

# IN THE SUPREME COURT OF NIGERIA

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Suit No: SC52/2002

**Petitioner:** Solomon Adekunle

And

**Respondent:** The State

Date Delivered: 2006-06-30

**Judge(s):** Salihu Modibbo Alfa Belgore , Umaru Atu Kalgo , George Adesola Oguntade , Mahmud Mohammed , Ikechi Francis

## Judgment Delivered

The appellant in this appeal was a sergeant in the Nigeria Police Force. On 7-2-1997, he was on Anti-Crime patrol duty along Sagamu Benin Express-Way. The patrol team was under the command of an Assistant Superintendent of Police. On arrival at the Express Way, the Commander of the team divided it into two. The appellant's team was stationed along the Benin-Sagamu side of the Express Way. The Commander and his other team were on the Sagamu-Benin side. The two teams were about 100 meters apart.

Not long after the arrival of the patrol teams and taking their positions, the Commander of the team heard gun shots from the Benin-Sagamu side of the Expressway. He shouted and asked who fired the gun shots. He saw the appellant walking towards a moving bus with passengers. The appellant replied to the Commander's question that the gun shots were fired by him. The Commander asked the appellant why he fired the gun shots. There was no reply from the appellant. The Commander then quickly disarmed the appellant before moving towards the bus where he found that three men and a girl, Alice Tominiyi inside the bus had been hit by the bullets from the gun shots fired by the appellant. The victims were taken to the hospital where the girl Alice eventually died on 8-2-1997.

The appellant after the completion of the investigation of the case was charged before the Ijebu-Ode High Court of Justice of Ogun State for murder of Alice Tominiyi contrary to Section 319 (1) of the Criminal Code Law of Ogun State. In the course of the trial, which the Prosecution listed seven witnesses to be called; in the end only two witnesses gave evidence for the Prosecution. They are the Commander of the patrol team and the investigating police officer. The two witnesses having testified in Chief and duly crossed examined by the learned Counsel to the appellant, the Prosecution closed its case in the absence of the remaining witnesses who could not be procured to testify. There and then when the appellant was called upon to defend himself on the charge against him having regard to the evidence adduced by the Prosecution, his learned Counsel informed the Court that the appellant was resting his case on that of the Prosecution and therefore the defence was not adducing evidence. After taking final addresses from the learned Counsel on both sides, the learned trial Judge in his judgment delivered on 13-10-2000, came to the conclusion that the Prosecution had proved its case of murder against the appellant and convicted him accordingly by passing a sentence of death upon him. The appellant's appeal to the Court of Appeal Ibadan was equally dismissed by that Court in its judgment delivered on 28-11-2001. The appellant is now on a final appeal to this Court against his conviction and sentence.

Issues for determination in this appeal arising from the grounds of appeal filed by the appellant contained in the appellant's brief of argument are: -

'1. Whether having regard to the failure of the Prosecution to comply with the mandatory provisions of Section 319 (1) of the Criminal Procedure Law, Cap 29 Laws of Ogun State and Section 33 (6) of 1979 Constitution of Federal Republic of Nigeria, the learned Justices of Court of Appeal were right to have affirmed the Appellant's conviction - Ground 1.

2. Whether having regard to Appellant's statement (Exhibit A) and other evidence before the Court, the learned Justices of Court of Appeal were right in rejecting the defence of accident ' Ground 2.

3. Whether having regard to the totality of admissible evidence, the learned Justices of Court of Appeal were right in affirming the Appellant's conviction for the offence of murder (without substituting manslaughter therefore) - Grounds (sic) 3 and 4.'

The complaint of the appellant in the first issue for determination is that not having been charged for the offence of murder contrary to Section 316 and punishable under Section 319 (1) of the Criminal Code Law, Cap 29 Laws of Ogun State, his charge and conviction under Section 319 (1) alone is irregular. The conviction and sentence must be set aside as the charge against him did not disclose an offence known to law. There being no complaint, that the appellant was misled by the description of the offence and the ingredients thereof in the charge, or misled in the preparation of his defence having adopted the case of the Prosecution, the trial of the appellant under the charge cannot be vitiated. This is so when the appellant is not even complaining that the irregularity had occasioned a miscarriage of justice. See *Ogbotu v. The State* (1987) 2 NWLR (Pt. 54) 20 at 49. This issue therefore which appeared to have been raised rather half heartedly as the appellant was not complaining of any denial of justice, must fail.

