DEFENCE OF ACCIDENTAL DISCHARGE IN THE TRIAL OF POLICE OFFICERS FOR MURDER: ATTITUDES OF NIGERIAN COURTS *

Abstract

This study examined the defence of accidental discharge in the trial of police officers for murder. In a murder trial, the law allows the accused person or a police officer standing trial for a murder charge to raise any of the several defences recognized by law which if successfully pleaded may result to his acquittal or may reduce the gravity of punishment from murder to manslaughter. One of such defences, which is the major concern of this paper is the defence of accident. The researcher considered this defence in few Nigerian cases and and examined the judicial attitude in Nigerian courts with respect to defence of accidental discharge in a murder trial. This paper also highlighted the basic things the accused must prove before this defence will avail him under the criminal justice system. The article suggested that temperamental police officers or those officers with volatile character should be flushed from the police force or they should not be allowed to hold guns. This is because every citizen has a right to his life until otherwise ordered by a court of law.

Keywords: *Accidental Discharge, Defence, Trial of Police Officers, Murder, Judicial Attitude, Nigerian Courts*

1. Introduction

Unlawful killings by the police while in the execution of their lawful duties have assumed some questionable dimension in recent times. The newspapers and magazines are replete with accounts of such killing[1]. The police force, it seems, is unable to stem the tide of the use of legal force by its members in the course of their lawful duties. It seems as a result that the citizens have resigned themselves to their fate[2]. These killings are mainly done with firearms which the police in this country are authorized to carry while on duty.[3] The mere *earning of firearms itself portends* force and its use means in effect the application of force. The law in certain circumstances authorizes the use of force.[4] These circumstances are mainly when an arrest is being[5] or about to be effected, or when preventing the escape of, or rescuing a person lawfully arrested,[6] or when dealing with rioters.[7] But the law does not give a blank cheque to the police to shoot or kill or even maim in any of the foregoing circumstances. The law permits such use of force only when it is reasonably necessary to overcome the force used by a person sought to be arrested[8]. What this means is that lethal force may be used if the arrester's life or any other life is in danger of being terminated by the would-be arrestee.[9] Beyond this, except where authorized by law[10], any excessive use of lethal force is a punishable offence.[11] It is common knowledge that the police have always used the argument of self defence or defence of life or the prevention of escaping felon to justify the killings of alleged armed robbers, or any other person suspected to have committed on offence. Where any of these defences is not plausible in a murder trial, the police fall back on the defence of accidental

*__E.Q. OKOLIE, LLB, BL, LLM, PhD FIPMD,__ Senior Lecturer, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam Campus.

[1]See, e.g. *Sunday Concord*. April 12, 1981, p. 1 *African Concord*. 5 May 1987, pp. 14-25; The Guardian. Nov. 22, 1987, p. 84, May 29, 1986, p. 10; May 30, 1986, pp. 11; 12 National Concord. Nov. 8, 1987, p. 7; April 18, ff 86, p. 3; May 30, 1986, p.7; *Sunday Punch*. Dec 6,1987, p. 12: *Vanguard*. May 30. 1986, p. 6, *The Nigerian Observer* April 24, 1986, p.l; *Sunday Tribune*. Dec. 29, 1985, p. 1.

[2]In late 1990 in Enugu, a man was shot dead and several others injured by a police officer when the deceased refused to obey his order to convey the body of a lynched man to the nearby University of Nigeria Teaching Hospital; see: e.g. The Punch. Nov. 7 1990, p. 1; Satellite. Nov. 7, 1990.

[3]See *Samson Uzoka v. The State* (1990) 6 N.W.L.R. (Pt. 159) 680, at p. 687; *Ibe v. State* (1993) 7 N.W.L.R. (Pt. 304) 185.

[4]This article is based on the Criminal Code (C.C.) which operates in the Southern States of Nigeria. Though other states in Nigeria have their own criminal codes applicable to the various states like Anambra, Imo, Eboyi, Enugu, etc. The Panel Code which operates in the Northern states of the country has more or less similar provisions as the former.

[5]Criminal Code, ss. 3, 261. See also Criminal Procedure Act (C.P.A.) s. 4.

