebisi & Anor. v. The State* (2010) 5 NWLR (Pt. 1188) 472 at 485. ***It must be stressed that there is no law which precludes a blood relation of a deceased person from testifying for the prosecution. What a Court must consider as an abiding fact is the truthfulness of the witness touching on his integrity, veracity and knowledge on the matter.*** See *Oguonzee v. The State* (1998) 5 NWLR (Pt. 551) 521. ***In the present case, the evidence of PW1, PW2 and PW3 as the eye witnesses to the shooting event that led to the death of the deceased was quite cogent and free from element of falsehood or bias and was therefore rightly accepted and relied upon by the trial Court and affirmed by the Court below.***

Learned Counsel to the Appellant also strenuously

submitted that the charge against the Appellant was not proved beyond reasonable doubt. It must be stressed that proof beyond reasonable doubt is not proof to the hilt as stated in Miller v. Minister of Pension (1947) 2 All E.R. 372. In any case in Princewill v. The State (1994) 6 NWLR (Pt. 353) 703 at 716 - 717 Iguh, JSC, stated the law on the point thus -

“To secure a conviction for murder, the prosecution must prove beyond reasonable doubt that the death of the deceased was caused directly or indirectly by the act of the accused. It is incumbent on the prosecution to establish not only that the act of the accused could have caused the death of the deceased but that in actual fact the deceased died as a result of the act of the accused to the exclusion of all other possibilities.”

See also R. v. Izobo Owe (1961) 1 All NLR 680, R. v. Nwokocha (1949) 13 WACA 453 at 455 & Valentine Adie v. The State (1980) D 1-2 SC 116 at 122-123. **The trial Court having found that the charge against the Appellant had been proved beyond reasonable doubt and the Court below having affirmed that finding on appeal, I find no reason to disturb these findings.**

On the final note, this appeal being one from concurrent findings of fact by the two Courts below supported by overwhelming credible evidence which is not perverse and not reached as a result of wrong approach to evidence or caused miscarriage of justice or violated some principles of substantive and procedural law, I find no reason whatsoever to disturb these concurrent findings. See Igwe v. The State (1982) 9 S.C 114 and Shorumo v. The State (2010) 12 S.C (Pt. 1) 73 at 102. The appeal is plainly lacking in merit and therefore ought to be dismissed. The appeal is dismissed. The judgment of the trial Court of 22nd December, 2005 finding Appellant guilty of murder for which he was sentenced to death by hanging and which judgment was affirmed on appeal by the Court below, is hereby further affirmed.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Mahmud Mohammed, JSC. I agree with the reasons therein advanced and the conclusion arrived thereat that the

appeal lacks merit and should be dismissed.

I seek leave to chip in just a few words of my own in support. The case of the prosecution is that the death of Chief Tuomor Obiri on 24th November, 2001 was intentionally caused by the appellant; not by accident. The appellant rested his defence on accident and
B that it was not proved beyond reasonable doubt that he was responsible for the fatal shot that caused the death of the deceased.

In a bid to exculpate himself, the appellant maintained that the alleged offensive weapon - Exhibit D, a 'Baretta' pistol was not
C his and that his official service pistol is a 'Browning' pistol. The poor show was designed to create a circumstance that a reasonable doubt has been created if the prosecution maintained that the fatal bullet came from Exhibit D. Exhibit 'H' was procured from the office of National Intelligence Agency where the appellant worked at the ma-
D terial time. Same debunked the appellant's assertion that the pistol he held on the fateful day was a Browning pistol. Exhibit H states that the weapon which the appellant -

"....Used in the incidence under reference i.e. Baretta pistol No. E00080 with nine rounds of ammunition was officially issued to
E him."

The appellant thus lied in respect of the vital issue in a bid to extricate himself. It beats ones imagination that the appellant, who handed the Baretta pistol - Exhibit D to PW6 immediately after the episode, could embark upon such a design which portrayed him as
F someone who should not ordinarily be believed. The trial court did not believe him and the stand was affirmed by the Court of Appeal. There is no doubt about it that they were right.

The appellant tried to bank on the defence of accident which
G has been defined as an event that takes place without one's foresight or expectation; an undersigned, sudden and unexpected event, Kochring C. v. American Auto Ins. Co. CA Wis, 358 F 2nd 993, 996 (Black's Law Dictionary Sixth Edition, page 15).

The appellant maintained that his pistol fell to the ground. As
H he was trying to pick it up the pistol discharged accidentally. It does not tally with gumption that such a discharge on the ground would cause a bullet to hit the deceased on his chest while standing near by. The bullet would fire flat horizontally and not up or vertically. The learned trial judge rejected the defence of accident and same was

affirmed by the court below. I agree with them. They were right. See: Adekunle v. The State (2006) 12 NWLR (Pt. 1000) 717 at 742.

In this matter, PW1, PW2 and PW3, who were eye witnesses, maintained that the appellant fired two shots into the sky and fired the third shot at the chest of the deceased at a close range. They all said the deceased on being shot by the appellant shouted and said - 'Amaremor, ye tein neye' which means - 'Amaremor, you have shot me'. The appellant also confirmed that he heard the shout by the deceased. This has the semblance of 'a dying man's last declaration'. Same props the evidence of the eye witnesses. The trial court believed them. He was perfectly entitled to so do having watched them testify at a close range. Certainly, ascription of probative value to the evidence of witnesses is pre-eminently the business of the trial court which saw and heard the witnesses. The appellate court will not lightly interfere with same unless compelling reasons are shown. See Ebba D v. Ogodo (1984) 1 SCNLR 372; Ogbechie v. Onochie (1984) 1 SCNLR 372; Ogbechie v. Onochie (1998) 1 NWLR (Pt. 470) 370.