The real issue for determination in this appeal is the second issue of whether the defence of accident under Section 24 of the Criminal Code CAP 29 Laws of Ogun State is available to the appellant having regard to the evidence on record against him in support of his conviction. The appellant is asserting this defence on the contents of his statement to the police under caution Exhibit 'A'. In that statement the appellant said that the gun he was holding at the time of the incident fell down from his shoulder and started to discharge without his intention to shoot. He said it was an accident. Section 24 of the Criminal Code under which the appellant is claiming this defence states that a person is not criminally responsible for an event which occurs by accident. 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.

In the present case, was the act of discharging bullets from the gun carried by the appellant, which resulted in the death of the deceased done accidentally or independently of the exercise of the will of the appellant? The law is trite 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. See *Iromantu v. State* (1964) 1 All NLR 311. In other words in law, for an event to qualify as an accident, such event must be the result of an unwilling act, an event which occurs without the fault of the person alleged to have caused it or an event totally unexpected in the ordinary cause of events. See *Adelumola v The State* (1988) 1 NWLR (Pt. 73) 683 at 692. The defence put up by the appellant in Exhibit A is that while on duty on the highway, he ordered the driver of the bus carrying the deceased and other passengers to stop but the driver refused. The appellant said he chased the driver for some distance and when the driver refused to stop, he became suspicious that the bus was carrying incriminating items. It was while he was pursuing the bus that the gun which was hanging on his shoulder fell down and started to discharge.

However, in the face of this version of the appellant's story is the uncontradicted evidence of the Commander of the Patrol team who testified for the Prosecution as PW 2 in the discharge of its burden of disproving the defence of accidental discharge being claimed by the appellant as required in *Sholuade v. The Republic* (1966) All NLR 134. The evidence of PW2 is to the effect that on hearing the gun shots while he was about 100 metres away from the scene of the incident, he shouted and asked who fired the gun shots. The appellant, who the witness saw walking towards the moving bus, answered in the affirmative that it was he who fired the shots. On being asked why he fired the gun shots, the appellant kept mute. At this first opportunity to raise the defence of accidental discharge, the appellant did not tell his boss PW 2 that it was the gun that fell down from his shoulder and started to discharge. This earliest opportunity to raise the defence availed the appellant right at the scene of the incident. The fact that the defence was not raised instantly until much later in the appellant's written statement Exhibit 'A', shows quite clearly that what the appellant raised in Exhibit 'A' is not a defence of accidental discharge but something else entirely that arose from his own imagination. See *Utteh v The State* (1992) 2 NWLR (Pt. 223) 257 at 274. Therefore the Court below was perfectly justified in rejecting the defence of accident raised by the appellant in Exhibit A.

The third and last issue in this appeal is whether having regard to the evidence adduced by the Prosecution, the Court below was right in affirming the conviction and sentence of the appellant for the offence of murder. The stand of the appellant on this issue is that on the evidence on record of the trial Court particularly the evidence of PW2 who was not at the scene of the incident and the contents of the appellant's own statement Exhibit 'A', did not establish the offence of

murder against him. Relying on the cases of Akpabio v. State (1994) 7 NWLR (Pt. 359) 635 and Akpan v. State (1994) 9 NWLR (Pt.368) 347, the learned Counsel for the appellant argued that the ingredients of the offence of murder had not been proved against the appellant and urged this Court to discharge and acquit him.

The State (respondent) however maintained that the Prosecution had succeeded in establishing all the ingredients of the offence of murder under Section 319 (1) of the Criminal Code against the appellant to justify his conviction and sentence. The case of Gira v. The State (1996) 4 NWLR (Pt.443) 375 at 382, was called in aid by the learned Counsel to the respondent who urged this Court not to disturb the concurrent findings of fact of the two Courts below. She urged the Court to dismiss the appellant's appeal.

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 the prosecution must prove: -

- (a) that the deceased had died,
- (b) that the death of the deceased was caused by the accused, and
- (c) that the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence.

See Ogba v. The State (1992) 2 NWLR (Pt. 222) 164; Monday Nwaeze v The State (1996) 4 NWLR (Pt. 143) 375 and Gira v. The State (1996) 4 NWLR (Pt. 443) 375.

