

SUPREME COURT OF NIGERIA
10TH SEPTEMBER, 1993. SC.90/1991
CORAM:- A. G. KARIBI-WHYTE, U. OMO, I. L. KUTIGI, U.
MOHAMMED, S. U. ONU, JJSC

TAJUDEEN ALABI APPELLANT

V.

THE STATE RESPONDENT

CRIMINAL LAW - Proof of identify of a robber when not arrested at the scene of crime- whether the prosecution must establish the identity of the accused in order to succeed in a charge of robbery - whether identification parade is necessary

CRIMINAL LAW - Substantial doubts as to the identity of accused person -whether resolved in favour of accused person

EVIDENCE - Evidence of a lone witness as to purported identification parade - accused not arrested at the scene of the crime - whether such evidence is sufficient to ground conviction

FAIR HEARING - Court stating that it is not convinced of accused person's innocence by the statement of the accused whether the burden of proof of innocence is therefore cast on accused -whether fair hearing is occasioned thereby

IDENTIFICATION - Police bringing complainant and accused persons to the police station together at the same time- identification of the accused thereafter-whether-proper considerations governing proper identification

FACTS

The Appellant in this case was the second accused in the trial court. The first accused died in prison before the hearing of his appeal along with that of the appellant. The Appellant with the co-accused were arraigned at the Lagos High Court charged with the offence of conspiracy to commit Robbery and Robbery itself. PW1 the complainant gave evidence to the effect that he was driving his car, a Peugeot 505 saloon along Alien Avenue Ikeja

when some men pounced on him, opened the driver's door of his car and demanded the keys and money. The Robbers then snatched his car after having inflicted machet cuts on him and equally attacking his passenger. He stated how he identified the accused persons in an identification parade conducted in the course of investigation of the case. The Appellant emphatically denied ever being in Lagos or ever being put in any identification parade. He further stated that he was not arrested at Ibadan on the complaint of his sister's husband.

The trial court after considering the case on the evidence adduced convicted the two accused persons. Their appeal to the court of Appeal failed. Appellant has therefore appealed to the Supreme Court challenging the judgment of the trial court and that of the court of Appeal affirming it.

HELD (Unanimously dismissing the appeal)

1. As to whether proof of the identity of a robber is an essential requirement in a charge of robbery, the prosecution to succeed must of necessity establish the identity of the accused and by credible evidence prove its case beyond reasonable doubt especially in the instant case where the robber was not arrested at the scene of the crime. (p.153 L16)
2. Before the prosecution can rightly be said to have proved its case beyond reasonable doubt, every ingredient of the offence charged, which is the instant case is robbery, must be established. In other words if one element is left out, there is no proof beyond reasonable doubt. (p.154 L12)
3. The learned trial judge and the court of Appeal were wrong when they held that an identification parade was unnecessary. Court of Appeal was also wrong to hold that the prosecution should by evidence have established in unmistakable terms the identity of the Appellant which in the circumstance of this case was a complete stranger to PW1, the complainant. (p.156 L12)
4. As the Police brought the Appellant and the deceased together with P.W.1 into the Police station at the same time as established under cross examination, any purported identification of the Appellant thereafter was a mere sham and a mockery of an identification parade. (P.156 L25)