The trial court, rightly in my view, believed the evidence of the stated eye witnesses and found that the appellant fired the deceased on the chest region and caused his death. The court below correctly affirmed same. The concurrent findings by the two courts below is without blemish. They have not been demonstrated to be perverse. This court does not interfere in such a situation. I shall not interfere. See: Shorumo v. The State (2010) 12 SC (Pt. 1) 73 at 96; 102 and Igwe v. The State (1982) 9 SC. 114.

My learned brother said it all. Mine is just an addendum. For the reasons herein stated and basically the lucid reasons ably adumbrated in the lead judgment, I too feel that the appeal is devoid of merit and should be dismissed. I order accordingly. I affirm the judgment of the court below which affirmed that of the trial court.

PETER-ODILI JSC

I am in total agreement with the judgment and reasoning just delivered by my learned brother, Mahmud Mohammed, J.S.C. and to show my support, I shall make some comments.

This is an appeal against the judgment of the Court of Appeal, Port Harcourt Division delivered on 15th March, 2010 affirm-

ing the conviction for murder and sentence to death by hanging on the appellant by the Bayelsa State High Court sitting in Sagbema.

FACTS BRIEFLY STATED

The appellant was an armourer with the National Intelligence Agency. He was of a high rank being the equivalent of an Assistant Commissioner of Police. The appellant had travelled to his home town, Bulou-Orua to attend the burial ceremonies of a late aunt. He went with his service pistol, a Beretta. His agency regulations forbade the carriage of guns on private trips such as the one the appellant embarked on at the time of incident.

According to the prosecution on the 24th day of November, 2011 in the morning, the appellant was to attend a meeting with some other persons towards sending a delegation to Twigbo Community. When they did not see the appellant, PW1 was sent to call him. PW1 went to the appellant's house and called him so they could go for the meeting. The appellant rushed out of the house and tucked his pistol into his waist and continued with his dressing on the way out. When they got to the compound, the appellant brought out his gun, shot twice towards the river and then shot the deceased in the chest. The deceased was heard to have shouted, Ye etein neyo! Saiperemor etein neyo!!" meaning in English language - you have shot me o!. Saiperemor has shot me o!. The deceased was rushed to the Ufor hospital, Ughelli where he was confirmed dead by a doctor.

Three of the prosecution witnesses claimed to have seen the appellant shoot the deceased. PW4 was withdrawn as a witness, PW5 was the Medical Doctor and PW6 the Investigating Police Officer who tendered the Beretta Pistol which was admitted as Exhibit D.

The case as put up by the appellant is that he had gone to Buluo-Orua village, Sagbama for his aunt's funeral and the deceased was his close cousin and they were both in the village for the said funeral. That at the meeting of the family, it was reported to them that some Tungbo youths had mounted a road block and were harassing and extorting money from those who were passing through the road. Therefore the meeting resolved to send a delegation to the scene. At about 8.50am in the morning of 24th November, 2001, while he was entertaining guests in his house, PW1 came to inform him that the members of the delegation to Tungbo were waiting for him, the appellant at Pa Obiri's house. Appellant said he quickly put

on his trousers and was still dressing as he was leaving the house. That he picked up his service pistol, jeans jacket and was accompanying PW1 to the said residence and at the entrance to the compound as he was walking briskly he stumbled on a stone and his service pistol fell off his waist as it was not in its holster. That he bent down to pick it up and as he did so his finger touched the trigger which exploded in quick succession twice. He said he muzzled up the gun and removed the magazine which he tucked into his breast pocket and returned the pistol to his waist. B

Appellant said he then heard the deceased shout, Ye etein neyo!, Saniperemor etein neyo!." The deceased jumped twice and fell and later he heard that the deceased had died at which he went to the Sagbama Police Station and reported himself to the police who then detained him. He handed over the pistol and remaining nine rounds of ammunition to the police. C D

DW2 also testified for the appellant under subpoena and he said he saw appellant bend down and heard two gun shots. He heard the deceased shout out and was one of those who took the deceased to the hospital.

On the 22nd December, 2005 the appellant was found guilty by the trial court and sentenced to death by hanging. E

Not satisfied with the verdict the appellant went to the Court of Appeal or the court below, which court dismissed his appeal and affirmed the decision of the trial High Court. Again dissatisfied appellant has appealed to the Supreme Court on five grounds of appeal. F

On the 16th day of January 2014 date of hearing, Mr. Aham Eke-Ejelam for the appellant adopted their Brief of Argument filed on 2/5/12 and deemed properly filed on 3/5/12. Mr. Eke-Ejelam in settling the Brief had decoded two issues for determination which are as follows: G

1. Whether the defence of accident availed the appellant by virtue of the provisions of S. 24 of the Criminal Code. (Grounds 1, 2 and 3 of the Notice of Appeal.)

2. Whether the essential elements of murder and the guilt of the appellant were established beyond reasonable doubt as laid down by S.138 (1) of the Evidence Act. (Grounds 4 and 5 of the Notice of Appeal) H

Learned Attorney-General of Bayelsa State, F. F. Egele Esq.

for the respondent adopted their Brief of argument which he settled, and filed on 18th July, 2013 and deemed filed on 16/1/14. He formulated two issues for determination.

1. Whether the defence of accident availed the appellant in the circumstances of this case. (Grounds 1, 2 and 3)

B 2. Was the court below wrong in affirming the decision of the trial court that the prosecution proved its case of murder against the appellant beyond reasonable doubt. (Grounds 4 and 5)

The issues as differently crafted by each side are substantially the same and it really does not matter whose style is preferred.