The evidence relied upon to establish a charge of murder may be direct or circumstantial. Whether this evidence is direct or circumstantial, it must establish the guilt of the accused person beyond reasonable doubt. The onus in this connection on the prosecution as a general rule never shifts and misdirection on the question of onus of proof is fatal unless it can be shown away from the team led by the appellant when he heard gun shots from the Benin-Sagamu part of the Express highway. Part of this evidence at pages 25-26 of the record reads: -

'Some few minutes after my arrival, I heard gun shots from the Benin-Sagamu unit. I shouted for who fired. I saw accused walking towards a bus bound for Lagos with passengers. The accused told me he was the one who fired. I quickly disarmed him and moved towards the bus. I found out three men and a girl Alice had been hit by bullets. I rushed the victims to Ijebu-Ode General Hospital. I took the accused to Odogbolu Police Station and reported the incident. Exhibits C and CI are the SMS and bullets recovered from the accused after disarming him. I reported to my D.P.O. I went back to see the condition of the victims. While the men responded to treatment, Alice's condition however deteriorated and I got her transferred to OSUTH Sagamu. I bought blood for the girl but on 8-2-97, her condition became worse and she eventually died.'

However, in the statement of the appellant Exhibit 'A' tendered by PW 1 which also forms part of the case of the Prosecution, the appellant who refused to explain to PW2 why he fired the gun shots, claimed in Exhibit 'A' which was written after the day of the incident, that the firing of the gun was caused by its falling down from his shoulder to the ground. The learned trial Judge in his judgment rejected the defence of accidental discharge put up by the appellant in Exhibit 'A' and accepted the uncontradicted evidence of PW2 that the appellant fired the gun shots at the moving bus carrying passengers. As a result of this shooting at the bus by the appellant, four persons in the bus were hit by the bullets from the gun fired by the appellant. As a result of the injuries sustained by the victims, one of them a girl, Alice Tominiyi died on 8-2-1997.

After very carefully evaluating the entire evidence on record, the learned trial Judge found the appellant guilty of the offence of murder and convicted him accordingly. The appellant was sentenced to death. On appeal, the appellant's conviction and sentence were affirmed by the Court of Appeal. The effect of these concurrent findings of fact which the appellant has to face in convincing this Court to set aside his conviction and sentence is well settled. It is, that this Court will not interfere with the concurrent findings of the lower Courts on issues of fact except there is established a miscarriage of justice, a perverse decision or a violation of some principle of law or procedure. See National Insurance

Corporation of Nigeria v. Power and Industrial Engineering Co. Ltd (1986) 1 NWLR (Pt. 14) 1; Enang v. Adu (1981) 11-12 SC 25; Nwagu v. Okonkwo (1987) 3 NWLR (Pt. 60) 314; Igwego v. Ezeugo (1992) 6 NWLR (Pt. 249) 561 and Ubani v. The State (2003) 18 NWLR (Pt. 85. 1) 224 at 247. In the present appeal there being nothing that was urged by the learned Counsel to the appellant to bring the concurrent findings of the guilt of the appellant within the ambit of the exceptions, the appeal must fail. With the overwhelming evidence on record against the appellant from the only two witnesses who testified for the prosecution in proving all the ingredients of the offence of murder against the appellant, his chances of success were compounded by his resting his case on that of the Prosecution, the implication of which is that he is presumed to have accepted that the evidence against him is exactly as stated by the Prosecution.

I cannot end this judgment without commenting on the efforts made by the police to frustrate the action of the Prosecution to successfully prosecute this case against their colleague. Although the incident that led to the death of the deceased, Alice Tominiyi took place in the presence of all the five members of the PW2 ASP Sylvester Okparaji's Police Anti-Crime Patrol Team on 7-2-1997, who were therefore all competent witnesses for the Prosecution, only PW2 was made available to the Prosecution. Not only that, the Prosecution in its application to the trial Court gave the names of seven witnesses with their full addresses the Prosecution wanted to call in the course of the trial but only the two witnesses who testified in this case were served. The remaining witnesses could not be procured for the Prosecution up to the end of the trial in the course of which it was revealed that even the police case diary containing relevant documents necessary for the effective prosecution of the case was missing from the custody of the police. Clearly, if it were the police who were put in full control of the Prosecution of this case against their colleague, perhaps the result would have been different. To this end, the learned Counsel for the Prosecution at the trial Court from the Ministry of Justice of Ogun State ought to be commended for diligently handling this case particularly in overcoming all the obstacles placed on the path of the Prosecution at the trial to ensure the attainment of justice.