[6]Section Criminal code. 273, See also C.P.A, s. 27(2).

[7]Section 73 Criminal code.,

[8]This is clearly stated in the foregoing sections. See *Oyakhire v. Qbaseki* (1986) 1 N.W.L.R. (Pat. 19) 735; *Beim v. Cover* (1965) S.C.R. 638.

[9]Ibid.; See also *R. v. Aliechem* (1956) I.F.S.C. 64; *R. v. Ndo* (1953) 14 W.A.CA.-362; *R. v. Aniogo* (1943) 9 W.A.C.A. 62

[10] See sections. 271, 273 Criminal Code.

[11] Section 298 of the Criminal Code applicable to southern Nigeria.

discharge where firearms is the instrument of murder. The intention of this article is to examine this defence in the light of the current position of the criminal law.

2. The Defence of Accident

In a murder trial, the law allows the accused to raise any of the several defences recognised by it which if successfully raised may either free him from criminal responsibility or reduce the gravity of the liability from capital punishment to imprisonment[12]. One of such defences which is the concern of this article is the defence of accident. The law says of this defence as follows: 'Subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs by accidents.'[13] Three main provisions are apparent in this section. The first is that the defence is not available to an accused whose act or omission is inherently negligent. But this is where the person is tried under the Code. Arguably, the defence is, therefore, confined to offences under the Code and may not be raised where a trial is under a different criminal provision whether or not the act or omission smacks of negligence. The second is that the non-negligent act or omission must occur *independently* of the exercise of the will of the accused. The third is that if the second provision is not applicable, then an event which invariably stems from the act or omission must have occurred by accident. The first provision poses little or indeed no contention as murder charges are brought under the Criminal Code[14]. The second and third provisions are the ones that have been involved in controversial interpretations by the courts.[15] What seems to be responsible for the controversy is the reluctance of the courts to acquit a person whose non-negligent act or omission resulted in some harm but who has successfully covered the conditions under section 14 of the criminal Code Law Cap 36 Revised laws of Anambra State 1991 as amended. This as a consequence had led the courts to uphold the defence but sometimes paradoxically return a guilty verdict and pronounce sentence.[16]

Another issue which is inherently present in the defence under section 14 is the concurrent rebuttal of *mensrea* which under the Criminal Code is the intention to commit a crime. While a person is saying that his act or omission occurred independently of the exercise of his will or that the event resulting from his act or omission occurred by accident, he is at the same time stating that he did not *intend* to commit the act or omission. Therefore, a successful plea of the defence simultaneously means that the prosecution has failed to prove the intention to commit the offence with which the accused is charged. It is a trite principle of criminal law that a person is not guilty of an offence unless he intended the act, i.e. *actus non tacit reum nisi mens sit rea.*[17] But it is worthy of note that the defence of lack of intention, even though interwoven with the defence of accident under section 14, stands naked and alone in that its successful plea leads to acquittal or at least to the reduction of the offence of murder to that of manslaughter.

3. Application of the Defence

In the very few cases in which the police officers have faced prosecutions for unlawful use of firearms in the execution of lawful duties, the duty of the prosecution has always been, like in any other criminal trials, to prove the guilt of the accused beyond reasonable doubt. In other words, the prosecution, in order to succeed, has to destroy whatever defence the police might put forward. This defence as we have mentioned earlier revolves mainly on accident or lack of intention or both. Its application was the issue in question in two important Nigerian cases which shall now engage our attention:

The State v. *Patrick Nwankwo*[18a]

In that case the accused, a police officer, was charged with the murder[18] of Miss Ijeoma Udebiuwa, a survey student of the University of Nigeria, Enugu Campus. The accused was charged under section 316 of the criminal code law applicable to southern Nigeria and which is in pari materia with section 271 of the criminal code cap 36 applicable to Anambra State. The deceased and her friends attended a night party on the eve of October 1, 1981. she was

