IN THE SUPREME COURT OF NIGERIA

Suit No: SC308/2002

Petitioner: Dickson Moses
And
Respondent: The State

Date Delivered: 2006-04-21

Judge(s): Sylvester Umaru Onu , Akintola Olufemi Ejiwunmi , Dahiru Musdapher , Walter Samuel Nkanu Onnoghen , Ikechi F

Judgment Delivered

This is an appeal against the judgment of the Ibadan Division of the Court of Appeal in appeal NO. CA/I/29/99 delivered on 17th day of January, 2002 in which the court affirmed the judgment of the Ogun State High Court holden at Ijebu-Ode delivered in charge NO. HCJ/9C/91 in which the trial court convicted and sentenced the appellant for the offence of causing death by dangerous driving a.k.a. manslaughter.

Appellant was charged before the trial court with the following offences:

\"Statement of offence - 1st Count

Causing death by dangerous driving contrary to and punishable under section 4 of the Federal Highway Act, 1971 (No. 4 of 1971).

Particulars of Offence

Dickson Moses \"M\" on or about the 23rd day of January, 1990 at Oke - Owa along Old Ondo/Benin road, Ijebu - Ode Judicial Division caused the death of one Olufemi Adetola \"M\" by driving a motor vehicle registration No. OY 1758 LE on the said Federal Highway in a manner which was dangerous to the public having regard to all the circumstances of the case.

Statement of Offence - 2nd Count

Dangerous driving contrary to and punishable under section 5 (1) of the Federal Highway Act 1971 No. 4 of 1971.

Particulars of Offence

Dickson Moses \"M\" on or about the 23rd day of January, 1990 at Oke Owa along old Ondo/Benin Road, Ijebu - Ode a Federal Highway in the Ijebu - Ode Judicial Division drove a motor vehicle Registration No. OY 1758 LE on the said Federal Highway in a manner that was dangerous to the public having regard to all the circumstances of the case.\"

The respondent called a total of six witnesses while the appellant testified on his behalf and called no other witness.

The facts of the case include the following. On the 23rd day of January, 1990 the deceased, one Olufemi Adetola, male was driving a Volkswagen Bettle Car with registration No. OGLG 48 J along old Ondo/Benin Road, Ijebu - Ode, a Federal Highway and when he got to Oke - Owa town, the deceased had a head-on collision with another vehicle, a petrol tanker with registration No. OY 1758 LE driven by the appellant. At the time of the accident, the deceased had two passengers in the vehicle he was driving including PW5 and a lady referred to as Titilayo who allegedly sat in front with the deceased while PW5 sat at the back of the said vehicle. It is the case of the prosecution that the accident occurred as a result of the dangerous manner appellant drove his vehicle along that road that particular day in that appellant allegedly left his rightful lane by pulling out of it as a result of a long queue of vehicles and drove on the lane of the on

coming vehicle then being used by the deceased and collided with the vehicle of the deceased thereby killing him on the spot.

On the other hand, appellant denies leaving his lane and colliding with the deceased in the deceased\'s lane. His case is that there was a broken down water tanker on the road which had spilled water on the road thus rendering the road slippery and that the deceased was overtaking the said broken down water tanker when he (the deceased) drove into the appellant\'s vehicle and caused the accident. Appellant further said that he tried to avoid the accident by applying his brakes only for the vehicle to swerve and collide with the vehicle of the deceased.

The prosecution called the Vehicle Inspection Officer who tested and examined the vehicles involved in the accident and he told the court that in his opinion, the accident was not caused by any mechanical defect in any of the vehicles. In addition to that testimony and the reports, the prosecution also called the Investigating Police Officer who drew up a sketch map of the scene of accident which he tendered. At the end the trial court considered the case of the parties and came to the conclusion that the prosecution had proved its case beyond reasonable doubt and convicted and sentenced appellant on the 1st count of the charge while he suspended further proceedings in respect of count 2.

Appellant was dissatisfied with that judgment and consequently appealed to the Court of Appeal which affirmed the judgment of the trial court and in addition convicted and sentenced appellant to a term of 2 years in respect of count 2. Finally appellant has appealed to this court against the concurrent findings of facts by the trial and lower courts.

In the appellant\'s brief of argument filed by learned counsel, Joseph Nwobike Esq on the 16th day of July, 2003 and adopted in argument of the appeal on 26th January, 2006, learned counsel formulated three issues for the determination of the appeal. The issues are as follows:

\"(1) Whether the prosecution discharged the burden of proof placed on it by law and thereby proved its case against the appellant.....

(2) Whether PW5 was a tainted witness under the law

(3) Whether the sentencing of appellant on count No. 2 by the court below was not an improper exercise of judicial powers in the circumstance.\"

Before proceeding further to consider the arguments on the above issues, I intend to reproduce the amended grounds of appeal and the issues formulated before the Court of Appeal, for reasons that will become obvious later in the judgment. The amended grounds of appeal and the issues are as follows:-

\"Amended Grounds of Appeal

1. The learned trial judge erred in law by relying on the rough sketch of the accident which sketch was highly defective, considering all the circumstances of the case and thereby came to a wrong conclusion which has occasioned a miscarriage of justice.

2. The learned trial judge misinterpreted the sketch drawing exhibit \"3\" and thereby wrongly applied the misinterpretation to the facts of the case and thereby came to a wrong conclusion which had occasioned a gross miscarriage of justice.

3. The learned trial judge erred in law by failing or omitting to consider the defence of skidding caused by water which defence appears in the evidence of the accused person and thereby occasioned a failure of justice.

4. The learned trial judge erred in law by failing to make a specific finding of fact as to whether \"oke - owa\" along old ondo/benin road, ijebu - ode\" was indeed a Federal Highway as alleged in the information before sustaining the information against the accused person.

5. The learned trial judge erred in law by failing or omitting to make specific finding of fact of who was actually overtaking on the road, between the deceased (driver) and the accused person and thereby failed to determine the person really at fault in the accident, before proceeding to convict the accused person and thereby occasioned a miscarriage of justice.

6. The learned trial judge ought to have invoked the provisions of section 382 of the Criminal Procedure Code to give the appellant an option of fine as appellant had no previous criminal records.

7. The judgment of the lower court is unreasonable, unwaranted and cannot be supported having regard to the evidence adduced.\"

The issues formulated by learned counsel for the appellant arising from the above amended grounds of appeal are stated as follows:

\"Issues for determination.

(1) Whether the reliance placed by the learned trial judge on the rough sketch drawing was fit and proper in view of the inadequacies in the sketch drawing as compared with the evidence of PW5 and the accused appellant.

(2) Whether the lower court gave proper consideration to the defence of the appellant before proceeding to convict him.

(3) Whether all things considered the prosecution\'s case was proved beyond all reasonable doubt as required by law.\"

From the reproduction of the grounds of appeal and the issues formulated therefrom, it is very clear that appellant never complained before the Court of Appeal that PW5 was a tainted witness. The grounds and issues clearly speak for themselves. From the record, no further additional grounds of appeal were filed neither was any other issue formulated to include any complaint against PW5 as a tainted witness. Also from the record, no leave of court was sought and obtained before formulating and arguing any issue regarding PW5 as a tainted witness.

Turning to the issues for determination in this appeal, learned counsel for the appellant, Joseph Nwobike Esq. submitted in the appellant\'s brief filed on 16/7/03 on issue No. 1 that the prosecution failed to discharge the burden of proof placed on it by law; that the prosecution owes the duty to prove the charge against the appellant beyond reasonable doubt as provided under section 138 (2) of the Evidence Act, 1990. Learned counsel further submitted that the failure of the prosecution to prove the charge beyond reasonable doubt emanates from the material contradictions and insufficiency of evidence. Referring to exhibit \"3\", the rough sketch of the scene of accident, learned counsel stated that the said exhibit is intended to show graphically the effect of the accident and not an account of how the accident occurred but that exhibit 3 failed in its assigned role as the distance between the point of impact and the resultant position was not indicated. Strangely and without referring to the alleged material contradictions in the evidence of the prosecution, learned
counsel proceeded to submit at page 5 of the brief as follows:

\"It is submitted that these contradictions are material and ought to have been a basis for the resolution of the doubt in favour of the appellant and the discharge and the acquittal of the appellant by the court below. An appellate court is entitled to examine the evidence and make its own assessment of it. See Onuchukwu vs The State (1998) 4 S.C 49 at 54.