On the whole therefore, this appeal lacks merit and the same is hereby dismissed. The conviction of the appellant for the offence of murder under Section 319 (1) of Criminal Code CAP 29, Laws of Ogun State and the sentence of death passed on him by the trial High Court and affirmed by the Court below, are hereby affirmed.

Judgement delivered by  
Salihu Modibbo Alfa Belgore, J.S.C.

I adopt entirely the facts of this case as set out in the lead judgment of my learned brother, Mohammed, J.S.C. The appellant, in face of the overwhelming evidence that he fired the gun whose shot killed the deceased, refused to testify, resting his case on the Prosecution's case. After final addresses by Counsel, the learned trial Judge came to the conclusion that the prosecution had proved its case beyond reasonable doubt. The Court of Appeal had no reason to interfere with this decision.

Before this Court, for all the issues raised, I agree with Mohammed J.S.C. that it is not possible to find substance in them. To my mind, the appellant without any reason whatsoever opened up with his gun on innocent passengers in a bus. Up to now he has not advanced any credible reason for this wanton act.

I also dismiss this appeal.

Judgement delivered by  
Umaru Atu Kalgo, J.S.C.

I have read before now, the judgment just delivered by my learned brother Mohammed, J.S.C. I entirely agree with his reasoning and conclusions, which I fully adopt as mine in the circumstances of this appeal. I have nothing useful to add. I therefore find no merit in the appeal, which I hereby dismiss and affirm the decision of the Court of Appeal.

Judgement delivered by  
George Adesola Oguntade, J.S.C.

The appellant was charged with the offence of murder contrary to Section 316 and punishable under Section 319(1) of the Criminal Code Law. Cap 29 Laws of Ogun State before the Ijebu Ode High Court.

On 7-2-97, the appellant was one of a group of policemen who were on anti-crime patrol duty along Shagamu'Benin Express way. There was no doubt that bullets from the gun held by the appellant had hit one girl who was in a moving vehicle. The girl Alice died on 8-2-97. The defence of the appellant was that the gun dropped from his hand and that live bullets were in the process, discharged from his gun. That defence which he stated on his written statement exhibit 'A' did not match his first reaction immediately after the occurrence. This is because the noise following the gun shots were heard by the senior police officer heading the patrol team who had been positioned some 100 metres away from the appellant.

The senior officer came to meet the appellant and asked who fired the gun shots. The appellant stated that he did. He was asked why he did. He did not make a reply. He did not there and then explain that the bullets were discharged accidentally from his gun, which fell down.

The appellant did not give evidence on oath to explain that the gun had been accidentally triggered. The evidence called by the Prosecution was therefore not challenged. The appellant was convicted as charged and sentenced to death. The appellant brought an appeal before the Court below which affirmed appellant's conviction and sentence. The appellant has come before this Court on a final appeal.

My learned brother Mohammed, J.S.C. has in the lead judgment stated in full, the facts leading to the death of the victim and shown why this appeal must be dismissed. I entirely agree with him. In *Lori v. State*, [1980] 8-11 S.C. at 95-96, this Court per Nnamani J.S.C. observed:

'In a charge of murder, the cause of death of the deceased must be established unequivocally and the burden rests on the Prosecution to establish this and if they fail, the accused must be discharged. See *Rex v. Samuel Abengowe* 3 W.A.C.A. 85; *R. v. Oledima* 6 W.A.C.A. 202. It is also settled law that the death of the victim must be caused by the act of the accused or put differently it must be shown that the deceased died as a result of the act of the accused. See *Sunday Omonuju v. The State* [1976] 5 SC. 1; *Frank Onyenkeye v. The State* [1964] N.M.L.R. 34'.

In this case, it was not disputed that the victim died when bullets from the appellant's gun were discharged and hit her. The only question that remained was whether or not the deceased was accidentally shot. It seems to me that the two Courts below were right in their conclusion that the appellant's gun could not have accidentally discharged bullets in the manner stated by the appellant. Further, this statement, if true, ought to have been made by the appellant immediately after the occurrence in reaction to the question asked from the appellant by the senior police officer commanding the patrol.