[12]See generally, C.O. Okonkwo, *Okonkwo and Naish on Criminal Law in Nigeria* ,2nd edition, chap. 5.
[13]Section 14 of The Criminal Code Law, cap 36 revised laws of Anambra State 1991 as amended
[14]Ibid
[15]In particular, in murder trials discussed above
[16]Eg *Patrick Nwankwo v. The State*, No. F.C.A/E/82/83 (unreported, delivered on March 29,1984, C.A., Enugu Division), discussed above.
[17]Offenses of strict liability are exceptions: SeeR. v. Etana (1927) 8 N.L.R. 81; *Police v.AdamuVahave* (1942)16 N.L.R. 98.18a 1989) 3 NWLR (Part 110) 455 at 466.
[18]Cap 36 Revised Laws of Anambra State 1991 as amended; Section 271 whereof a person who unlawfully kills another is guilty of murder in a circumstances here 'the offender intends to cause the death of the person killed, or that of some other per son'.

returning with her friends from the party at about 4.15 a.m. in a Volkswagen beetle car when she was shot dead by the accused. The police officer claimed that he wanted to shoot at the tyre of the car in order to stop it because the driver refused to stop at a check point when he was signalled to do so. The accused stated that before the shooting he and his other colleagues on duty heard three gun shots (this was disputed by the prosecution) and they suspected that armed robbers were operating in the vicinity. He suspected the occupants of the car to be armed robbers. There was disputed evidence as to whether or not the car was in motion when the accused fired the fatal shot. But he admitted that the car was two meters away from him when he fired at it. And the trial court found as a fact that the nozzle of the mark 4 rifle, the murder weapon, was 'less than one meter from the tyre' of the car. The accused admitted that the rifle was a 'deadly and powerful weapon'. The evidence of the forensic ballistician showed that the accused missed the tyre by 0.2 meters; the tyre was 0.6 meters high, showing that the point of every of the fatal bullet was at the height of O.8 meters. Based on these facts, the accused not only argued that the killing was not intended but also that the death of the deceased was an event which occurred by accident. In rejecting the first contention, the trial court held:

> the firing of the gun into the car and the consequent killing of the deceased in the circum stances in which it was done is not authorised, excused or justified by law. The... accused acknowledged that... mark 4 rifle which he used that night was 'a deadly and powerful weapon and that a bullet from it could go through 6 people at a time'. By that I understand him to mean that the weapon was so deadly and powerful that a bullet from it could kill 6 people at a time. When the ... accused shot such a weapon ... into a moving car, 2 meters away from him and thereby killed the deceased, I hold the view that he intended the natural and probable consequence of his act either to kill or to do grievous bodily harm to the occupant of the car. I find as a fact that the ... accused intended to kill or do grievous bodily harm to the occupant or occupants of the car who he said he suspected to be armed robbers,[19]

But the Court of Appeal[20] found the police officer guilty of manslaughter instead. It was clearly influenced by the appellant's contention that he never intended to kill any of the occupants of the car, but had the intention to im-mobilize the car by shooting at its tyre. In other words, the appellant raised in the mind of the court of Appeal a reasonable doubt as to his intention to commit murder. In coming to this conclusion, one important issue which the Court of Appeal apparently paid less serious attention was the power of the police to use firearms in the discharge of their duties. Put differently, it is whether the appellant had the power to shoot at the car, and, if so, whether the shooting which resulted in the deceased's death was excusable or justifiable in the circumstance. In resolving the issue, the court of Appeal held that 'the shooting was authorised by virtue of (the appellant's) official duty but not the killing in the circumstances'[21]. And as a result the killing was not murder but manslaughter because the intention to kill was not proved by the prosecution. Why the intention to kill was not proved was, in the words of Karibi-whyte J.C.A. (as he then was), because

> Ordinary prudence and caution does not suggest that death would necessarily result from shooting at the tyre of the car. When the aim misses and death results, it is clearly not the intention to shoot at the tyre that resulted in death. The death, in the words of section 24 of the Criminal Code[22] occurred independently of the exercise of the will of the actor.[23]