5. The considerations that govern proper identification may be derived from the principles enunciated in *Ikemson v. The State* as follows; the description of the accused, the opportunity the victim had for observing the accused and what features of the accused noted by the victim and communicated to the Police that marked him out from other persons. The prosecution in this case has satisfied none of these three conditions. (p.157 L4)
6. Where only PW1 (the complainant) testified about a purported identification parade of a robbery case in which the appellant was not arrested at the scene of the crime coupled with the fact that the evidence adduced through the lone witness as regards appellant identity was most unsatisfactory, it will be most unsafe to convict the Appellant thereon. (p.158 L29)
7. In the case at hand, there exists substantial facts which when taken into consideration would create serious doubt as to the identity of the Appellant as one of the robbers who attacked PW1 the complainant. The doubt ought to have been resolved in favour of the Appellant and the trial court ought of necessity, to have acquitted and discharged the appellant. (p. 161 L8)
8. The statement on record of the trial judge that the statements of the Accused persons did not convince him of their innocence clearly cast the burden of proof on the Appellant and so amount to a breach of his right of fair hearing. That being so, an appeal court is bound to set aside the judgment being contrary to the constitution. (p. 164 L17)
9. The Court of Appeal was in error when in the instant case it held that no miscarriage of justice had arisen to vitiate the judgment of the trial court. Indeed, once an accused person has demonstrated that the trial court wrongly placed the onus of proof in its judgment, the accused need not go any further to prove miscarriage of justice before the judgment would be set aside.(p.164 L37)
10. Having been shown that the trial court misdirected itself as to the onus of proof in this case, it is no longer necessary to show miscarriage of justice. The trial court's decision is therefore vitiated and afortiori the decision of the Court of Appeal affirming it.(p165 L8)

PER ONU JSC *“Every case must be considered on the evidence adduced or to be adduced and its own particular (usually pre-trial) circumstance. Such that where, as in the instant case, an accused in addition to his not being arrested at the scene of the crime pleads alibi, a proper identification parade ought to be conducted.”* (p.159 L10)

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REPRESENTATION

Tayo Oyetibo, Funmi Ojo (Miss) Nojim Tairu, For the Appellant
Bode Rhodes- Vivour, Director of Public Prosecutions, Ministry of Justice,
Lagos State, For the Respondent

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CASES REFERRED TO

1. Alonge v. I.G.P. (1959) 4 F.S.C 203 10
2. Bakare v. The State (1987) 3 SC 1
3. Okogbue v. C.O.P. (1965) NMLR 232
- 15 4. Umeh v. The State (1973) 2 SC. 9
5. Obue v. The State (1976) 2 SC 141
6. Lori v. The State (1980) 8-11 SC -81 15
7. Ayub-Khar v. The State (1991) 2 NWLR (pt 172) 127
8. Asanya v. The State (1991) 3 NWLR (pt 180) 422
- 20 9. Bozin v. The State (1985) 2 NWLR (pt.8) 465
10. Madagwa v. The State (1988) 5 NWLR (pt. 92)60
11. Ikemson v. State (1989) 3 NWLR (pt 110) 455 20
12. R. Turnbull (1976) 3 All E.R 549
13. Nwabueze v. Okoye (1988) 4 NWLR (pL91) 664
- 25 14. Okosi v. The State (1989) 1 NWLR (pt. 100) 645
15. Okouofua v. The State (1981) 6-7 SC. 1
16. Adaje v. The State (1979) 6-9 S.C 18 25
17. Ali v. The State (1988) 1 NWLR (pt. 68) 1
18. Ogonla v. The State (1991) 2 NWLR (pt 175)
- 30 19. Akpan Ikono v. The State (1973) 5 S.C 231
20. Adamu v. The State (1986) 3 NWLR (pt32) 865
21. Mbenu v. The State (1988) 2 NWLR 615 30
22. Obidika v. The State (1977) 2 S.C 21
23. Orimoloye v. The State (1984) 10 SC. 138
- 35 24. Obiode v. The State (1971) 1 All NLR 35
25. Abudu v. The State (1985) 1 NWLR (pt 1) 55
26. Anyanwu v. The State. (1986) 5 NWLR 612 35
27. Smith v. Evans. (1908) 1 C.A.R. 203
28. Ukorah v. State (1977)4 SC. 167

29. Nwabueze v. The State (1988) 4 NWLR (p.86) 16
30. Walter William Chadwick's case (1917) 12 C.A.R. 247
31. Stephen v. The State (1986) 3 NWLR (pt. 46) 982
32. Onuocha v. State (1988) 3 NWLR (pt 83) 460
33. Mariagbe v. The State (1977) 3 S.C. 47
34. Ogbu Nwagu v. The State (1966) 1 All NLR (New Edition) 207 5
35. Adigun v. A.G. Oyo State (1987) 1 NWLR (pt. 53) 678