Learned counsel finally submitted that the finding of the trial court and its confirmation by the Court of Appeal to the effect that \"there can be no doubt from the sketch as to whose lane the accident occurred and in whose lane both vehicles fell\" is perverse and urged the court to interfere with the said finding and resolve the issue in favour of the appellant, relying on Oguonzee vs The State (1998) 4 S.C 110 at 124.

On his part, learned counsel for the respondent, Adesola Shobayo (Mrs) then as Administrator-General and Public Trustee, Ministry of Justice, Abeokuta, Ogun State, now Director of Public Prosecutions of the said State, in the respondent\'s brief of argument filed on 15/12/04 submitted that in a charge of causing death by dangerous driving and dangerous driving under sections 4 and 5 (1) of the Federal Highway Decree, 1971 the prosecution must prove the following:

(a) that the accused person\'s manner of driving was reckless or dangerous;

(b) that the dangerous driving was the substantial cause of the death of the deceased.

(c) that the accident occurred on a Federal Highway, relying on The State vs Usifor (1974) I NMLR 72.

Learned counsel submitted further that the prosecution duly discharged the burden of proof placed on it by law by calling witnesses and tendering documents at the trial; that there is evidence on record that appellant left his lane of the road by overtaking a convoy of vehicles and had a head-on collision with the Volkswagen vehicle driven by the deceased in the deceased\'s lane; that the driver of the Volkswagen vehicle died on the spot; that an eye witness account of the accident was given by PW5 who was a passenger in the Volkswagen vehicle. Learned counsel further submitted that in addition to the eye-witness account, exhibit 3, the sketch map of the scene of accident also corroborated the evidence of the prosecution witnesses that the accident happened on the deceased\'s lane and that the said exhibit 3 revealed the skid marks of the appellant\'s tanker trailer on the lane of the deceased before the accident. Learned counsel then submitted that to leave ones lane for another and collide with another vehicle on its lane is a piece of dangerous driving as held in Abdullahi vs The State (1985) 1 NWLR (Pt. 3) 523.

Counsel further submitted that the trial court believed the evidence of PW1, PW5 and PW6 as to how the accident occurred which finding was confirmed rightly, in the opinion of learned counsel, by the Court of Appeal; that this court should not interfere with the concurrent findings of facts by the trial and lower courts particularly as those findings are not perverse nor are they erroneous, relying on Ahmed vs The State (1998) 9 NWLR (Pt. 566) 389 at 401; Bakare vs The State (1987) 1 NWLR (Pt. 52) 579 at 593 - 594.

Finally learned counsel submitted that the prosecution adduced evidence to prove that the accident occurred on a Federal Highway as confirmed by the judgments of the trial and lower courts and urged the court to resolve the issue against the appellant.

It is settled law that for the prosecution to discharge the burden of proof placed on it by law in a charge of causing death by dangerous driving under the provisions of sections 4 and 5 (1) of the Federal Highway Decree No. 4 of 1971, it must establish by evidence, the following ingredients of the offences:

(a) that the accused person\'s manner of driving was reckless or dangerous.

(b) that the dangerous driving was the substantial cause of the death of the deceased; and

(c) that the accident occurred on a Federal Highway -see State vs Usifor (1974) 1 NMLR 72.

It is also settled law that the standard of proof required of the prosecution in every criminal case is that of proof beyond reasonable doubt - see section 138 of the Evidence Act, 1990.

Section 4 of the Federal Highway Decree No. 4 of 1971 under which the appellant was charged with the offence of causing death by dangerous driving provides as follows:-

\"4. Any person who causes the death of another person by the driving of a motor vehicle on a Federal Highway recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the Federal Highway, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the Federal Highway, shall be guilty of an offence and liable on

conviction to imprisonment for a term of seven years.\"

On the other hand, section 5 (1) which grounded the second count on which the appellant also stood trial provides as follows:-

\"5 (1). Any person who drives a motor vehicle on a Federal Highway recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case including the state, condition and use of that Highway, and to the amount of traffic which at the time is or might reasonably be expected to be on that Highway shall be guilty of an offence and liable on conviction to a fine of two hundred pounds or to imprisonment for two years or to both such fine and imprisonment.\"

I hold the view that by looking at the two sections reproduced supra, it is very clear that the same facts are necessary to prove the two counts involved in this case though in respect of count 1 the prosecution must prove that the piece of dangerous driving resulted in the death of the deceased. In other words for the prosecution to succeed in a charge under sections 4 and 5 (1), it must prove dangerous driving and the fact that the accident occurred on a Federal Highway. So the common denominator in sections 4 and 5 (1) are (a) dangerous driving and (b) Federal Highway while the only ingredient peculiar to section 4 is \"causing death\" as a result of the dangerous driving on a Federal Highway. In the instant case, there is no doubt, in fact both parties agree that, one Olufemi Adetola (M) who drove Volkswagen vehicle No. OGL 648 J died on the spot following the accident involving vehicle No. OY 1758 LE driven by the appellant at Oke - Owa along old Ondo/Benin Road, Ijebu-Ode on the 23rd day of January, 1990. The relevant issue that needs to be proved is whether the death was caused by the dangerous driving of the appellant, apart from the secondary issue of whether the said accident occurred along a Federal Highway.

While the prosecution maintained that it was the dangerous driving of the appellant that caused the accident resulting in the death of the deceased, the appellant contends that it was rather the dangerous manner of driving of the deceased that caused the accident.

There is only one eye witness account of the accident as testified to by PW5, Wole Afuye, apart from the appellant. He told the court that he is an accountant working with the firm of Odunlami, Erinle and Co; that on 23/1/90 he was inside the vehicle driven by the deceased while on official duty and that when they got to the steep hill at Oke - Owa along old Benin/Ore Road, just before reaching Our Lady of Apostles Girls School and while the deceased maintained his proper lane, he observed a queue of motor vehicles on the other side of the road or lane. PW. 5 further stated that he saw a big fuel tanker coming from the opposite direction and he (PW5) had expected the driver of that tanker to stay on the queue on that side of the road instead of moving out of his own lane into the side of the road in which PW5 and the deceased were travelling and had a head on collision with their vehicle. PW5 said he passed out immediately after the head-on collision and later found himself in a hospital. Under cross examination PW5 said a lady by name Titi was sitting by the side of the deceased driver on the day of the accident and that he was not engaged in conversation with her. PW5 further said that he sat at the back of the vehicle which was at the time ascending the steep hill while the petrol tanker was descending.

On the other hand, the appellant told the court that he is a motor mechanic and that on 23/1/90 he drove a mercedez lorry 911 with registration No. OY 1758 LE along Makalewo from Olisa Street to Lagos - Benin Express Road. At Makelewo along Okeowa while driving on the right side of the road, he saw a tanker which had broken down on the left hand side of the road and an on coming Volkswagen car approaching also from that side; that the car overtook the broken down water tanker and he applied the break of his lorry resulting in the lorry swerving and colliding with the Volkswagen car. He later made a statement to the police after which the police prepared a sketch of the scene of the accident which appellant said he signed. He did not have the opportunity to look at the registration number of the broken down water tanker because he had to run away to avoid being mobbed. He maintained that he did not drive dangerously on that day and that the road was slippery from the water which had poured on it from the broken down water tanker.

Under cross examination appellant agreed that he signed exhibit 3 but denied accompanying the police to the scene where exhibit 3 was drawn since he was in detention; that it was when the two vehicles collided that the vehicle driven by him fell to the other side of the road, it being a bigger vehicle; that the resultant position of his vehicle was at the other

side of the road while the Volkswagen vehicle was on his own side of the road.