By this statement, the learned justice has shown the defence of lack of intention can be linked with the defence of accident. Indeed both tend to have a common ground for linkage mainly in cases where firearms or perhaps any other weapon is the instrument of murder. But even though this linkage may be legally necessary for a proper defence of the appellant, we shall see shortly that the verdict reached by Court of Appeal with al due respect showed a misconception of the defence of accident under section 14 of the criminal code applicable to southern Nigeria which is similar to section 14 of criminal code cap 36 applicable to Anambra State. This therefore, leads us to the second contention of the appellant police officer that the killing was by accident. This defence was rejected by the trial court - and rightly too - as we shall presently show. The established facts which led to its rejection are easily apparent in the following statement of Ubaezonu J. (as he then was):

[19] Ibidi at P. 63
[20] *Patrick Nwankwo v. The State*, note 17, above.
[21] At p. 11 of the typed judgment, per Karibi-Whyte J.C.A. (as he then was)
[22] Ibid
[23] Ibid at 12.

> If the car was about 2 meters away from the him (the accused) when he aimed and shot at it with an instrument ... which is about one meter long in the way the accused person demonstrated the shooting in the court, the nozzle of (the gun) would almost be touching the tyre and no stretch of the imagination could the bullet have hit the car a the point shown by an arrow on (the sketch). I completely disbelieve the story of... (the) accused that he aimed at the tyre of the car.[24]

The Court of Appeal disagreed. According to Karibi-Whyte J. C.A (as he then was), the fact 'that the aim by the appellant at the tyre of the car resulted in the bullet entering into the car did not mean that the appellant did not aim at the tyre of the car'. But in what seems a contradiction in terms the learned justice felt able to say elsewhere in his judgment that the 'death of the deceased was not the result of (the appellant's) intentional act, in accordance with section 14 of the Criminal Code'. He concluded, therefore, that the police officer was 'not guilty of murder under section of criminal code 316 ... (but) guilty of the offence of manslaughter under section 317 of the criminal, code'[25]. It is submitted with respect that the fallacy in this reasoning is indeed overwhelming. The learned justice tends to assume that the intention to kill[26] is the same as the intention to commit any unlawful act which results in death.[27]. This is not a correct assumption in law.[28] The intentional act of the appellant was the ostensible shooting at the tyre of the car. The shooting was not involuntary.[29] The shooting was basically an application of force in the execution of duty. But the force used was so unreasonable that it was not justifiable or excusable in law.[30] It was, therefore, an unlawful act likely to endanger human life which, according to section 271 of criminal code[31] may be murder because a reasonable man could have appreciated the danger inherent in the unlawful shooting at a tyre of a car with a powerful gun at a very close range.[32]

However as we have earlier noted, the only reason why the appellant's conviction was reduced from murder to manslaughter was because he was able to establish in the view of the Court of Appeal a reasonable doubt as to his intention to kill or cause grievous harm. Again, and more importantly, the irrelevancy of section 14 of the criminal code is buttressed by the fact that the shooting (i.e. the intentional act of the appellant) was not accidental. The intention which the police officer sought to establish was the intention not to commit murder or grievous bodily harm. But the intention to shoot and which shooting caused death was proved. The shooting did not occur independently of the exercise of the appellant's will, although death resulting there which might be an event that occurred by accident. But the fact surrounding the shooting as we have seen negatived the notion that death of the deceased was an event which occurred by accident. Indeed, the death of the deceased was in fact as a result of negligent application of force. In the light of this, it is submitted that section 24 which is *in pari material* with section 14 of the Criminal Code Law of Anambra State 1991 (as amended) has no relevance in the case. If the section were applicable, then the correct verdict of the court of Appeal would have been an acquittal.[33] Because the section provides that a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident. There was, however, sufficient evidence indicating that the police officer committed at least manslaughter. The type which, it is submitted, the law regarded as involuntary. It involves a situation where a person causes death under such circumstances that he did not intend to kill and did not foresee death as a probable consequences of his conduct but there is some blameworthiness such as gross negligence[34] in his conduct. It may also occur where death is the result of an unlawful act which involves the risk of harm to another'.[35] The last part of this statement is relevant to the case under discussion. This is because the appellant had no power in the circumstances to shoot at the tyre of the car.