It occurred to me also that if the gun fired accidentally 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 sum total of all these is that the appellant's statement, was found untrue and unacceptable. It is my view that the appellant was correctly convicted and sentenced on the charge brought against him.

I would also dismiss this appeal as in the lead judgment of my learned brother Mohammed J.S.C. I would also affirm the conviction of the appellant and the sentence imposed on him.

Judgment delivered by  
Ikechi Francis Ogbuagu, J.S.C.

The Appellant was at the High Court of Ogun State holden at Ijebu-Ode, tried on an information for the offence of murder contrary to Section 319(1) of the Criminal Code Law (Cap.20) Laws of Ogun State of Nigeria, 1978. He pleaded not guilty to the charge. The Prosecution called two (2) witnesses and tendered Exhibits, to prove its case beyond

reasonable doubt. The Appellant relied on the Prosecution's case and therefore, called no evidence, either of himself or any other witness.

Let me quickly and at once, dismiss Issue 1 of the Appellant and all the argument in respect thereof as being of no moment. This is because, there is no evidence from the Records that any objection was ever taken by the learned Counsel for the Appellant as to the charge/information when some was read out to the Appellant before he pleaded to the same. He did not raise this issue in the Court below. Surely, the objection cannot be raised now in this Court. It is the duty of Counsel especially in murder cases, to promptly take objection to any or every perceived irregularity relating at least, to procedure or charge. See the case of Okaroh v. The State [1990] 1 SCNJ, 124; [1990] 1 NWLR (Pt. 125) 128 @ 136 - 137, and recently, the case of Uguru v. The State (2002) 4 SCNJ. 282 @ 290, citing several other cases including R V. Ntia [1946] 12 W.A.C.A., 54; Ejilukwu v. The State (1993) 7 NWLR (Pt. 307) 544@583; (1993) 9 SCNJ. 152 and Ichi v. The State (1996) 9 NWLR (Pt. 470) 84 C.A. See also, my Judgment in John Agbo v. The State (2006) 6 NWLR (Pt. 977) 545 @ 577-578; (2006) 1 SCNJ, 332@356, (2006) Vol. 135 LRCN, 808 @ 846-847; (2006) 2 SCM (Supreme Court Monthly) 1@24. Incidentally, the Appellant and his learned Counsel, have not shown either that the Appellant was misled by the charge or Information or what prejudice the Appellant suffered as a result or that, there was a miscarriage of justice in respect thereof. The issue to say the least is merely academic and it is discountenanced by me.

The evidence of the P.W.2 - ASP Sylvester Okparaji who led the team of Police on patrol at Ijegan junction on the Expressway is very significant. Said he on oath at pages 25 to 26 of the Records, inter alia, as follows:

'..... We were about 100 metres apart. Some few minutes after my arrival, I heard gun shots from the Benin/Sagamu units. I shouted for who fired, I saw accused walking towards a bus bound for Lagos with passenger (sic). The accused told me he was the one who fired. I quickly disarmed him and moved towards the bus. I found out three 3 men and a girl Alice had been hit by bullets.....I bought blood for the girl, but on 8/2/97, her condition became worse and she eventually died.'..'

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

'..... When I went over to the accused and shouted who fired, the accused answered he did. I then asked why but he did not answer'.

I have noted earlier in this Judgment, that the Appellant did not testify or call any witness. The evidence of the P.W.2 therefore remained uncontroverted.

However, from Exhibits 'A' and 'B', his two statements made on 7th February 1997 and 12th February 1997, respectively, the stories by him as to what happened appear very conflicting. In Exhibit 'B' where 'I (fire)' which is mutilated, appear, but in Exhibit 'A', what appears, is that the rifle which he hung on his left shoulder, fell down and started discharging bullets accidentally without his intention to shoot at the passengers. It is easy to tell lies, but very difficult at most times, to justify the lie. Surely, if a, gun/rifle, fell on the ground, and started emitting bullets, first of all, it is evidence that the gun must have been 'cocked' for action. Secondly, that the bullets will not fly towards a moving vehicle and hit the windscreen and in the process, hit some of the occupants/passengers in the said bus.

In any case, the Appellant never testified in order to either make an explanation in support of his assertion, that the gun/rifle which he said was loaded with fifteen (15) rounds of ammunition, discharged itself ten (10), leaving five rounds. He did not subject himself to cross-examination. The reason was obvious, particularly in the face of the weighty evidence of the P.W.2, his boss.