C ISSUE 1

In this issue is questioned the fact of whether or not the defence of accident availed the appellant by virtue of Section 24 of the Criminal Code or in the prevailing circumstances.

D In tackling the question, Eke-Ejelam, Esq. for the appellant argued that Section 24 of the Criminal Code was available as a defence for the appellant in the light of the testimonies especially the pieces rendered by appellant on stumbling and the accidental discharge of the gun and those areas not controverted in cross-examination. That the implication is that the prosecution accepted the truth of the matter as led in evidence. He cited *Nnamah v. State* (2005) 9 NWLR (Pt. 929) 147, *Oforlete v. State* (200) 12 NWLR (Pt. 681) 415 at 436.

F For the appellant was further submitted that the PW6 said in his testimony that he did not find out or know how many rounds of ammunition were fired but he tendered nine live rounds and two spent shells which exhibits corroborated the version of the appellant and DW2 as to what transpired. He cited *Ibeh v. State* (1997) 1 G NWLR (Pt. 484) 660.

Mr. Eke-Ejelam of counsel submitted that prosecution witnesses admitted that the event was a surprise to all and sundry which lent support to the accidental discharge posture of the appellant and so appellant should be exculpated from blame. He relied on *Ibikunle v. State* (2005) 1 NWLR (Pt. 907) 387 at 409 - 410; *Babuga v. State* (1995) 5 NWLR (Pt. 395) 350 - 351; *Iromantu v. State* (1964) 1 H ALL NLR 311.

That with the material contradictions in the evidence of the prosecution, it cannot be said the prosecution disproved the said

defence of accident. He cited *Effa v. State* (1998) 2 NWLR (Pt. 537) 275 at 289.

Countering the submissions of the appellant, Chief F. F. Egele for the respondent said the undisputed evidence before the trial court was that on the fateful day, the appellant shot the deceased on the chest with a pistol with an impact so grave that the deceased died the same day. That PW1 - PW3 gave eye witness accounts of the shooting which fact of shooting appellant and DW1 confirmed. That the Medical Doctor who performed the post mortem examination testified as PW5 and stated that the shot was on the front of the chest of deceased and examination revealed a single penetrating wound between the ribs and a corresponding exit wound posteriorly at the back. His conclusion is that the deceased died from "a through to through" gunshot wound.

The learned Chief for the respondent referred to Exhibits "A", "C" and "J", the three judicial statements of the accused/appellant, each with a version different from the other. Also, the learned counsel for the respondent referred to the contradictory testimonies of the appellant in court, in one breath, he said he did not see the deceased and in another breath that he saw the deceased in between several people at the time one of the bullets located him. Also how the shots came by when he stumbled on a stone and the gun discharged accidentally and again different that he was doing a weapon check when the gun went off. Those stories above not being all he could conjure to extricate himself and so there is left to the court no option than to see appellant as a liar and so difficult to accept any of those divergent defences. He relied on *Adekunle v. The State* (2006) ALL FWLR (Pt. 332) 1452 at 1476, a case in point.

Chief Egele of counsel contended that for the defence of accident to avail an accused person it must be raised timeously which is not the case here and so the defence of accident would fail. He relied on *Maiyaki v. The State* (2008) 15 NWLR (Pt. 1109) 173 at 197.

He said the version of how the shots were fired as rendered by the appellant was different from that stated by DW2 on whether the shots occurred while appellant was standing or walking briskly.

For the respondent was submitted that the appellant raising questions of the identity of the pistol is neither here nor there since

he handed the weapon of offence to the police himself, the same weapon tendered in court as Exhibit D without objection, is an objection too late in the day. He referred to *Agbo v. The State* (2006) 6 NWLR (Pt. 997) 545, *Maiyaki v. State* (2008) 15 NWLR (Pt. 1109) 173 at 200 per Mukhtar, J.S.C. (as she then was).

B The poser herein is hinged on Section 24 of the Criminal Code since the appellant's defence is that of a killing that accidentally occurred. Stated differently is that though the act of the appellant brought about the death of the deceased, the intention to so commit was absent. This therefore calls for the exploration of the ambit of C Section 24 of the Criminal Code in the context of the facts of the matter. I shall quote the said provision hereunder thus:

Section 24:

D *"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."*

The substance of the evidence proffered by the appellant as DW1 in court reads as follows:

E *"Just at the entrance of the family compound, as I was walking briskly, I stumbled on a stone and my service pistol fell off from my waist because it was not in the holster. I immediately bent to pick it up, my fingers touched the trigger and it exploded in quick succession twice. I muzzled up, that is faced the gun up, and removed the F magazine and tucked it into my breast pocket and returned the pistol to my waist".*

From the same appellant come out three statements variously made to the police and on each occasion a different version G and I shall recast just the salient points of each of those statements which are Exhibits J, A, C.

Exhibit J made on 24th November, 2001-

H *"I, Chief S. P. Amaremo during weapon check had an accidental discharge that resulted to the shooting of one Chief Tuomor Obiri of Tomobiri Quarters, Bulou-Orua village, a cousin which later resulted to his death as pronounced by a medical doctor at Ughelli".*

Exhibit A - made 27th November 2001

"At the entrance of the family compound, I stumbled on a stone and the pistol fell off from my waist, I immediately bent down

and as I was picking it up my finger unknowingly touched the trigger and it exploded and hit one High Chief Tomor Obiri (m) a cousin of mine on the chest and saw him stumbling and vomiting blood profusely.”

Exhibit C - on the same 27th day of November 2001

“I agree that the statement at Sagbama Police Station and that of State C. I. D. Yenogoa is contradictory in the sense that I did not clearly state the stage the pistol exploded. That as I picked it up to check when it fell down my finger touched the trigger and it exploded. While in Sagbama I simply said the pistol fired during weapon check because I was in a state of shock, confused and in an uncomposed state of mind.”