---

[24] Ibid at P. 62-63.
[25] Ibid at pages 8 & 11.
[26] Section 316(1) of the criminal code law applicable to southern Nigeria
[27] Ibid. S. 316(3) provides that it is murder 'if death caused by means of an act done in the prosecution of an unlawful purpose, which act is of such nature as to be likely to endanger human life'. Emphasis added.
[28] See *Valiance v.R* (1961-62B5 A.LJ.R. 182.
[29] See *Iromantu v. The State* (1964)1 All N.L.R.
[30] *R.V. Aliechem (*1956); F.S.C. 64; *R.v Ndo* (1953)14 W.A.C.A. 362; *R v Aniogo* (1943)9 W.A.C.A. 62; *Beim v. Cover*
[31] Ibid
[32] *The State v. Appoh* (1970)2 All N.L.R.218.
[33]*Iromantu v The State* (1964)1 All N.L.R. 311: *Valiance v.R*(1961)35 A.LJ.R. 82; *Timbu Kolian v The Queen* (1968)42 A.L.J.R. 298; *R. v. Tralka* (1965)Od. R. 225.
[34]Also described as 'culpable', 'Criminal', 'Clear', 'Complete', 'wicked' negligence which is above and graver than ordinary or mere tortious negligence: *R. v Bateman* (1923) 133 L.T. 730: 19 Cr. App. Rep. 8.
[35] C. O. Okonkwo, *op.c it*., p. 253

The criminal law categorically states that firearms can be used only in certain conditions where are : (i) if it is the only reasonable force necessary to overcome any force used in resisting an arrest,[36] particularly in self defence of another life; (ii) if it is the only reasonable force necessary to prevent the escape of a person sought to be arrested provided his alleged offence is such that the offender may be punished with death or with imprisonment for at least seven years[37], and, (iii) if it is the only reasonable force necessary to prevent the escape or rescue of a person already arrested provided the offence for which he was arrested is such that the offender cannot be arrested without a warrant.[38] There was no evidence that the police was arresting or proceeding to arrest or had arrested the driver or any other occupant of the car when the shooting occurred, again, there was no evidence showing that the driver and other occupants of the car were attempting to escape from lawful arrest or custody when the police officer released the fatal shot. All that the evidence pointed to was that the police officer suspected that the occupants of the car approaching the check point were armed robbers because of disputed gunshots, before the emergence of the vehicle, were heard in the vicinity. Against this background, it is submitted that the shooting was un-lawful. Consequently, the death of a deceased was as a result of an unlawful act which, to all intents and purposes, involved the risk of harm to the occupants of the car and verdict of surlty for murder ought to have been returned by the learned justices of the court of Appeal.

Samson Uzoka v The State[39]

The first part of the foregoing statement on involuntary manslaughter seems to be the basis of the decision in *Samson Uzoka v. The State*. In that case, the appellant and one Moses Nwaroh (the first accused person, but discharged and acquitted by the trial court) were police officers manning the toil gate at the Lagos-Ibadan ex-pressway on March 6, 1986, when the deceased and two other persons came in a pick-up van carrying nine tyres. The deceased and his colleagues had an invoice but which the police officers suspected to be fake. They tricked the officers into allowing them pass. But their trick was discovered and the accused persons decided to chess them in order to effect their arrest. They finally caught up with the deceased and his colleagues at kilometer 72 near Shagamu, and stopped them. The accused person then approached the deceased and his colleagues who had then come out of his own vehicle. The appellant (i.e. the second accused) then asked the deceased and others why they behaved in the way they did, but before any answer could be given, the appellant opened fire at the deceased; he fell and died on the spot. The other colleagues who were the seventh and eighth prosecution witnesses fled into the bush. As for the appellant and his colleagues, they did not bother to take the deceased to the nearest hospital for any first aid treatment. They simply abandoned him there and boarded the next available vehicles and returned to their post at the Lagos toll gate.