PW.1 who visited the scene soon after the accident said he did not observe any broken down water tanker on the road. He also said that he found both the tanker driven by the appellant and Volkswagen vehicle driven by the deceased side by side on the same side of the road to Oke - Owa.

PW 2 is the vehicle Inspection Officer who tested the two vehicles and came to the conclusion that the accident was not caused by any mechanical defect. The trial court believed the testimony of the prosecution witnesses and disbelieved that of the appellant.

The quarrel of learned counsel for the appellant in issue No. 1 appears to be centred on exhibit 3. After talking of contradictions in the evidence of the prosecution without pointing to any such evidence, learned counsel stated thus:

\"Exhibit 3 is the rough sketch drawn by the police at the scene of the accident. The rough sketch is intended to show, graphically, the effect of the accident and not an actual account of how the accident occurred. Evidence of PW 6 was admitted to show that exhibit 3 was made to show the position of the vehicles after the accident occurred. The learned trial judge, in relying on exhibit 3, said that:-

\"it clearly shows B-C being the width of the road as 6 metres; A-B the grass verge on that side of the road on which the vehicle lies as 6 metres; G-H, the distance from the edge of the road to the resultant position of OGLG 48 J as 1.6 metres; and the skid mark of OY 1758 LE to the point of impact X as 40.9 metres. I am of the view that these are details sufficient to make one have a clear view of the position of things at the scene of the accident at the time of the accident not withstanding the fact that the distance between X and X1 to the point of impact and the resultant position was not indicated....'.\"

From the foregoing, it is obvious that exhibit 3 was inadequate to perform the evidential role which it set out to perform. As the trial judge rightly agreed, the distance between the point of impact and the resultant position was not indicated. It is therefore, surprising how he found that -

\"There can be no doubt from the sketch as to whose lane the accident occurred and in whose lane both vehicles fell.\"

It is submitted that these contradictions are material and ought to have been a basis for the resolution of the doubt in favour of the appellant and the discharge and the acquittal of the appellant by the court below...\"

From the passages quoted by learned counsel from the judgment of the learned trial judge, it is very clear that there are no contradictions let alone material contradictions therein. That apart, learned counsel for the appellant appears to have quoted the passages out of context. What the judge said at pages 119 - 121 is, inter alia, as follows:-

\"On the sketch exhibit 3 learned counsel complains that there is no measurement from the point of impact to either side of the road to show on which lane or at which point the accident happened. In this connection, learned counsel would seem to have overlooked the fact that exhibit 3 contains a rough broken line between the words \"par amount inn\" to the left of the exhibit and the words \"Oke Owa\" to the right. I have no doubt that this is meant to indicate the middle of the road. If this is so, then there is no doubt as to which lane the point of impact occurred .....

Learned counsel seems to be mistaken also when he complains that exhibit 3 does not show the distance between the point of impact and the various resultant positions. It clearly shows B - C being the width of the road as 6 metres, A - B etc, etc, etc.\"

It is very clear that learned counsel, for reasons best known to him, carefully avoided quoting the judge from the beginning of his evaluation of exhibit 3 which would have made the conclusion meaningful and understandable in the context in which it was reached, but adopted the style which but resulted in confusion. In any event, the most important point is not the distance between the point of impact and the resultant position of the vehicles but in whose lane the point of impact occurred and the learned trial judge was emphatic in his findings in that respect when he stated that-

\"there can be no doubt from the sketch as to whose lane the accident occurred and in whose lane both vehicles fell..... I have had a close look at the rough sketch of the scene of the accident - exhibit 3. As indicated earlier in this judgment, the broken line is intended to show the middle of the road. In that event, the point of impact is clearly within the lane of the Volkswagen vehicle and confirms the evidence of PW5 as to whose lane the accident occurred on. Besides, if it was true that the Volkswagen bettle car was overtaking a broken down water tanker, there is no doubt that the Volkswagen bettle car would have got on to the lane of the accused person and that any head - on -collision thus resulting could only be on the lane of the accused. This is not confirmed by exhibit 3.\" Emphasis supplied by me.

The above finding was confirmed by the Court of Appeal making same concurrent finding. Unfortunately learned counsel for the appellant has not advanced any reasons why this court should interfere with the said findings particularly as the same is in no way perverse. There is equally no contradictions, let alone material contradictions in the evidence of the prosecution in the instant case and I therefore resolve the issue against the appellant.

On issue No. 2 which is whether PW5 was a tainted witness, learned counsel for the appellant referred to the case of Akpan vs The State (1992) 6NWLR (pt. 248) 439 at 461 - 462; Mailayi vs The State (1968) 1 All NLR 116 at 123; Ishola vs The State (1978) 9 - 10 S.C 81 at 100; Mbenu vs The State (1988) 7 S.C (pt. 111) 71 on the definition of the term tainted witness and proceeded to submit strongly as follows:-

\"PW.5 was in the vehicle when the accident occurred. He sustained serious injuries as a result of the accident. His evidence was intended specifically to establish the guilt of the appellant and not to state how the accident occurred. The interest he was serving in giving the evidence was a way of seeking vengeance against the appellant. The witness was out to punish the appellant. To this end, the PW5 ought to have been found to be a tainted witness by the count below. It is submitted that if the lower court had treated PW5 as a tainted witness whose evidence must be corroborated, the court would have found the prosecution\'s case against the appellant not proved beyond reasonable doubt in view of the absence of any form of eye witness corroboration. See Jimoh Ishola vs The State (1978) 9&10 S.C 81 at 100.

In view of the foregoing, this court is urged to resolve the 2nd issue in favour of the appellant and allow the appeal on that ground.\"

The above submission of learned counsel is full of wonders and very strange proposition of law that is why I decided to lift it in extenso.

On the other hand, learned counsel for the respondent stated that since PW5 was neither an accomplice nor have any personal purpose to serve, he cannot be termed a tainted witness, relying on R vs. Enahoro (1964) NMLR 65; Ifejirika vs The State (1999) 3 NWLR (pt. 593) 59; Olalekan vs The State (2001) 18 NWLR (pt. 746) 793 at 815.

Learned counsel submitted that PW.5 was an eye witness of the accident in which he was a victim and that the facts and circumstances of this case do not make him a tainted witness. Learned counsel then urged the court to resolve the issue in favour of the respondent.

I had earlier in this judgment taken the trouble to reproduce the amended grounds of appeal and the issues formulated therefrom before the Court of Appeal and observed that the point of PW5 being a tainted witness never formed part of the complaints of the appellant before that court. It is also clear from the record that it also did not form part of the complaints before the trial court, the only complaint, if at all, being as summarised and dealt with by the trial judge at pages 127 and 128 of the record as follows:-

\"Learned counsel for the accused person has suggested that PW5 could not have been at a vantage point to see what was going on as he sat at the back of the Volkswagen vehicle. He therefore considered that the evidence of one Titi who was alleged to have sat in front in the car would have been more credible and so vital. Though invited to do, I do not share the view that one who sat at the back of a Volkswagen car is at a disadvantage to see what was going on. In any event, the evidence of PW5 is vivid and clear as to the events immediately before the accident.\"

Looking closely at the record it is clear that even though the issue of PW5 being a tainted witness was never raised before the lower court, learned counsel for the appellant presented arguments thereon which the Court of Appeal overruled. I hold the view that the fact that argument on the point was smuggled before the Court of Appeal does not mean that the issue was properly raised before that court and properly considered, there being no ground of appeal before the lower court complaining of PW5 being a tainted witness.
However, and for whatever it is worth, the law is settled that a tainted witness is a person who is either an accomplice or who on the evidence may be regarded as having some purpose of his/her own to serve - see R vs Enahoro (1964) NMLR 65; Ifejirika vs The State (1999) 3 NWLR (pt. 593) 59; Ogunlana vs The State (1995) 5 NWLR (Pt. 395) 266. From the facts of this case, it is clear that PW5 does not fit into the definition of a tainted witness not being an accomplice nor has it been shown that he had any purpose of his own to serve by testifying the way he did. To hold that PW5 is a tainted witness will be stretching the definition of that term too far and contrary to common sense particularly as every eye witness who testifies against an accused stands the risk of being branded \"tainted witness\" to the detriment of our criminal justice(s) administration. Granted, for the purpose of argument only that PW5 is a tainted witness his testimony is substantially corroborated by exhibit 3 - the sketch map of the scene of accident which was prepared not by PW5 but PW6, the Investigating Police Officer in the absence of PW5 as revealed by the evidence. So in whatever way or angle one looks at it, the issue must fail and is accordingly resolved against the appellant.