I am aware of and I recognize the right of an accused person, to remain silent throughout the trial, leaving the burden of proof of his guilt beyond reasonable doubt to the Prosecution. See the case of Utteh & Anor v. The State (1992) 3 NWLR (Pt. 138) 301@311 C.A., which went on appeal and is reported in (1992) 2 SCNJ. (Pt.1) 183 @ 194. In other words, an accused person is presumed innocent until he is proved guilty. There is therefore, no question of his proving his innocence. This is because, for the duration of a trial, an accused person may not utter a word. He is not bound to say anything. It is his Constitutional right to remain silent. The duty is on the Pro

secution to prove the charge against him as I had said, beyond reasonable doubt. See *Uche Williams v. The State* (1992) 10 SCNJ, 74@ 80. Afterwards, an accused person is not a compellable witness. See the case of *Singh v. The State* (1998) 1 NSCC 852; (1998) 5 SCNJ, 58. However, if an Appellant asserts that the Prosecution has failed to prove his guilt beyond reasonable doubt before conviction, it is now firmly settled, that it is for him, to establish that it is so and it is the duty of an Appellate Court, to examine the assertion against the whole background of the case and in particular, against the evidence leading to the guilt of the Appellant. See *Otaki v. The State* (1986) ANLR (Pt. 371 @ 378) - per Uwais, J.S.C., (as he then was) and *Edet Offiong Ekpe v. The State* (1994) 12 SCNJ, 131 @ 135 - per Mohammed, J.S.C.

More importantly, where an accused person opts not to testify and rests his case on that of the Prosecution as in the instant case leading to this appeal, and the prosecution, has, by credible evidence of its witness or witnesses, proved its case beyond reasonable doubt, then, he cannot turn round, to complain that the Court did not consider his defence, as has been done in the Appellant's Brief in respect of their Issue 2.

P.W.2 had testified on oath, that the Appellant confessed openly that he fired the gun that caused the death of the deceased. If I must repeat myself, this evidence, was not controverted or rebutted by the Appellant who did not testify. In other words, the evidence of the P.W.2 debunked and rubbished the assertion in Exhibit 'A'.

There is the further evidence of the P.W.2 that when he asked the Appellant why he fired the gun, the Appellant did not give or proffer any answer. At the earliest opportunity, the Appellant did not tell the P.W.2, his story as contained in Exhibit 'A'.

The Appellant surely, had a duty to be careful with a loaded gun containing fifteen rounds of ammunition or bullets while, according to his said statement, he was 'pursuing' a moving vehicle. How could the defence of 'accident' be sustained in the circumstances of this case? I or one may ask. The Appellant did not go into the witness box to testify, and then, give an explanation as to how a gun discharged on its own. The said defence therefore, was not given in evidence and so, the Appellant was not subjected to cross-examination. Surely and certainly, the Appellant cannot and could not eat his cake and have it so to say. So, the defence of accident was bound to be rejected. See the case of *R v. Akerele* (1941) 6 W.A.C.A. 56.

As stated by Oputa, J.S.C. in the case of *Ali & Anor. v. The State* (1988) 1 NWLR (Pt. 68) 1@18; (1988) 1 SCNJ, 17, it is always a gamble, to rest the defence on the case of the prosecution. That it is a risk where issues of fact will have to be decided in favour of an accused person before his defence will succeed. That the defence has in effect, shut itself out and will have itself to blame. That the Court will not be expected to speculate on what the accused person might have said.

On his part, Craig, J.S.C. at page 13 of the NWLR, stated that it means no more than that the accused person did not wish to place any fact before the Court other than those, which the Prosecution had presented in evidence. That it also signifies that the accused person did not wish to explain any fact or rebut any allegations made against him. Indeed, the situation is like or akin to a Counsel for an accused person, making a No Case Submission and relying or resting on it completely. The risk involved in taking such a stance is the type eloquently highlighted, by the Privy Council in the case of *The Queen v. Sharnpal Singh* (1962) 2 WLR, 238@243-245 and considered by this Court, in the case of *Nwede v. The State* (1985) 3 NWLR (Pt. 444 @ 455).