Juxtaposing these divergent statements of the appellant with the evidence as the proffered by the prosecution through its witnesses PW1, PW2, and PW3 who were clear as to what happened and in substance that appellant first shot in the air twice and pointing at the deceased deliberately shot him, there is no gainsaying that the versions bandied by the appellant cannot be of use in dislodging the rock solid evidence of the prosecution witnesses PW1, PW2, and PW3. As if those were not bad enough for the appellant, the evidence of PW5. Dr. Peter Claver Obakponovure, a consultant surgeon who carried out the post mortem examination on the body of the deceased. He stated that the penetrating wound on the third intercostal space, a little to the right of his sternum and there was a corresponding exit wound posteriorly at the back. That his conclusion was that he died from “a through to through” gunshot wound which connotes that the distances were not very far way otherwise the propelling force would not have been strong enough to drive the same pellet out of the body. If the force was weak the pellet would not have come out of the body.

The Investigating Police Officer, Inspector Odu testified as PW6. He took charge of the Beretta pistol, weapon used in the killing, holster and 9 live ammunitions and two expended rounds which were admitted in evidence as Exhibits “D”, “F - F8” and “G” and G1”. Interestingly PW6 said 9 rounds of ammunitions were issued to the appellant with Beretta pistol from the National Intelligence Agency Headquarters, office where appellant was employed. That he, PW6 did not know where appellant acquired the extra ammunition in-

cluding the two expended bullets.

The appellant had in spite of identifying the Beretta pistol in court as the one issued to him and the same one with which he killed the deceased, which weapon and 9 unexpended ammunition with the holster he had hand over himself and voluntarily to the police at Sagbama police station when he took himself there to report the incident though he termed it accidental. Therefore the turn around in court, questioning the identity of the weapon he had at the time of incident being different from a Beretta pistol but that it was a Brown-
 C ing pistol that was used is indeed as the trial judge found and supported by the court below is neither here nor there since it does not affect the proof of the offence before court.

In a thorough consideration of the evidence before him the learned trial judge, Adumein J (as he then was) held as follows:

D *“To be brief, I agree entirely with the learned prosecution counsel in his analyses of the evidence before the court especially in respect of the four aforementioned questions. I cannot agree more. In specific answers to the questions, I wish to state that I find as a fact, based on the evidence of PW1, PW2 and PW3 and believing these*
 E *three witnesses and not believing the accused who testified as DW1, that the accused did not stumble on a stone on the 24th day of November, 2001 and that his service pistol did not fall off his waist as alleged by him or at all. I also hold or find as a fact that the accused*
 F *fired a total of three rounds on that day: two into the air the third shot direct at the deceased. I further hold that the shooting of late Chief Tuomor Obiri, on the 24th day of November, 2001 by the accused was intentional and not accidental as alleged by the accused.”*

In the instant case, there is full and uncontroverted evidence
 G that the deceased died on the 24th day of November, 2001 as a result of the act the accused, namely, the accused shooting or firing at the deceased with his service pistol. As I have earlier held, the act of the accused was intentional. I do not need to say the obvious that the accused by firing or shooting the deceased at his chest region from a
 H distance of three to four meters, knew that death or grievous bodily harm was its probable consequence of his act. The defence of accident, raised by the accused, in this case is hereby rejected as it is an afterthought and a mere ploy to blindfold the court from the obvious truth of the matter. If for anything, I am constantly reminded of the

dying words of late Chief Tuomor Obiri, which words themselves seem to pass a “judgment” or “verdict” right at the scene and on the date of the incident. To use the words of PW1, Barrister Baitimizimo Florizel Obiri, the deceased then cried out in the Izon language.

“You have shot me o! Saiperemor has shot me o!!”

The accused, I must say, did not and has not put up a defence of insanity. He only put up the defence of accident which, as I have already held, cannot avail him. In my humble opinion, the killing of Chief Tuomor Obiri by Chief Saiperemor Priye Amaremo was dastardly, deliberate, devilish, dire, direct and disgraceful, having regard to the complete circumstance and facts of this case. Motive for killing the deceased is irrelevant in this case of direct and deliberate killing. The question of whether or not the accused can or should be convicted of the lesser offence of manslaughter does not arise in this case.

In sum, I hold that the prosecution has proved beyond reasonable doubt the offence of murder against the accused.”

The court below agreed with those findings and conclusion of the trial High Court.

If is the dissatisfaction of the concurrent findings of the two courts below that the attention of this court has been invoked on appeal for a further review of the circumstances alongside the relevant law and requirements thereof in a charge of the gravity with which the appellant was arraigned, tried, convicted and sentenced to death. Referring to similar prevailing circumstances and what this court had done, it is necessary to cite some of the judicial authorities that are helpful and relevant for our purpose now. In the case of Adekunle v. The State (2006) ALL FWLR (Pt. 332) 1452 at 1476 this court had, through Oguntade, J.S.C. stated:

“It occurred to me also that if the gun had fired accidentally horizontally on dropping on the floor, the bullets therein were likely to fire flat horizontally and not up or vertically so as to hit a passenger in a moving vehicle on the road.

The case above cited clearly settled the lame defence of the appellant on stumbling on a stone and the gun going off accidentally when it fell or when he bent to pick up the gun when it fell and appellant’s fingers accidentally set off the trigger or during a weapon check. Whichever of these three stuttering versions of the same ap-

pellant is taken just as in the Adekunle case (*supra*) the shots would have been horizontal and hit the deceased at the lower limbs and certainly not up at the chest region.