On issue No. 3 which is whether the sentence passed on the appellant on count 2 by the court below was not an improper exercise of judicial powers, learned counsel for the appellant stated that though the trial court convicted and sentenced appellant on count 1, it made no specific findings on count 2 but an order staying proceedings on count 2; that there was neither appeal nor cross appeal against the order of the trial court staying proceedings on count 2 nor was any issue formulated in relation to that decision of the trial court.

Learned counsel for the appellant further submitted that despite these facts the Court of Appeal went ahead to review the decision in question and convicted and sentenced appellant to two years imprisonment on the said count 2 under the purview of section 16 of the Court of Appeal Act; that the decision of the trial court staying further proceedings on count 2 is a decision within the provisions of section 277(1) of the Constitution of the Federal Republic of Nigeria, 1979, (hereinafter called the 1979 Constitution), Bamaiyi vs A-G (2001) FWLR (Pt. 64) 344 at 360 and 368; Akande vs Adesanwo (1962) All NLR 135 and therefore appealable under sections 220 and 221 of the 1979 Constitution; that since neither party appealed against that decision, it remains valid and subsisting, relying on Aro vs Lagos Island Local Government (2000) FWLR (Pt. 3) 2132 at 2147; Rosek vs ACB (1993) 8 NWLR (Pt. 312) 382.

Learned counsel further submitted that the lower court improperly exercised its judicial power under section 16 of the Court of Appeal Act in so far as there was no appeal on the issue, relying on Oshodi vs Eyifunmu (2000) FWLR (pt. 8) 1271 at 1305; U.B.N PLC vs Ishola (2001) FWLR (pt. 81) 1868 at 1885. Learned counsel then urged the court to resolve the issue in favour of the appellant and allow the appeal.

On her part, learned counsel for the respondent submitted that despite the conclusions reached by the trial judge that the prosecution had proved its case beyond reasonable doubt, it strangely turned round and found appellant guilty on count 1 while; making no finding on count 2 and further stayed proceedings thereon in the meantime; that the findings of the trial court on count 2 is not only novel but without justification having regards to the evidence and that the court had no reason whatsoever not to have convicted appellant on count 2 and as such the Court of Appeal was right in invoking its powers under section 16 of the Court of Appeal Act which power, learned counsel further submitted is exercisable by that court in favour of all or any of the parties although such parties may not have appealed from or complained of the decision, relying on Fulomo vs Banigbe (1998) 7 NWLR (pt 557) 679 at 701; 1BWA Ltd vs Pavex Int. Co. Ltd (2000) 7 NWLR (pt. 663) 105 at 135.

Learned counsel finally submitted that the case of Oshodi vs Eyifunmi (2000) 12 NWLR (pt 684) 298 cited and relied upon by learned counsel for the appellant is distinguishable on the facts and consequently inapplicable to this case and urged the court to resolve the issue against the appellant and dismiss the appeal.

The passage resulting in the invocation of the powers of the Court of Appeal under section 16 of the Court of Appeal Act can be found at pages 129 and 130 of the record. There, the learned trial judge made the following findings and

holdings:

\"I therefore find as follows:-

(1) The maneuver by the accused person of the commercial vehicle registration No. OY 1758 LE out of the queue of vehicles on the lane in which he was travelling on to the lane on which Olufemi Adetola was travelling in the Volkswagen Bettle car registration No. OGLG 48 J on 23rd January, 1990 on the Federal Highway was in the circumstances a manner of driving dangerous to the public. It resulted in a head - on - collision between the two motor vehicles.

(2) The accident was caused by the reckless manner in which the accused person drove the said commercial vehicle on the Federal Highway and not by any mechanical fault on any of the two motor vehicles concerned.

(3) The accused person caused the death of Olufemi Adetola by such reckless driving.

In the circumstances, I find that the prosecution has proved beyond reasonable doubt, that having regard to all the circumstances of this case, including the nature, condition and use of the Federal Highway, in question and the amount of traffic which was actually at the time on the Federal Highway, the accused person on 23rd January, 1990 driving a motor vehicle registration No. OY 1758 LE on the said Federal Highway in a manner which is dangerous to the public, caused the death of one Olufemi Adetola (M).

Accordingly, I find the accused person guilty of the offence charged in count 1 and I convict him accordingly.

I shall make no finding on the offence charged in count 2, the trial of which is hereby stayed in the meantime.\"

From the above passage, it is very clear that the learned trial judge did not only find the appellant guilty of dangerous driving but also causing death by dangerous driving. It is therefore rather strange for the learned trial judge to turn round later to say

\"I shall make no finding on the offence charged in count 2, the trial of which is hereby stayed.\"

It is very clear from the way sections 4 and 5 (1) of the Federal Highway Decree are drafted that you cannot find an accused guilty of causing death by dangerous driving without finding his manner of driving dangerous to the public. That is what the Court of Appeal was faced with particularly as appellant\'s counsel presented the argument that without a finding of guilt on the count of dangerous driving the conviction of causing death by dangerous driving cannot stand in law.

In an attempt at remedying the situation the lower court, at page 168 held, inter alia, as follows:

\"In respect of count II on the charge an appellate court ought not to interfere with the findings of fact of trial court which had the unique opportunity of seeing and hearing the witness give evidence and observing their demeanour in the witness box. There are, however, a number of exceptions to this rule, a major exception being that where such findings are in fact interferences from findings properly made the Court of Appeal is in a good position as the trial court to come to decision. Having made the findings that the appellant drove in a dangerous manner on the highway - stay placed on further trial is hereby revoked.... I shall invoke the power of this court under section 16 of the Court of Appeal Act, 1990 ..... whereupon the appellant is found guilty of dangerous driving on the Federal Highway under section 5(1) of the Federal Highway Act (No. 4 of 1971) - and shall proceed to convict him accordingly.....\"

The issue is whether the Court of Appeal properly exercised its judicial powers in the passage reproduced supra. There is no doubt that neither party appealed against the decision of the trial court to stay further proceedings on count 2 as reproduced supra.

The Court of Appeal in making the decision supra, relied on the provisions of section 16 of the Court of Appeal Act which provides as follows:-

\"16. The Court of Appeal may from time to time make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court Appeal thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorised to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with case accordance with the powers of that court, or in case of an appeal from the count below is that in that court\'s appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction.\"

That apart, order 3 Rule 23 of the Court of Appeal Rules 1981 as amended which was relied upon by the courts in some of the decisions cited and relied upon by counsel provides as follows:

\"23(1) The court shall have power to give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs.

(2) The powers contained in paragraph (1) of this rule may be exercised by the court, notwithstanding that the appellants may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision.\"

However, order 3 deals with civil appeals in the Court of Appeal, not criminal appeals. There is no corresponding rule in order 4 which deals with criminal appeals.