STATUTES REFERRED

1. Criminal Code of Lagos State S. 402 (2) (a) and S. 403A 10
2. Constitution of the Federal Republic of Nigeria 1979 - S. 33 (5)

LEAD JUDGMENT BY ONU JSC

This is an appeal from the decision of the Court of Appeal sitting 15
in Lagos which affirmed the decision of High Court of Lagos State that
convicted two persons of the offences of conspiracy to commit Robbery
contrary to section 403A of the Criminal Code (Amendment No.1) Law,
1980 of Lagos State and Robbery contrary to section 402(2) (a) of the
same Law. The appellant herein was the second accused in the trial court, 20
the 1st being one Adelani Onifade, who has been shown to have died in
prison between the period of his conviction by the trial court and hearing
his appeal along with that of the present appellant. It is pertinent to point
out here that although no death certificate was produced in respect of the
1st accused, the lower court acting on counsel (A.F. Okunuga's) pronounce- 25
ment from the bar on 17th January, 1990 that the 1st accused was dead,
struck out his appeal. See page 167 of the Record. Albeit, in its judgment
dated 19th February, 1991 (for which see pages 186-194 of the Record) the
Court below in an apparent oversight treated the appeal of the 1st accused
as still subsisting and considered the appeals of both the 1st accused and 30
the appellant together and dismissing both, as earlier shown. The facts of
the case which are not in dispute are briefly as follows:-

PW.1, Adebisi Olabisiye, who was the victim of the alleged robbery stated how at about 7.15p.m on 7th September, 1981, he was driving
his Peugeot 305 saloon car registration Number LA 899 AJ along Allen 35
Avenue, Ikeja, while in the company of one Rolan Verge, a German, some
men pounced on him as he approached the gates of 45 Allen Avenue to
where he was going. That one of the men forced the driver's door open and
asked for his keys and money. That thereupon, he was given matchet cuts

on his head and left thumb though he eventually managed to escape, while their attackers made away with the car. He described how the passenger in his car was also attacked by one of the robbers. He stated how he identified 1st and 2nd accused persons in an identification parade conducted at Panti Police Station. It is noteworthy here to stress that P.W.1 put the
5 number of their attackers on that day at two men.

P.W.2 was the Police Officer who received the report of the incident at the Ikeja Police Station on the day it occurred on 7th September, 1981. He stated under cross-examination that P.W.1 gave the number of their attackers who robbed him of his car as six.

10 P.W.3, was the Police Officer attached to the State C.I.D., Panti, Yaba, who took the statements of the two accused persons. According to him, he only investigated the case against the 1st accused as to how he was arrested at Ibadan with the stolen car now bearing a new registration plate number. Nothing was however said by the witness as to the case
15 against the appellant and with his evidence, the prosecution closed its case.

Both 1st accused (hereinafter called the deceased) and appellant denied the charges both in their extra-judicial statement to the Police (See Exhibit B) and in their oral evidence in court. The deceased said the motor car in question was sold to him by one Yinka Adebawale for N4,000.00
20 but that he could only make a down payment of N2,000.00; such that when the seller came to demand for the balance of the price, he decided to resell the car for N5,000.00 so that he could payoff the balance of N2,000.00 to Yinka Adebawale. He said he then took the car to Ibadan where he saw the appellant who said his aunt had wanted to purchase a car prior to that
25 time and that they, the deceased and appellant should take the car to appellant's said aunt. Whereupon, the husband of appellant's aunt alerted the police that the car was a stolen vehicle and they were both arrested and brought to Lagos.

The appellant's story about the stolen car confirmed all that the
30 deceased explained. He in addition asserted that he and the deceased took the car to his sister (not aunt as claimed by the deceased) and that it was the latter's husband who after inspecting the vehicle particulars, saw that it was a stolen vehicle and thereafter invited the police to arrest the deceased. Whereupon, he too was arrested with the deceased and were
35 both brought to Lagos. He emphatically denied being in Lagos on 7th September, 1981, adding that he was never put on any identification parade. The appellant's further appeal to this court as herein before alluded to is against the lower court's dismissal of his conviction and sentence premised on a Notice of Appeal containing three grounds.