Again the scenario of the gun exploding when the appellant picked it from the ground being illogical can be seen in the case of
 B *Maiyaki v. The State* (2008) 15 NWLR (Pt. 1109) 173 at 200, this court per Mukhtar, JSC (as she then was) stated:

*“Most unlikely, I would say for how could the appellant’s hand by merely touching the trigger without (pulling it result in firing
 C not once, but twice) and killing someone. That is working on the supposition that gun was already corked and ready for shooting”.*

Back to the case in hand, PW1 PW2 and PW3 testified of appellant shooting in the air before pointing the gun at the deceased and shooting him on the chest and close by. The nearness of the
 D appellant to the deceased tallying not only with the evidence of PW1, PW2 and PW3 but also that of the pathologist, PW5.

As if the above was not enough the accidental excuse the appellant is hanging on to was not raised timeously but rather after
 E some days and considering the four conflicting versions of the same incident he was spinning. Though accident is a defence, it does not operate in vacuo. This is because since the invocation of Section 24 Criminal Code is negated by a willed and deliberate act such as
 F what has been established by the prosecution in this case. See *Adekunle v. The State* (*supra*) at 1465; *Maiyaki v. The State* (2008) 15 NWLR (Pt. 1109) 173 at 197; *Adedumola v. The State* (1988) 1 NWLR (Pt. 73) 683 at 692.

The conclusion as I see in line with findings of the two courts below is that the act of killing the deceased was well thought out,
 G deliberately schemed by the appellant who left the explanations and escape routes for later, thereby producing these afterthought poorly couched defences that do not avail him. The issue is resolved against the appellant.

ISSUE 2

H This poses the question whether the essential elements of the offence of murder and the guilt of the appellant had been established beyond reasonable doubt in accordance with section 138 (1) of the Evidence Act.

Learned counsel for the appellant submitted that it is not in

dispute that appellant is an expert in guns. That appellant's testimony on the type of gun he had was not challenged under cross-examination and no ballisticsian called by the prosecution to resolve the conflict as to the type of gun and so a doubt ensured which should be resolved in favour of the appellant. He placed reliance on *State v. Jawan Singh* (1971) Cr. LI. 1956; *Ibeh v. State* (supra). B

It was also contended for the appellant that PW1, PW2 and PW3 were close relations of the deceased and so their evidence must be treated with caution. He cited *Opara v. State* (2006) 9 NWLR (Pt. 986) 508 at 527. C

That what was available to the trial court could only lead to appellant being found negligent in the handling of his gun. He cited *Okoziebu v. State* (2003) 11 NWLR (Pt. 831) 327 at 338 - 339.

That the court should resolve the discrepancies in favour of the appellant in the light of the lapses in the evidence of the prosecution witnesses and no cogent explanation for the contradictions. He cited *FCDA v. Nwanna* (1998) 4 NWLR (Pt. 544) 73 at 89; *Arehia v. State* (1982) 4 SC 78; *Lado v. State* (1999) 9 NWLR (Pt. 619) 369 at 380; Section 138 of the Evidence Act etc. D

For the appellant was submitted that the mens rea for the act was absent and the lies stated by the appellant not sufficient to ground a conviction for murder. He cited *Festus Amayo v. The State* (2001) 18 NWLR (Pt. 745) 251 at 281; *Ogidi v. State* (2005) 5 NWLR (Pt. 918) 318. E

In response, Chief Egele of counsel submitted that there is no doubt about the gun used in shooting the deceased and sending him to an early grave. That Exhibit D was the gun tendered and admitted in evidence in the presence of the appellant and his counsel, the same gun he handed over to the police after the killing. Exhibit E was the admitted Baretta pistol holster. He said there was therefore no reason to call a ballistic expert to give evidence on the nature of the gun used in the killing. That even then, the failure of the prosecution to call such a ballistic expert to give evidence on the nature and type of gun used in this case which is not prejudicial to the case of the prosecution. He placed reliance on the case of *Iden v. The State* (1994) 8 NWLR (Pt. 365) 719. F G H

Learned counsel for respondent contended that the recommendation of PW6 that the appellant be charged for manslaughter is

not an opinion that would bind a court of law. He cited *Onuchukwu v. The State* (1998) 7 NWLR (Pt. 547) 576 at 597, *Nwali v. The State* (1993) 3 NWLR (Pt. 182) 663 at 673.

The learned Attorney-General stated on that it is indeed settled law that lies told by an accused are not enough to convict him but in this case the various lies put across by appellant show him as a desperate man who had acted in a most deliberate, dire, devilish, disgraceful, direct and dastardly killing of the deceased. He cited *Agbo v. The State* (supra)

On the matter of PW1, PW2 and PW3 being close relations of the deceased, learned counsel for the respondent said that would not change the reliability of their testimonies since it has not been shown that they were biased or had an interest of their own to serve or had not spoken the truth. He cited *Christopher Anehia & Anor v. The State* (1982) NSCC 91.

Also, Chief Egele said withdrawal of PW4 as a witness by the prosecution has not been shown by the appellant to be favourable to them. He relied on *Odili v. The State* (1977) SC 1: *Oduneye v. The State* (2001) FWLR (Pt. 38) 1203 at 1218 - 1219.

For the respondent was canvassed that the prosecution proved its case of murder against the appellant as required by Section 135 of the Evidence Act, 2011 (formerly Section 138) and therefore the killing as proved by the prosecution was unlawful under Section 316 (1) of the Criminal Code, Laws of Eastern Nigeria, 1963 applicable in Bayelsa State. The finding by the court of trial and affirmed by the court below is not perverse and this court should so hold.