Apart from the provisions of section 16 of the Court of Appeal Act, the Court of Appeal in arriving at the decision under consideration also cited and relied on the following cases as authority for the decision; Woluchem vs GUDI (1981) 5S.C 291; Okuoga vs Ishola (1982) 7 S.C1, Ifeanyichukwu Osondu Co. Ltd vs Akhigbe (1999) 11 NWLR (pt. 625) 1; Ebba vs Ogodo (1984) 4 S.C 84; Fabunmi vs Agbe (1985) 1NWLR (pt. 2) 200, Fatoyinbo vs Williams (1955) 1 FSC 87 and Ukatta vs Ndinaze (1997) 4 NWLR (pt. 499) 257. I have carefully gone through all these cases and I observe that none of them deals with a criminal matter on similar facts. In Ukata vs Ndinaze (1997) 4 NWLR (pt. 499) 251 at 268, this court held as follows:

\"The defendants who were the appellants in the count below challenged the issue of misjoinder in ground nine of their amended grounds of appeal and it is covered by issue (5) in their brief of argument. It was issue (1) in the respondents\' brief in that court. Quite unfortunately the court below did not pronounce on it. Since it is a question of law and this court does not need to go outside evidence and the law for its determination, it is the duty of this court to pronounce on it and having regard to the fact that it has been raised in the court below and in this court.\"

From the above quoted passage, it is very clear that the facts are very different from the facts of this case. In the present case, there was no appeal or cross appeal on the decision of the trial court in relation to count 2 neither was any issue formulated on it before the court below which issue the court below failed or neglected to pronounce upon. Apart from these, the matter in that case is, civil and by the provisions of order 3 Rule 23 Supra, the court below could entertain the matter anyway.
Learned counsel for the respondent cited and relied on the case of Falomo vs Banigbe (1998) 7 NWLR (pt. 557) 679 at 701 where this court, per Iguh, JSC stated thus:-

\"Issue 3 complains of the order of transfer of the substantive case by the Court of Appeal to another judge of the Kwara State High Court for hearing and determination when no party applied for it. In the first place, there is section 16 of the Court of Appeal Act, 1976 which empowers the Court of Appeal to exercise full jurisdiction over all matters before it and may, inter alia, remit a case to the court below for the purpose of rehearing or may give such other directions as to the manner in which the court below shall deal with the case, or, in case of an appeal from the court below in that court\'s

appellate jurisdiction, order the case to be reheard by a court of competent jurisdiction.....
There is also the provision of order 3 rule 23 of the Court of Appeal Rules, 1981 which inter alia, empowers the Court of Appeal to give any judgment or make such further or other order as a case may require. These powers are exercisable by the court in favour of all or any of the parties although such parties may not have appealed from or complained of the decision.....\"

The Supreme Court thereby resolved the issue against the appellant by upholding the order of transfer made by the Court of Appeal in the circumstances. Another decision of this court relied upon by learned counsel for the respondent is the case of IBWA Ltd vs Pavex Int\'l (Nig) Ltd (2000) 7 NWLR (pt 663) 105 at 135, which, I am afraid, does not support the contention of counsel for the respondent. The facts of that case include the following: The respondent in the Supreme Court was the plaintiff in the High Court of Lagos State where it instituted action for injunction and damages which reliefs were granted by Adeniji J. Appellant was not satisfied and appealed and filed a motion for stay of execution before Adeniji J which application was refused on 23/7/91. Following the refusal learned counsel for the respondent immediately commenced steps for execution of the judgment and by 24/7/91 execution was levied. Meanwhile, appellant had filed an application for stay of execution of the said judgment at the Court of Appeal on 23/7/91 which was received by the secretary of the respondent\'s counsel on the same day. Appellants consequently filed two applications before the Lagos High Court, one exparte and the other on notice praying that the writ of execution issued be set aside etc etc. On the 25th July, 1991 Balogun Ag, Chief Judge of Lagos State assigned the ex parte motion to himself, heard and granted it despite the minutes of the registrar to the effect that the matter was pending before Adeniji J., and the provisions of the Lagos State High Court Law. Anyway it was argued, in the motion on notice that Balogun Ag. Chief Judge had no jurisdiction which was overruled. The respondent appealed to the Court of Appeal which allowed the appeal. Upon further appeal to the Supreme Court which court at page 135 after referring to the powers of the Court of Appeal in section 16 of the Court of Appeal Act and order 3 rule 23 of the Court of Appeal Rules, held thus:

\"Wide as the powers of the Court of Appeal are, and as envisioned in the provisions of section 16 of the Court of Appeal Act, 1976 and order 3 Rule 23 of the Court of Appeal Rules 1981, reproduced above, the exercise of these powers with regard to the judgments and orders of any trial court must depend on whether that court was vested with the jurisdiction to make such orders or determine the rulings and/or judgments on appeal to the Court of Appeal. It follows that where a trial court has been declared as lacking in jurisdiction in the Court of Appeal to hear and determine a matter, then whatever orders made by the trial court cannot be varied or further orders made thereon by the Court of Appeal. It follows that I must hold that the court below, having held that Balogun Ag. Chief Judge lacked jurisdiction to hear and determine the motions filed by the appellants, the orders made by the Balogun Ag.

Chief Judge of Lagos State High Court at the material time in this matter lack the requisite validity. The result then is that the parties were back where they were before 25/7/91.....\"

In the present case, both parties agree that there was no appeal or cross appeal against the decision of the trial judge on count 2. That being the case, I hold the view that that decision still subsists until set aside by a court of competent jurisdiction on appeal; that there being no such appeal that decision remains valid and in force see Rosek vs ACB (1993) 8 NWLR (pt. 312) 382. In the case of Oshodi vs Eyifunmi (2000) FWLR (pt. 8) 1271 at 1305 per Iguh, JSC, this court held as follows:

\"In this regard, it is to be emphasised that the appellate jurisdiction of the Court of Appeal is to hear and determine appeals from the High Courts. If a finding or decision of a trial court, whether on an issue of fact or law is not challenged in an appeal to the Court of Appeal, such finding or decision, rightly or wrongly, must not be disturbed for the purposes of the appeal in question - see Nwabueze vs Okoye (1988) 4NWLR(pt. 91)664.

..... Perhaps I should also add that when an issue is not placed before an appellate court, it has no business whatsoever to deal with it - see Florence Olusanya vs Olufemi Olusanya (1983) 3 S.C 41 at 56 - 57.\"

I hold the view that the above represents the law on the matter as at now and therefore binding. Having regards to the position of the law, I hold the view that the powers of the Court of Appeal under section 16 of the Court of Appeal Act

relied upon by the lower court in this matter does not empower that court to raise issues and decide them contrary to what the trial court had decided and in respect of which neither party had appealed to the Court of Appeal. In the present case, the appeal emanates from a criminal trial, not civil. In the circumstance I resolve issue 3 in favour of the appellant.

In conclusion I find no merit in the appeal which is accordingly dismissed though issue 3 is resolved in favour of the appellant. It is further ordered that the decision of the Court of Appeal on count 2 be and is hereby set aside while the conviction and sentence of the appellant on count 1 is further confirmed by me.

Appeal dismissed.

Judgement delivered by
Sylvester Umaru Onu, JSC)

I have been privileged to read before now the judgment of my learned brother Onnoghen, JSC just delivered. I am in entire agreement that the appeal is devoid of any merit and I accordingly dismiss it.

Judgement delivered by
Akintola Olufemi Ejiwunmi, J.S.C

I have had the privilege of reading the judgment just delivered in its draft form. In the said judgment as the issues raised in the appeal have been properly considered in the light of the accepted facts on record, I agree entirely with the conclusion reached by my learned brother that the appeal lacks any merit.

The short point in this appeal is, whether the appellant who was charged for the offence of causing death by dangerous driving contrary and punishable under section 4 of the Federal Highway Act 1971 (No.4 of 1971) was properly convicted of causing the death of one Olufemi Adetola by driving a motor vehicle Registration No. OY 1758 LE on the said Federal Highway in a manner which was dangerous to the public having regard to all the circumstances of the case.

The simple evidence which the trial Court and the Court below accepted and rightly in my view is, that on the day of the incident i.e. the 23rd day of Jan 1990 at Oke-Owa along Old Ondo/Benin Road, Ijebu Ode, the appellant left his own side of the road to collide with the car being driven by the deceased on his own side of the road. There can be no doubt that it is settled law that where the driver of a vehicle left its own side of the road to collide with another vehicle coming on the opposite direction and was being driven properly on its own side of the road, that driver who left its own side of the road to cause the collision drive its vehicle negligently and dangerously.