In the case of *Babalola & Ors. v. The State* (1989) 4 NWLR (Pt. 115) 264 @ 276; (1989) 7 SCNJ. 127 also referred to by the trial Court, Nnaemeka-Agu, J.S.C. stated inter alia, as follows:

'He was of course within his Constitutional right'..... Hence whereas prudence dictates that an accused person should not assist the Prosecution which has failed to prove every material ingredient in the case against him ..... It is a reckless hazard to insist on the exercise of that right when the Prosecution has made a prima facie case, which calls for the accused person's (sic) explanation. ....'.

It is now settled, that an accused person as in the instant case, cannot take refuge on (in) a defence of accident for a deliberate act even if he did not intend the eventual result. See the case of *Oghor v. The State* [1990] 3 NWLR (Pt. 139)

484 @ 502 C.A. The test of the plea or defence of accident, is always that if the act even though unlawful, is not such that would, from the view of a reasonable man, cause death or grievous bodily harm though death resulted therefrom, the person charged, can only at most, be convicted of manslaughter. See the case of Thomas v. The State (1994) 4 SCNJ. (Pt. 1) 102@109; (1994) 4 NWLR (Pt. 337) 129 - per Wali, J.S.C. It need be stressed, that the act leading to the accident, must be a lawful act done in a lawful manner. Thus, for an event to qualify as accidental under Section 24 of the Criminal Code referred to and relied on in the Appellant's Issue 2 of the Brief, it must be a, surprise to the ordinary man of prudence, that is, a surprise to all sober and reasonable people. The test is always objective. See the cases of Adelumola v. The State (1988) 1 NWLR 683 @ 692 '693; (1988) 3 SCNJ. 68; Aliu Bello & 13Ors. v. Attorney General of Oyo State(1986) 5 NWLR (Pt. ) 828 ' per Karibi-Whyte, J.S.C. It must always be borne in mind, that Section 24 of the Criminal Code, does not deal with an 'act' but an 'event' and the event within the meaning of the section, is what apparently follows from an act. See the cases of Audu Umaru v. The State(1990) 3 NWLR (Pt.138) 363@370 C.A.; Daniels v. The State (1991) 8 NWLR (Pt. 212) 715 C.A. and Chukwu v. The State (1992) 1 NWLR (Pt. 217) 255; (1992) 1 SCNJ. 57.

What is relevant in our criminal law, and this is settled, is that the act of the accused person resulting in the death of the deceased, must be unlawful. The mens rea or malice afore-thought, no longer governs the criminal responsibility of the accused person. These are common law concepts. Motive, is also irrelevant except that where it is proved, it strengthens the case of the Prosecution. See the case of Nwali v. The State (1991) 5 SCN.J.1 4.

Let me observe here, that it is becoming very notorious and most disturbing these days, when Policemen, use guns purchased for them with public money and meant for the protection of the citizenry, are freely used to mow down innocent citizens of this country with reckless and careless abandon and in each case or every event, the aggressor policeman, is heard to say and rely on 'accidental discharge'. Enough, I think, is enough. Unless the Courts 'put down their feet' so to speak and make it abundantly clear to our policemen in this country, that never again, will such plea or defence be available to any of them accused of murder or acceptable by the Courts, then of course, Nigerians, will continuously be sprayed with bullets from the police who will hide on the plea 'he was killed by stray bullet' or by 'accidental discharge'. I suppose that when a gun is properly locked, stray bullets and accidental discharge syndrome, will not occur. Invariably, accidental discharge, always occur, when some of the drivers, are unwilling and refuse to pay the N20.00 (twenty naira) or such money being extorted by the police at every check point, (and there are so many on our roads, separated by very short distances). When such drivers refuse to stop, oh yes, 'they must be carrying contraband goods or some imagined incriminating stuff. This state of affairs is of common knowledge and it is a notorious fact on our Nigeria roads.

However, I note that in the Judgment of the learned trial Judge, he had held that the facts of this case as presented by the P.W.2, showed that the Appellant, fired the shots which killed the deceased and that the said firing, was unlawful and that the act of the Appellant, 'fell within Section 316 (1) of the Criminal Code.