Attacking the verdict of the trial court as affirmed by the court below, learned counsel for the appellant contends that the case of murder had not been proved beyond reasonable doubt. He raised questions of the absence of a ballistic expert to give evidence of the nature and type of gun used and also that the recommendation of PW6 for the appellant to be charged for manslaughter should have been accepted and put into effect. Also appellant's counsel posited that the withdrawal of the PW4 as a witness substantially affected the prosecution's case. Again he raised the issue of PW1, PW2 and PW3 being relations of the deceased their testimonies should have been treated with caution.

For the respondent, those issues above were effectively confronted and I have no difficulty swimming along.

Firstly the failure to call the ballistics is a call that has no weight in the circumstances of this case. The reasons glaring in the face of the record, one, the appellant is a senior security personnel and even the amouner in his establishment very familiar or at home with weapons of all calibres and the Beretta pistol was evidentially the same one he handed over unsolicited and which he so identified in court as the very one. To now turn around to sing the song of a Browning pistol is an afterthought in the light of a drowning man trying his hands at anything he can clutch at in the hope of getting saved. The evidence of a ballistic expert may in some situations be desirable or necessary, certainly not in this instance where the weapon used in the offence is not in any doubt and the expert's evidence not produced is not prejudicial. I rely on the case of *Iden v. The State* (1994) 8 NWLR (Pt. 365) 719. B
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The appellant's counsel made much of the recommendation of PW6 for a lesser charge of manslaughter but I am in agreement with learned counsel for the respondent when he said the recommendation is an opinion that is not binding. Indeed that opinion or recommendation is for the court to use in the consideration of the totality of what is before the court and therefore the trial court and the court below were correct in not giving effect to that recommendation in the light of other grounds which rendered the opinion not acceptable. I rely on *Onuchukwu v. The State* (1998) 7 NWLR (Pt. 547) 576 or 597; *Nwali v. The State* (1993) 3 NWLR (Pt. 182) 663 at 673. E
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On the evidence of PW1, PW2 and PW3 to which the appellant alluded should be taken with caution, as there is the possibility of bias since the witnesses were close relations of the deceased. That allusion flies off the handle since the appellant was cousin to the deceased and related by blood to the aforesaid witnesses and the appellant has not proffered any material from which bias his detriment from those witnesses can be discerned. See *Christopher Arehia & Anor v. The State* (1982) NSCC 91. G
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On the withdrawal of PW4 as witness immediately after his introducing himself after swearing, the allegation of the appellant that the withdrawal was because his testimony would have been against

the prosecution and in favour of the appellant, nothing has been brought in to support that assertion. This is viewed from the fact that the prosecution is at liberty to call the number of witnesses and whoever it desires to prove its case and no obligation to call a host of witnesses nor is there a specific number of witnesses it so wishes.

B Anyway a sole witness can even suffice in a given circumstance and so the stance of the appellant cannot be sustained. I place reliance on *Odili v. The State* (1977) SC 1; *Oduneye v. The State* (2001) FWLR (Pt. 38) 1203 or 1218 - 1219 which are cases in point and from this court.

C Clearly the prosecution adequately proved this case beyond reasonable doubt in line with Section 135 of the said Act. This is because the deceased died and his death as a result of the act the appellant who carried out the shooting with the full knowledge and D intention that death would be the natural result. The accidental discharge theory of the appellant having no dent on the essential ingredients of the offence of murder as well established by the prosecution beyond reasonable doubt. See *Agbo v. The State* (2006) 6 NWLR (Pt. 977) 545 at 583 per Acholonu, JSC; *Nwosu v. The State* (1998) E 8 NWLR (Pt. 562) 433 at 444.

In the light of the foregoing I also resolve this issue against the appellant. The two issues resolved against the appellant and the fuller reasoning in the lead judgment, I hereby dismiss the appeal F which lacks merit as I affirm the judgment of the court of Appeal which in turn affirmed the judgment and orders of the trial High Court.

G **MUHAMMAD JSC**

I have read in draft the lead judgment of my learned brother Mahmud Mohammed, JSC just delivered. I agree with the reasonings and conclusion therein that this appeal is completely bereft of merit and that it stands dismissed.

H The appellant was charged and convicted for the murder of Chief Tumor Obiri pursuant to Section 319 of the Criminal Code Law Eastern Nigeria 1963 applicable to Bayelsa State. He had intentionally fired a third shot with his pistol, after the two in a different direction, straight into the chest of the deceased. Appellant's victim

shouted that the former had killed him as he fell and died after the fatal shot. This was on 24th November, 2001 at Bulon-Orua Town in Bayelsa State.

There were three eye witnesses to the unfortunate incident. PW5 is the medical doctor whose testimony established the cause and the fact of the death of Chief Tumor Obiri. Through PW6, the recorded statement of the appellant and the Barreta service pistol he used in murdering the deceased were tendered by the respondent. B

The appellant and another witness testified in appellant's defence. Appellant initially denied shooting his victim. He also raised the defence of accident. C

At the end of trial, the appellant was found guilty and on 22nd December, 2005 accordingly convicted as charged. His appeal against the decision of the trial court, the Bayelsa State High Court, was dismissed by the Port-Harcourt Division of the Court of Appeal. D Still dissatisfied, the appellant has further appealed to this Court on a Notice filed on 1st June 2010 containing five grounds.