In an appeal against the conviction of an appellant in a criminal cause or matter, the Appellate court has the duty to consider carefully whether the guilt of the appellant was established beyond reasonable doubt. That onus rests throughout on the prosecution. See Ameh v. State (1978) 6/7 S.C. 27; Ukut v. State (1995) 9 N.W.L.R. (pt.420) 392. It is also necessary to be reminded that proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. That proposition was adroitly illustrated long ago by Denning J. (as he then was) in Miller v. Minister of Pensions (1947) 2 ALL E.R. 372 at 373 when he said thus: -

\"The law would fail to protect the community if it admitted if fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence \"of course it is possible, but in the least probable\", the case is proved beyond reasonable doubt but nothing short of that will suffice.\"

I adopt that reasoning in respect of the instant appeal. I would add that upon a proper view of the evidence led and accepted by the trial Court and the Court below, I am in no doubt that the guilt of the appellant was established beyond reasonable doubt. I therefore affirm his conviction under section 4 of the Federal Highway Act 1971 (No.4 of 1971) for the above reasons and the fuller reasons given in the judgment of my learned brother Onnoghen JSC by dismissing his

appeal.

Judgement delivered by
Dahiru Musdapher, J.S.C

I have had the honour to read before now the judgment of my lord Onnoghen, JSC just delivered wilh which I entirely agree. For the same reasons so eloquently and comprehensively set out in the aforesaid judgment, which I respectfully adopt as mine, I too find no merit in the appeal. I accordingly dismiss it except that I set aside the decision of the Court below on Count No 2. For the avoidance of doubt I affirm the decision of the Court below on Count No. 1.

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

I had the privilege of reading before now, the lead Judgment of my learned brother, Onnoghen, JSC, just delivered by him I agree with his reasoning and conclusion that the appeal be dismissed. However, I wish to make my own contribution by way of emphasis. I note that the three (3) issues formulated by the parties in the respective Briefs, are substantially the same although differently worded.

Issue (1) of the parties. The Appellant, has relied principally, on alleged material contradictions and insufficiency of evidence. He attacked the reliance of the trial court on Exhibit 3 - the sketch drawn by the P.W. 6 - the I.P.O (Investigation Police Officer) and submitted that Exhibit 3, \"was inadequate to perform the evidential role which it set out to perform\".

Now, in the first place, it is significant and most remarkable, that the learned counsel for the Appellant, in their Brief, did not point out or identify, one single evidence of any contradiction either in the evidence of the prosecution witnesses or in any documentary evidence tendered before the trial court. I suppose, and with respect, this is commonsensical, that it is not enough or sufficient to complain or allege contradictions, without indicating the areas of any such material contradiction or contradictions either in the evidence of the prosecution witnesses or in the totality of the admissible evidence before a trial court.

I note that both in the oral submissions of the learned counsel for the Appellant at the trial court, in the seven (7) Grounds in the Amended Grounds of Appeal, in the three (3) Issues formulated in the court below, in the Brief of the Appellant in the court below, in the Grounds of Appeal in this Court and in the Issues three (3) formulated in this Court, that there is no question of any contradiction or contradictions to talk of material contradictions in the evidence of any of the witnesses for the prosecution or in their evidence in the trial court with perhaps, Exhibit 3.

In the circumstance, I am obliged to discountenance the said allegation of any material contradictions or in fact, of any contradiction whatsoever.

As regards the attack in respect of the said Exhibit 3 and what the learned trial Judge stated, (which the learned counsel for the Appellant described or stated to be - \"The learned Trial Judge, in replying on the Exhibited 3 said that\"- (he reproduced the pronouncement of the learned trial Judge). With respect, the complaint in this said issue, makes no sense to me. In the first place, the learned counsel for the appellant, in order to distort the findings and holding of the learned trial Judge at pages 119 to 121 of the Records, quoted or reproduced the limited portions of the said Judgment. At page 127 of the Records, the learned trial Judge, made a weighty finding of fact in respect of Exhibit 3 and this was confirmed by the court below at pages 158 and 159 of the Records.
The court below stated inter alia, as follows:

\"In a fatal accident case the sketch of the scene is indispensable as it elicits on features like point of impact, the width of the road, skid marks resultant position of vehicles and corpses at the scene. It does not depict how an accident occurred. The sketch Exhibit 3 had these features which are what the learned trial Judge required as corroboration for

the evidence of witnesses. The point of impact of the vehicle according to the sketch did not support the defence of the appellant, that the driver of the Volkswagen Beetle overtook a broken down water tanker. The learned trial Judge disbelieved the evidence of the appellant on page 18 lines 9 - 10 of the additional Record. The learned trial Judge pointed out the mistake of the appellant - when he complained that Exhibit 3 does not show the distance between the point of impact and the resultant position of the vehicle vide page 10 lines 1 - 5 of the Supplementary Record\".

[the underlining mine]

After reproducing the said pronouncement of the learned trial judge at page 121 lines 1-12 of the Records (as reproduced at page 4 of the Appellant\'s Briefs, the court below, stated as follows:
\"It is apparent that the learned trial judge had enough information from Exhibit 3 to enable him to determine who was at fault and enough corroboration of the 5th prosecution witness. I share the impression that the complaint on Exhibit 3 were unjustified\".

[the underlining mine]

It is pertinent and it need be emphasized by me, that Exhibit 3 was admitted in evidence, without any objection by the learned counsel for the Appellant.

It is not surprising to me that the learned counsel for the Appellant, having been overwhelmed (so to speak), by the evidence of the prosecution witnesses - particularly the 5th and 6th PWS, with respect, had/have, nothing meaningful or useful to offer in his argument in respect of this issue.

It is noted by me, that the Appellant, both in his statement to the Police at page 46 of the Records and in his evidence in court, admitted at page 24 of the Records, that he signed Exhibit 3. The P.W.6, testified that the Appellant, was present together with two others at the scene of the accident when he took the sketch after he had explained the same to him. See pages 18, 19, and 46 of the Records. Said the Appellant in his said Statement to Police made on 24th January, 1990 inter alia, as follows:

\".....The Police visited the scene of accident, sketched, measured and I duly signed and we returned back to the Station where my statement was recorded\".

The learned trial Judge, believed that the Appellant was present at the scene when Exhibit 3 was drawn, explained to him and he signed the same.

It is therefore, very surprising to me, that the very Exhibit 3 the Appellant signed and which was admitted in evidence without any objection and which the learned trial Judge, perused and used in his well considered judgment, is the same exhibit that the learned counsel for the Appellant in their Brief, states \"that the Exhibit 3, was inadequate to perform the evidential role which it set out to perform\". I hold therefore, that there is no substance in this issue which I accordingly, reject.

Before concluding this Issue 1 of both parties, let me state in summary, as follows:

1 It is now settled that carelessness on the part of a driver no matter how slight, has been held to amount to dangerous driving. See R v. Evans (1963) 47 CAR 62 @ 64

2. It has been held that momentary inattention, has been accepted to amount as a fault sufficient to constitute dangerous driving. See The State v. Felix Ibeneme (1965) 3 ENLR. 26.

3. In the case of Simpson Peat (1952) 2 QB 24. it was held that a driver might be convicted of dangerous driving, even though such driving were due to something which could be described as an error of judgment. See also The Attorney-General of Western Nigeria v. Salami Aiibola (1966) NMLR 204.

4. In the case of The State v. Stephen Eienabe (1976) (1) NMLR 135- Uwaifo, J. (as he then was), held that dangerous driving is proved, by the slightest negligence on the part of the driver so charged. That driving from one side of the road, to the other, amounts to driving to the danger of the public. See also Lewis v. Raglan Building Co. Ltd. (1941)3 All E.R. 332. Avo Richards v. Inspector General of Police (1959) LL.R 88 and TAie State v. Felix Ibeneme (supra).