Said His Lordship at page 35 of the Records, inter alia, as follows:

'The defence of accident or accidental discharge as raised in Exhibit A would not be considered. The accused said he shouted stop three times to the driver of the passenger bus who refused to stop and chased him along for some distance. When the bus refused to stop, the accused became suspicious that the vehicle was carrying incriminating items. The gun then fell down and started to discharge. If a gun fell down and started to discharge I cannot see how such discharge could go up and hit passengers in a bus. If the gun fell down P.W.1 that went to the scene would have seen the discharged cartridges on the ground as there is evidence that only five bullets out of those issued to accused were recovered when the accused was disarmed by P.W.2. I see the accidental discharged (sic) raised in Exhibit A as an afterthought. The accused when asked by P.W.2 why he fired did not say that it was accidental discharge, as a matter of fact he did not say anything. Further when P.W.2 shouted who fired, the accused was said to have answered that he did. The accused did not at the earliest opportunity available to him when asked by P.W.2 who fired say that it was accidental discharge. I therefore hold that he (sic) (meaning the) defence of accident or accidental discharge is not open to the accused in this case'.

The above, are findings of fact and holding by the trial Court. The learned trial Judge at page 36 of the Records, stated



inter alia, as follows:

'I find that it was at that time the accused formed the intention to fire and actually fired. This case is clearly not one of accidental discharge but it was a clear case of intentional and deliberate firing which was clearly unlawful in the circumstances of the circumstances of this case. It was because the accused knew there could be no defence for the shooting in this case which he did that he later as an after thought brought the issue of accidental discharge'.

The above again, are findings of fact. The learned trial Judge further held that

'In this case the circumstances that warranted the shooting by the accused calls for explanation and none was forth-coming in this case'.

I agree. I have also said so in this Judgment. His Lordship continued inter alia, as follows:

'I believe that it was the accused that shot the passenger but when according to the accused, the driver did not stop when shouted upon to stop. That would not require a shooting but the accused could have taken down the registration number of the vehicle and later get the driver arrested rather than terminating the life of an innocent young girl called Alice'.

I also agree.

In their unanimous decision, the Court below ' per Akintan, JCA, (as he then was), stated at page 81 of the Records, inter alia, as follows:

'The position of the law is that the Prosecution is not required to prove an accused person's motive. This is because the law is that a person intends the natural consequence of his conduct. See Adamu v. Kano N.A. (1976) 4 S.C. 65; Gira v. The State (1996) 4 NWLR (Pt. 443) 375; and Mohammed v. The State (1997) 9 NWLR (Pt. 520) 169. It follows therefore that when the appellant fired the loaded rifle in his possession into a passenger bus loaded with travellers, the law presumes that he intended to kill or cause grievous injury or injuries to some of the passengers in the bus. The onus is therefore on him to prove otherwise. Since his action resulted in the death of the deceased, who was one of the four passengers hit by bullets released from the gun shots he fired, the law would presume that he intended to kill or cause grievous bodily harm on the passengers hit by the bullets. The learned trial Judge was therefore right in holding him liable for the murder of the deceased, a victim of the gun shots. The Prosecution, in my view, proved all the ingredients required in establishing the charge preferred against the appellant'.

His Lordship concluded thus,

'Since I have held that the learned trial Judge was right in rejecting the defence of accidental discharge and that the appellant fired the gun shots which resulted in the death of the deceased, the question of considering substituting a conviction for manslaughter will therefore not arise. In the result, there is totally no merit in the appeal. I accordingly dismiss it. The conviction of the appellant for murder is therefore affirmed. Similarly, the sentence of death passed on him is also affirmed'.

I entirely agree. Since these are also the concurrent findings of fact by the two lower Courts, the attitude of this Court remains, that it will not interfere because, none of the said decisions, is perverse. See the cases of Abinabina v.Enyimadu (P.C.) 12 WACA 17 @ 173 ' Per Lord Thankerton; Dibiamaka v.Osakwe (1989) 3\_NWLR (Pt.107) 101 @ 110; (1989) 5 SCNJ. 30 and recently, Princent & Anor. v. The State (2002) 12 SCNJ. 250 @ 300 and Ubani & 2 Ors. v. The State (2003) 18 NWLR (Pt. 851) 224 @ 247; (2003) 12 SCNJ. 111@ 127 - 128 just to mention but a few.

It is from the foregoing and the fuller reasons and conclusion in the said lead Judgment of my learned brother, Mohammed, J.S.C., in which I entirely subscribe and agree, that I too, dismiss this appeal as being unmeritorious. I also, affirm the decision of the Court below affirming the decision of the trial Court.