During the trial the appellant put forward the defence of accidental discharge. In his first extra-judicial testimony made when he was arrested, the appellant stated that his rifle went off accidentally when the butt hit the bonnet of the car of the deceased and his colleagues. But in his statement on oath in court, he testified that it was when the door of the station wagon (estate) car that brought them was being opened, that a motor-boy hit the butt of the gun and it discharged accidentally and killed the deceased. But the prosecution witness No. 7 testified that he saw the appellant take a deliberate aim at the deceased, and shot him dead. However, prosecution witness No. 8 could not say how the killing took place. According to him, immediately he heard the gun shot he ran into the bush, and was not aware that any of them had been killed. In short the evidence of prosecution witness No. 7 was not corroborated, but the trial court believed it. This in effect negatived any idea of accidental discharge argued by the defence. The learned trial judge accordingly convicted the appellant of murder and sentenced him to death. The issue before the Court of Appeal hinged on the rejection of the defence of accident and the failure of the prosecution to establish the intention to commit murder which in effect means that the prosecution failed to prove its case beyond reasonable doubt. The Court of Appeal after due consideration of the issues unanimously upheld the appeal, but partially in the sense that the appellant was found guilty of manslaughter and sentenced to ten years imprisonment.

4. Duty of the prosecution

The outcome of the two cases brings to mind the approach of the prosecution towards cases of fatal shooting of citizens by the police. While the prosecution is by no means required to persecute accused police officers, it is expected that it should do its level-best to put before the courts every available evidence either through examination-in-chief or cross-examination that will enable them reach decisions in which guilty police officers

[36] C.C., ss. 3,261.
[37] Sections 271, 272 of the criminal procedural Act
[38] Sections 27(2), 273 of the Criminal Procedure Act
[39] (1990)6 N.W.L.R. (op. 159)680.45.

receive their just deserts. But the prosecution may be handicapped in doing its work because the police whose duty is to investigate crimes may be less than thorough when colleague is involved. The notion of *asprit de corps* may overwhelm the call to duty. And if an investigation - the primary and important stage in the quest of criminal justice - is not satisfactorily done, it becomes a herculean task for the prosecution to remedy the situation during trial.

5. Conclusion and Recommendation

We have seen from the Nwankwo and Uzoka cases how the defence of lack of intention and accident has helped police officer used unlawful force to carry out their lawful duties to escape from the hangman. Nobody wants any police officer hanged for his unlawful use of lethal force, particularly nowadays capital punishment is being abolished in several parts of the world. But until it is abolished in this country, it remains a punishment under our criminal justice system. It is against this background that a policeman meets his just deserts if he is convicted and sentenced for murder for unlawful shooting of a citizen while in the execution of his lawful duties. He also meets his just deserts if he is convicted and sentenced for manslaughter where the prosecution fails to prove the intention to kill, although there is gross negligence sufficient enough to make the police officer criminally blameworthy. Again, he meets his just deserts if he is acquitted because the shooting which resulted in death was purely accidental, or occurred in self-defence of life. The fundamental question is not whether the shooting by the police officer amounts to murder or manslaughter, but whether the shooting should occur in the first place. This goes to the root of the problem. The problem of police training and the rampant cases of unlawful shootings of citizens by police officers border on lack of intention or accident. If it is so, then it is either that the police lack the proper training as to how to handle guns when there is no danger to or that those who are given guns are volatile minds and indeed should not have in the first place been recruited or retained in the police force. It is instructive that one of the conditions of issuing an adult private person a license to own a gun, mainly the double-barreled type, in the country is that he must not have a temperamental disposition. Yet the police who are authorized by law to carry guns seem to have amongst them officers who are temperamental in nature and who are careless of their unlawful action while in the execution of their lawful duties. The Court of Appeal captures this unfortunate disposition when it stated:

> ...one must also comment on the general care-free and non-challant attitude of the appellant and his colleague in the way and manner they abandoned the body of the deceased on the road side, and returned to Lagos immediately after the incident without any effort whatsoever to provide first aid treatment for the deceased. If they were able to stop a vehicle to take them back to Lagos they could easily well have got a vehicle to take the deceased to the nearest hospital.[40]

It is submitted that it is high time the police purged themselves of men of volatile character. Or, in the alternative, as a short time measure, temperamental police officers should not be authorised to carry guns. The citizen has a right to his life until otherwise ordered by a court of competent jurisdiction in our criminal justice system.

[40]Ibid., at 688, per Akpabio, J.C.A. Also in Nwankwo the accused per son not only abandoned he deceased and her colleagues, but went and lodged a report that he shot an armed robber.