5. In R. v. Graham Ball f1966) 50 CAR 266 0). 270. Parker, L.C.J., held that the phrase \"driving in a manner dangerous to the public\", means the manner of the driving.

6. In Hill v. Bexter (1958) 43 CAR 42 @ 58. Lord Goddard, L.C.J, described dangerous driving (which resulted to manslaughter), as an offence of absolute prohibition into which no mens rea enters and that it is no answer to say, \"I don\'t mean to drive dangerously\".

7. To leave one\'s lane for another when another vehicle is approaching from the opposite direction (as in the instant case leading to his appeal) and thereby causing one\'s vehicle to hit that other in the process, has been held as dangerous driving. This is why, if a trial Judge, accepts the prosecution\'s case that the accused person left his own side of the road, crossed over to the other side and collided with the vehicle of the other driver on his own side of the road, it is not necessary to make a finding on the exact point of impact. See Abdullahi v. The State (1985) 3 NWLR (Pt. 3) 523 @ 528 S.C. - the facts are similar to that in the present case/appeal.

8. The proof required to establish a case under Section 4 of the Federal Highway Act, 1971, is not as high as the one required to establish a case of manslaughter under the Criminal Code. See Abdullahi v. The State (supra) page 527.

Comment: The Appellant should have been charged under the Criminal Code. Were that to be so, from the totality of the evidence before the trial court, he should have earned an enhanced term of imprisonment. Perhaps, that is why the court below, added another (2) two years imprisonment, but turned round, with respect, to make the term to run concurrently with that imposed by the trial court in count 1 of the charge.

9. A court, by virtue of Section 73 or now 74(1) of the Evidence Act, can take Judicial Notice of a Public Highway such as the Oke-Owa along Old Ondo-Benin Road in Ijebu-Ode. See Friday Onvekwere v. The State (1973) 5 S.C. 1 (8). 14. The State v. Usifoh (1974) (1) NMLR 72 (5> 77 and Adebodun Aiani v. The State (1978) 6 FCA 60. In concluding this Issue, it is now firmly established, that where the question involved are purely those of fact, an Appellate Court, will not interfere, unless the decision of the trial Judge, is shown to be perverse and not the result of a proper exercise of judicial discretion (to believe or disbelieve witnesses) or that there is no evidence at all to support a particular crucial finding or that the trial court made wrong deductions or drew wrong inferences from admitted or established facts. See Ubani & 2 ore, v. The State (2003) 12 SCNJ. 111 @ 727-728.

It need be stressed that it is also a well settled presumption, that the findings of facts of a court of trial, is correct and the burden is on the person challenging the findings of facts on appeal, to displace this presumption. See Bakare v. The State (1987) 1 NWLR (Pt 52) 579@ 593

In the instant case, the court below - per Adekeye, JCA, was right, when it stated, inter alia, at page 168 of the Records, thus:

\"I regard the conclusion of the learned trial judge in respect of count 1 as unimpeachable and it is not in doubt from the overwhelming evidence that the prosecution had established the guilt of the appellant in his appeal beyond reasonable doubt in count I.....\"

There is therefore, the concurrent finding of facts by the two lower courts See Princent & anor. v. The State (2002) 12 SCNJ. 280 and Amusa v. The State (2003) 1 SCNJ. 518. Since the Appellant has failed woefully, to disclose any exceptional reasons why this Court should interfere, this appeal is bereft of any merit in respect of Count I and it therefore, fails. Therefore, my answer to this issue, is rendered in the positive/Affirmative.

Issue 2

I note that in the two lower courts, this issue of the 5th P.W. being a tainted witness was never raised as a ground of appeal or as an issue for the Appellant in their Brief, but only the arguments or submissions. It is being raised for the first time in the said Brief in this Court and without leave of this Court. The consequence, is long settled in a number of decided authorities to the effect, that an appeal court, will not ordinarily, entertain issues that are fresh and not brought and decided before a lower court, without the leave of the Court having been had and obtained. See Oforlete v. The State (2000) 7 SCNJ. 162 @ 169 and Obiakor & anor. v. The State (2002) 6 SCNJ. 193 @ 201. just to mention but a few. The attitude of the Court on raising fresh point or issue(s) on appeal, has been clearly expressed in the case of Akpena v. Barclays Bank of Nigeria (1977) 1 S.C. 471 and Makanjuola v. Balogun (1989) 3 NWLR (Pt.105) 192; (1989) 5 SCNJ. 42 and many others. Let me add quickly, that the only exceptions are where the issue of jurisdiction, is raised as a fresh point, leave is not necessary. See recently, Tiza & anr. V. Begha (2005) 5 SCNJ. 168 (5) 181 - per Musdapher, JSC, citing several other cases therein or where the point raised in an Appellate Court for the first time, is based on a point of law only and it does not involve any issue of fact or the taking of additional evidence in which case, the Appellate Court, will consider the issue. See Qgigie & 3 ors. v. Obiyan (1997) 10 NWLR (Pt. 524) 179 @ 194; (1997) 10 SCNJ. 1 and recently, A.I.C. Ltd v.. Nigerian N.P.C. (2005) 5 SCNJ. 316.

However, for the avoidance of any doubt, I will briefly, deal with the merits of the Issue. A tainted witness is a witness who though not an accomplice, is a witness who may have his or her own purpose to serve. See Mbenu v. The State (1988) 7 S.C. (Pt. III) 71 @ 87 cited and relied on by the Appellant\'s learned counsel in their Brief, (it is also reported in (1988) 3 NWLR (Pt. 84) 415 and (1988)7 SCNJ. (Pt. II) 211 @ 219 - 220). See also the cases of Mailaiyi & anor. V. The State (1968) 1 ALL NLR (Pt. I) 116 @ 123: - per Idigbe, JSC, Jimoh Ishola v. The State (1978) 9-10 S.C. 81 @ 100 which was cited twice in Nos. 7 and 8 in the Appellant\'s Brief and in No. 7 putting the page as at 81 @ \"1000\") (it is also reported in (1978) NSCC (Vol.2) 99) and Akpan v. The State (1992) 6 NWLR (Pt. 248) 439 @ 461 - 462 all cited and relied on by the learned counsel for the Appellant in the said Brief, (it is also reported in (1992) 7 SCNJ. (Pt. 1) 22 @ 33).

In the case of Ogunlana & 3 ors. v. The State (1995) 5 SCNJ. 189, it was stated - per Iguh, JSC, that a tainted witness, may be defined as a witness who may not in the strict sense, be an accomplice, but who in giving his evidence, is established to have some purpose of his own to serve and in respect of whom it is desirable that the warning as to corroboration of his evidence may appropriately be given. The cases of William Idahosa v. The State (1978) 2 LRN III. (It is also reported in (1965) NMLR 85: Ishola v. The State (1965) NMLR 85) and Garba Mailaiyi & anor. v. The State (supra), were referred to. See also the case of Onuoha v. The State (1987) 4 NWLR (Pt. 65) 331 @ 346 and recently, Olalekan v. The State (2001) 12 SCNJ. 94 @ 111. 115.

In my respectful but firm view, there is no way or how the P.W. 5 could have, by any stretch of imagination, be described as a tainted witness. This is indeed, a victim of the absolute recklessness of the Appellant, who was a passenger or occupant in the Volkswagen Beetle Car, driven by the deceased. He was sitting at the back of the said car. The learned trial Judge, rightly in my view, rejected the suggestion or contention of the learned counsel for the Appellant that because the PW 5 sat at the back of the said car, he could not have been at a vantage point, to see what was going on. It was even suggested to the PW 5 under cross-examination, that he was charting with the lady - one Titi who sat in the front seat of the car by the side of the deceased. This suggestion, was denied by the witness.

The learned trial Judge, re-acted to the said contention, at pages 127 - 128 of the Records, inter alia, as follows:

\".....I do not share the view that one who sat at the back of a Volkswagen Car is at a disadvantage to see what was going on. In any event, the evidence of P.W. 5 is vivid and clear as to the events immediately before the accident. The effect of his evidence also appears to be corroborated by the sketch of the scene drawn by the Police on the day of the accident and signed by the accused person, among others.....\".