Appellant's grouse in the appeal is that the lower court's affirmation of the trial court's judgment convicting and sentencing him to death in the face of respondent's failure to establish his guilt beyond reasonable doubt is perverse. He did not intentionally kill the deceased. His being denied the defence of accident under Section 24 of the criminal code, argues learned appellant counsel, makes the review of the lower court's affirmation of the trial court's wrong decision necessary. The law entitles the appellant who is not responsible for the accidental death of the deceased to a discharge and acquittal. E F

It is contended that appellant's testimony at page 100 of the record that Chief Tumor was killed following an accidental discharge from his service pistol, in the absence of any cross examination by the respondent, must bind the trial court as being the truth of what led to the death of the late chief. The respondent, it is argued, did not succeed, through PW6, in establishing that the third and fatal shot which killed the deceased was fired with appellant's service pistol. PW6 tendered only two spent shells along with nine live rounds which fact, contend learned counsel, accounts for the ammunition under appellant's care and possession. G H

It does not matter, it is further submitted, that it was from appellant's pistol that the fatal bullet emanated. He is still entitled to

the defence of accident which the two courts below unjustly denied him. Inter-alia relying on *Ibeh v. State* NWLR (Pt. 484) 660, *Babuga v. State* (1995) 5 NWLR (Pt. 395) 350 at 351, *Nnemah v. State* (2005) 9 NWLR (Pt. 929) 147, *Ibikunle v. State* (2005) 1 NWLR (Pt. 907) 387 at 409 learned counsel submits that in the face of all the
B lingering doubt appellant is entitled to the defence of accident.

Learned respondent counsel disagrees. He submits that the evidence of PW1, PW2 and PW3, eye witnesses to the incident and DW1, appellant's only witness, belies appellant's story. Also, the ap-
C pellant in Exhibit "A", "C" and "J", his extra judicial statements, confessed to the shooting of the deceased. It was only in his evidence before the trial court that the appellant assert the act to be accidental. Learned Attorney General urges that we resolve the critical issue raised by the appeal against the appellant.

D I am in complete agreement with the learned Attorney General. Given the evidence on record, the lower court is right to have affirmed the trial court's disbelief in the appellant's story that the fatal shot which caused the death of the deceased was accidental. The
E appellant seeks that we interfere with the concurrent findings of the two lower courts on this point. Learned appellant counsel seems to have ignored the age long principle that this Court is very hesitant in doing so and that the plea avails an appellant only where he shows the findings he appeals against to be perverse. See *Ugbumba v. State* (1993) 5 NWLR (Pt. 296) 660 and *Agakitikpi v. State* (1993) 5 NWLR
F (Pt. 296) 641.

It must be restated here that it remains the primary function of the trial court to evaluate evidence and decide what probative value to attach to what piece of oral evidence. This is so because it is
G the court that had the opportunity of seeing, hearing and observing the witnesses in the course of their testimonies. An appellate court only steps in to evaluate evidence where the trial court failed in taking the advantage it had to discharge this primary duty or wrongly discharged the said function, to avert miscarriage of justice. See *Iman v. Okogbe* (1993) 9 NWLR (Pt. 316) 159 and *Anaeze v. Anyaso* (1993) 5 NWLR (Pt. 291) 1.

In the case at hand, the issue before the trial court, which decision the lower court in doing the needful affirmed, is as to whose evidence, the appellant's or respondent's, it was to prefer. It pre-

ferred the version proffered by respondent's witnesses that indeed it was the appellant who shot and killed the deceased. The lower court's affirmation of the trial court's decision that drew from evidence on record cannot be wrong. I so hold. For this and more so the fuller reasons adumbrated in the lead judgment I also dismissed the unmeritorious appeal.

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KEKERE-EKUN JSC

I have had the privilege of reading in draft, the leading judgment of my learned brother, MAHMUD MOHAMMED, JSC just delivered. I agree entirely that the appeal is devoid of merit and should be dismissed. My comments are in support of the leading judgment.

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The brief facts of the case are as follows: The appellant was an armourer with National Intelligence Agency. He travelled to his hometown, Bulou-Orua in the Sagbama Local Government Area of Bayelsa State to attend the funeral ceremony of a late aunt. He went with his service pistol, a Beretta. On the morning of 24/11/2001, PW1, a legal practitioner and younger brother of the deceased, was sent to call the appellant who along with himself, the deceased and some other persons, was part of delegation sent by the family to the neighbouring Tungbo Community regarding some youths who were setting up illegal road block and harassing motorists passing through. According to PW1, when he got to the appellant's house the appellant emerged with his pistol tucked into his waist. On getting to his father's compound PW1 said he heard two gunshots. He was walking in front of the appellant. He turned back and saw the appellant with his pistol in his hand. He testified that after the two gunshots, the appellant took a few steps forward. He stated that the deceased was standing by the house facing their direction. He stated that the appellant fired a third shot directly at the deceased and hit him in the chest, whereupon the deceased cried out "Ye-eteineye! Saiperemor eteineye" meaning "You have shot me O! Saiperemor has shot me O!!" He was rushed to Hospital where he was confirmed dead. Two other eyewitnesses, PW2 and PW3 testified to the same effect.

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The appellant gave several versions of what transpired. In one of his extra-judicial statements (Exhibit J) he stated that an accidental discharge occurred during weapon check. In a subsequent

statement (Exhibit A) and in his testimony in court his defence was that he stumbled on a stone at the entrance to the family compound and his service pistol fell from his waist. He stated that as he bent to pick it up his fingers accidentally touched the trigger and it exploded twice in quick succession. He said he then “muzzled up” i.e. turned
 B the gun upwards and removed the magazine, which he tucked into his breast pocket and returned the pistol to his waist, He said he heard the deceased shout “Ye - eteineye Saiperemor ye eteineye!” That he saw blood gushing out of his mouth and nostrils after which
 C he slumped and died. He went to the Police Station and reported what had happened and he was detained. In Exhibit C, he attempted to reconcile the inconsistencies between Exhibits J and A. He was arraigned before the trial court on a one-count charge of murder. Six witnesses testified for the prosecution. However PW4 was later with-
 D drawn as a witness. The appellant testified on his own behalf and called one other witness. In a considered judgment delivered on 22/12/2005, the trial court per Adumein, J (as he then was) found him guilty as charged, convicted him and sentenced him to die by hanging.