The two issues identified on behalf of the appellant (the first being related to grounds 1 and 2 of the appeal grounds while the second is concomitant with ground 3) which we are called upon to determine (two identical issues have similarly been submitted on respondent's behalf) are:

- "1. *Whether the case (it is one of robbery in which the appellant as an accused was not arrested at the scene of the crime and he denied ever committing the offence) was proved beyond reasonable doubt, more so that proof of the appellant's identity became mandatory and*
2. *Whether the Court of Appeal was right in law in holding that no miscarriage of justice has been occasioned to the appellant by the misdirection contained in the judgment of the trial Judge when he said "the evidence of the 1st and 2nd accused persons, in no way convince me of their innocence".*

At the hearing of this appeal on 17th June, 1993, learned counsel for the appellant adopted his brief dated 9th February, 1993 and orally expatiated on it. Learned D.P.P for the respondent similarly did likewise with regard to respondent's brief filed on 9th March, 1993.

In considering firstly the question as to whether proof of the identity of the robber is an essential requirement in a charge of robbery especially where, as in the instant case, the robber was not arrested at the scene of the crime, it is my view, that for the prosecution to succeed, it must of necessity establish the identity of the accused and by credible evidence, prove its case beyond reasonable doubt. In this wise, it is pertinent to call in aid section 137 of the Evidence Act which the Federal Supreme Court, followed by this court, have been quite consistent in applying to enunciate and amplify the said principle. For instance in *Alonge v. I.G.P.* (1959) SCNLR 516; (1959) 4 F.S.C. 203 at 204 Ademola, C.J .F. said:

"Now the commission of a crime by a party must be proved beyond reasonable doubt. The burden of proving that any person is guilty of a crime rests on the person who asserts it, and this is the law laid down in section 137 of the Evidence Ordinance, Cap. 62. The burden of proof lies of the prosecution and it never shifts; and if on the whole evidence the court is left in a state of doubt, the prosecution would have failed to discharge the onus which the law lays upon it and the prisoner is entitled to an acquittal."

In *Bakare v. The State* (1987) 3 S.C. 1 at page 33; (1987) 2 NWLR (Pt.52) 579 this Court (per Oputa, J.S.C.) said as follows:-

"Also it has to be noted that there is no burden on the prosecution to prove its case beyond all doubt. No. The burden is to prove its case beyond reasonable doubt with emphasis on reasonable doubt. Not all doubts are reasonable. Reasonable doubt will automatically exclude unreasonable doubt, fanciful doubt and speculative doubt - a doubt borne out by the circumstances of the case."

See also the cases of-

1. Okogbue v. C.O.P. (1965) NMLR 232 at 236
2. Umeh v. The State (1973) 2 S.C. 9 at 12-13.
- 10 3. Obue v. The State (1976) 2 S.C. 141 at 148-149
4. Lori v. The State (1980) 8-11 S.C. 81 at 99.
5. Ayub-Khan v. The State (1991) 2 NWLR (Pt 172) 127 at 144.
6. Asanya v. The State (1991) 3 NWLR (Pt.80) 422 at 466.