The court below at page 166 of the Records, stated inter alia, as follows:

\".....The 5th P.W. Wole Afuye cannot be treated as a tainted witness just for the simple reason that he was a mere passenger conveyed in the Volkswagen vehicle in the course of an official assignment. He was not an employee of the Local Government to whom the vehicle belongs - and he had no form of relationship with the deceased\".

I agree.

The cases of The State v. Okolo & Ors. (1974) 2 S.C. 73; Ishola v. The State and Mbenu v. The State (supra) were also referred to.

Afterwards and it need be noted firstly, that Section 4 of the Highway Act, was conclusively proved as to the circumstances of the road. There was evidence which included the nature, condition and use of the highway and the amount of traffic which was actually on the said highway at the time of the accident or which might reasonably be expected to be on the said highway. The Act provides that if these are proved, the accused shall be guilty of an offence and liable on conviction to imprisonment for a term of seven years. Section 5 of the said Act, provides for imprisonment for two years or to both such fine and imprisonment. Any wonder, the court below, gave him the maximum term of imprisonment/punishment provided in this Section.

Secondly, the Appellant lied when he stated that there was a broken water tanker on the road which according to him, had spilled water on the road, thus rendering the road slippery. If that were so, by ignoring the condition of the road, and driving so recklessly, he cared less about the consequences of his so driving which has/had resulted in sending the deceased to his untimely death and in the process, seriously smashing and damaging the said Volkswagen car. However, the learned trial Judge, did not believe him that the deceased, was overtaking the alleged broken down water tanker when he allegedly drove into the Appellant\'s vehicle. The 6th P.W, swore that he never saw any broken water tanker on the said highway when he arrived at the scene. So also the P.W. 1 - Mr. Olugbebi - an Administrative/Transport Officer with the Odogbolu Local Government, under cross-examination, swore that he never saw/observed any water tanker on the said highway. The Appellant, did not call any witness. His vehicle was a Mercedes Benz 911 Lorry. He lied and lied and as an incorrigible liar, he denied even going to the scene when Exhibit 3 was drawn. Yet, he signed it as being correct as to its contents. By such denial, he became a most unreliable person/witness having regard to his said statement at page 46 of the Records which I have hereinabove reproduced wherein, he admitted that he was present when Exhibit 3 was made by the P.W. 6.

Thirdly, the Appellant, was descending a steep hill, while the deceased, was ascending the hill. In his said statement, he said that he saw the deceased\'s vehicle \"in on-coming vehicle\". He \"matched\" (not applied) the brake and swerved according to him \"to avoid the Beetle but my effort, proved abortive while I collided with the Beetle as my vehicle fell down on the road\".

If I or one may ask, what more evidence, will be required in order to show the dangerous and reckless driving of the Appellant on the date of the incident' There is evidence that the deceased, died at the spot and that the PW 5, suffered very serious injuries and was unconscious after the collision and woke up in a Hospital. Any wonder the Appellant in Exhibit 4, stated that,

\"When I came out of the vehicle, some people whom I did not know started to beat me and I ran to the owner of the vehicle who later brought me to the Police Station.....\".

This was evidence or an admission that some people at the scene, were angry with his manner of driving which resulted in the instant death of the deceased and they nearly lynched him. He was lucky and he is alive to pursue this appeal up to this Court. Comment: Yes, tanker, Mercedes Benz 911 and lorry drivers, are the \"Kings of the roads\". They are a terrible menace on our public highways. They are known as saying \"if you want to give way, you better do or get crushed!\".

If the appellant was driving on a reasonable speed having regard to all the circumstances - i.e. the queue on his own side of the road, the fact of on-coming vehicles from the opposite side (not his lane), he should have not skidded. All these were evidence of his recklessness in his said driving. I am in no doubt that the Appellant, has no remorse for

causing the death of the deceased. He wanted an option of fine so that he could continue driving on the road. He and his learned counsel with respect, now have the guts to brand the P.W. 5, as a tainted witness which he is not. My answer therefore, in respect of this issue, (which is couched in the negative) is rendered in the Negative.

Issue 3

The learned trial Judge at page 130 of the Records, stated, inter alia, as follows:

\".....Accordingly, I find the accused person guilty of the offence charged in count 1 and I convict him accordingly. I shall make no finding on the offence charged in count 2, the trial of which is hereby stayed in the meantime\".

[the underlining mine]

The underlined words, to me, with respect, is very strange. The learned trial Judge, had completed the hearing of the case in respect of the two counts. In order to convict in count 1, there must be, proof of the charge in count 2. There was such proof. If I or one may ask, was the learned trial Judge going to call and receive \"fresh\" evidence in respect of count 2 from the prosecution witnesses' What was he up to'. Was the Appellant going to stand another round of trial' I must state, with respect, that this strange order, is not clear to me.

Be that as it may, that was his decision. I have no doubt in my mind, that the learned Justices of the court below, must have been \"incensed\" at the said Ruling of the learned trial Judge. I am only drawing an inference which is different from speculating. However, by the learned Justices invoking Section 16 of the Court of Appeal Act, they were, with respect, raising a matter or issue suo motu without affording the parties and their learned counsel, the opportunity to be heard by their addressing the court below in that regard. On the authorities, this stance of the court below, has been deprecated by this Court in a line of decided cases. See Odiase v. Agho (1972) 1 ANLR (Pt. 1) 170: Ugo v. Obiekwe & anor. (1989) 1 NWLR (Pt. 99) 566: (1989) 2 SCNJ. 95 and recently, Mallam Mohammed v. Alhaji Mohammed (2005) All FWLR (Pt. 275) 502 @ 508. 516 citing some other cases therein and Mrs. Evanqeline Fombo v. Rivers State Housing & Property Development Authority (2005) 5 SCNJ. 213 citing the cases of UBA Ltd, v. Mrs. Achoru (1990) 6 NWLR (Pt. 156) 254; (1990) 10 SCNJ. 17. Ohafor v. Attorney-General & Commissioner for Justice (1998) 31 LRCN 3679 (5) 3713 and Katto v. CBN (1999) 69 LRCN 11: (1999) 5 SCNJ. 1 just to mention but a few.

Perhaps, let me qualify the above proposition/principle of law, by stressing that the Court, can take up suo motu, issue of jurisdiction. See Oloriode v. Oyebi (1984) 1 SCNLR 390 cited in Katto v . CBN (1991) 1 NWLR (Pt. 320) 126 @ 149: Ezomo v. Oykhure (1985) 1 NWLR (Pt. 2) 195 and Oloba v. Akerqa (1988) 3 NWLR (Pt. 84) 508 C.A. and recently, INEC & Anor. v. Alhaji Balarabe Musa (2003) 1 SCNJ. 1@ 77.

It is also settled that an Appellate Court, should confine itself, with the issues formulated and canvassed before it by the parties. The general rule, is that where an issue has not been placed before the court, it has no business whatsoever going into it or to deal with it. Perhaps, see Chief Nteogwuile v. Chief Otua (2001) 6 SCNJ. 231 (supra) and Ebba v. Ogodo & anor. (1984) 15 NSCC 255, 266.

This apart, if a court raises a point, matter or issue suo motu, it must give the parties, the right to be heard on the said point, matter or issue so raised. See Olusanya v. Olusanva (1983) 3 S.C. 41 @ 56 - 57 and Nwabueze v. Okoye (1988) 4 NWLR (Pt. 91) 664: (1988) 10 -11 SCNJ. 60 just to mention but a few.

In the end result or final analysis, it is from the foregoing and the fuller reasons and conclusions in the said lead Judgment of my learned brother, Onnoghen, JSC, that I too, dismiss the appeal in respect of count 1. There is also, the concurrent findings of fact of the two lower courts in respect thereof. The complaint in Issue 3, has merit and it succeeds. I affirm the said decision of the court below in respect of count 1 and I accordingly, set aside the decision in respect of count 2.