E His appeal to the court of Appeal, Port Harcourt Division (the lower court) was dismissed on 15/3/2010. He has therefore further appealed to this court vide his Notice of Appeal filed on 1/6/2010. From the five grounds of appeal, he distilled the following
 F issues for determination:

1. Whether the defence of accident availed the appellant by virtue of the provisions of S.24 of the Criminal Code.
2. Whether the essential elements of murder and the guilt of the appellant were established beyond reasonable doubt as laid down
 G by S.138 (1) of the Evidence Act.

Issues 1 and 2 are interrelated. However since it is not in dispute that the deceased died and that his death was as a result of the act of the appellant, the resolution of issue 1 is sufficient to dispose of the appeal. For a charge of murder to succeed, the prosecution must establish the following ingredients beyond reasonable doubt:
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1. That the deceased died.
2. That the death of the deceased resulted from the act of the accused.
3. That the act of the accused was intentional with the knowl-

edge that death or grievous bodily harm was its probable consequence.

See: *Nwachukwu v. State* (2002) FWLR (Pt. 123) 312 @ 318 ratio 12; *Nweke v. State* (2001) FWLR (Pt. 40) 1595.

As stated earlier, the first two ingredients of the offence have been satisfied. It was however contended that the defence of accident availed the appellant because the defence presupposes that although he physically committed the offence, it occurred independently of his will. B

Section 24 of the Criminal Code provides, inter alia:

“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...” C

Section 24 of the Criminal Code Cap. 29 Laws of Ogun State of Nigeria 1978, which is in pari materia with Section 24 of the Criminal Code of Eastern Nigeria, then applicable in Bayelsa State, 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* (2008) 15 NWLR (Pt. 1109) 173 @ 204 F & 215 B-D; *Igago v. The State* (1990) 14 NWLR (Pt. 534) 1 @ 24; *Onye v. The State* (1984) 10 SC 81. D E

The uncontradicted evidence of PW5, the medical doctor who performed the post mortem examination on the deceased, was that the force of the shot that killed him was such that the bullet penetrated his body “through and through” i.e. it went through his chest and exited from his back. The eyewitness account given by PW1, PW2 and PW3 was to the effect that the appellant deliberately aimed at and shot the deceased and that he slumped and died shortly thereafter. Again, the undisputed evidence, corroborated by PW5, was that the deceased was shot through the chest. In Exhibits A, C and J, the appellant admitted shooting the deceased but gave different versions of how his gun accidentally discharged, as alluded to earlier. F G H

He stated under cross-examination that he was in the process of picking up the gun when it accidentally exploded. He admit-

ted that the deceased was in a standing position when he was shot. He also admitted that there were other people between him and the deceased. What is therefore curious is how a gun that had fallen to the ground and was being picked up could fire shots that would not only hit the deceased in the chest, but with such force as to penetrate
 B his body and exit through his back. The fact that the deceased was standing makes it difficult to believe that he could have been accidentally shot “through and through” in the chest by a gun that was more or less at ground level. See: *Adekunle v The State* (supra) at
 C 742 C, per Oguntade, JSC. It is also strange that the shot missed those who were standing between the appellant and the deceased but found its way to the deceased’s chest. The evidence of the eye-witnesses and the medical doctor was consistent with a deliberate and well-aimed shot and inconsistent with the defence of accident.

D Learned counsel for the appellant argued quite forcefully that the gun the appellant carried on the day of the incident was a Brown-
 ing pistol and not a Beretta and that it had a capacity for only nine rounds of ammunition, as opposed to the evidence of the prosecution, which suggested that the appellant’s gun contained eleven
 E rounds. This argument, with due respect to learned counsel, holds no water. The appellant personally handed over his firearm to the Police. It was produced from their custody and admitted in evidence as Exhibit D. His employer confirmed in Exhibit H that Exhibit D was
 F the Beretta Pistol No. E00090 officially issued to him. The appellant, a seasoned armourer and familiar with different types of weapons did not object to the admissibility of Exhibit D nor did he complain that Exhibit D was not the pistol that he handed over to the Police. In
 G my humble view, the alleged controversy over the type of gun used in the killing is just a smoke screen. It is an attempt to bamboozle the court because the appellant is versed in weaponry. The undisputed evidence was that the gun carried by the appellant on the day of the incident was the weapon that caused the death of the deceased. There is no evidence of any other shots fired from a different gun. The
 H appellant himself admits that it was his gun that killed the deceased. He only contends that it was an accident.

The learned trial Judge who saw and heard the witnesses testify believed the evidence of the prosecution witnesses, particularly PW1, PW2 and PW3. He disbelieved the appellant who testified

as DW1. The lower court affirmed the findings of the trial court, No cogent reason has been advanced by the appellant to warrant interference by this court with the concurrent findings of the two courts. I agree with my learned brother, Mahmud Mohammed, JSC in the leading judgment that the defence of accident did not avail the appellant in the circumstances of this case. Furthermore, it is evident from the facts of the case, as observed by the learned trial Judge at page 248 of the record that the appellant, in shooting the deceased in the chest region from a distance of three to four metres, knew that death or grievous bodily harm was the probable consequence of his act. All the ingredients of the offence were proved. The prosecution established its case against the appellant beyond reasonable doubt. In the circumstances, I also find no merit in this appeal and dismiss it accordingly. The judgment of the lower court delivered on 15/3/2010 affirming the judgment of the trial court delivered on 22/12/05, convicting the appellant of murder and sentencing him to death by hanging, is hereby affirmed.

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