15 Before it can rightly be said that the prosecution has proved its case beyond reasonable doubt therefore, every ingredient of the offence charged, which in the instant case is robbery must be established. In other words, if one element is left out, then there is no proof beyond reasonable doubt: In Bozin v. The State (1985) 2 NWLR (Pt.8) 465, a case similar to
20 the one in hand where the appellant was charged with armed robbery but was not arrested at the scene of the crime and he denied being involved in the incident, Oputa, J.S.C. delivering the lead judgment of this court held at page 469 of the Report as follows:

*"For the prosecution to succeed in this case, there ought to be proof beyond
25 reasonable doubt:*

- (i) That there was a robbery or a series of robberies.*
- (ii) That each robbery was an Armed Robbery.*
- (iii) That Appellant was one of those who took part in the robberies."*

If in the instant case it is ingredient (iii) in the Bozin's case (supra) that
30 can rightly be said to be relevant, as indeed it is, then the appellant's identity logically became mandatory of proof beyond reasonable doubt by the prosecution. Which is to say, that the answer to issue No.1 is positive. That then leads me on to the next logical question: Did the prosecution in this case prove the identity of the appellant as one of the robbers who attacked
35 P.W.1 on 7th September, 1981 and consequently his case beyond reasonable doubt to justify sentencing him to death? Let me hasten to point out here that before my further consideration of this issue, that I fully share learned counsel for appellant's view that the proper and only valid procedure by which the prosecution could have proved by the identity of the

appellant and its case beyond reasonable doubt was to prove that an identification parade was conducted in the proper way as a result of which P.W.1 identified the appellant. See *Madagwa v. The State* (1988) 5 NWLR (Pt.92) 60 S.C. where an identification parade properly held and accepted by the trial court and approved on appeal by the Court of Appeal, was upheld as validly carried out by this court amongst other circumstances considered, in dismissing the appellant's appeal. The circumstances that warranted an identification parade may therefore be deciphered inter alia as follows:-

1. The appellant was not arrested at the scene of crime.
2. The fact that by the time of the attack by the armed robbers it was already dark or near so although evidence adduced through P.W.1 showed that the gates at which his car stopped was lit by lights.
3. The discrepancy between what P.W.1 said in his evidence in chief at page 46, lines 11-17 of the Record to the effect that:-

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"As we approached the gates of 45 Allen Avenue. where Alhaji Yahaya lived, two men pounced on us. They are that: 1st and 2nd accused. They are the two who pounced on us." and

4. What he (P.W.1) later said at page 47, lines 1 - 5 of the record to the effect that

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"It was the 1st accused who had macheted and cut me during the operation. 1st accused forced the door open and demanded my keys. 2nd accused was busy with the other door where the passenger was."

Added to the above are:

5. P.W.2, Sergeant Moses Olanrewaju, who said that the information given to him at the Police Station by P.W.1 was that six armed robbers at tacked and robbed him of his car and
6. P.W.3 Sergeant Amos Anacha, who said under cross-examination at page 53, lines 29-30 that *"The two accused and the complainant P.W.1 were brought together to me."*

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By a fairly long line of decided cases, this court has laid down the guiding principles as to when an indentification parade is necessary in a criminal charge, In the more recent decision of *Ikemson v. The State* (1989)

NWLR (Pt.110) 455 Karibi-Whyte, J.S.C., applying the familiar English authority of *R. v. Turnbull & Ors* (1976) 3 All E.R. 549 at 557, had this to say at page 472 of the Report thus:

"I agree with the submission of Counsel to the respondent that an identification parade is only essential in the situations enunciated in R. v. Turnbull & Ors (1976) 3 All E.R. 542 at 551. These are cases where the victim did not know the accused before and was confronted by the offender for a very short time and in which time and circumstances he might not have had full opportunity of observing the features of the accused. In such a situation a proper identification will take into consideration the description of the accused given to the Police shortly after the commission of the offence, the opportunity the victim, had for observing the accused and what features of the accused noted by the victim and communicated to the police marks him out from other persons."

(Underlining above is mine for emphasis)

As all the attributes of the overriding necessity to hold an identification parade in the instant case were what were crowned in the *Turnbull's* case (supra) and so gave rise to the principles therein laid down which, I hold, should equally be adopted in this case, I share learned counsel for appellant's view that the learned trial Judge was wrong when he held on page 69, lines 30 - 32 of the Record that an identification parade was unnecessary. Equally, the court below at page 192 lines 20 - 30 of the same, was wrong to hold that he (the learned trial Judge) was right in so holding. The logical corollary of the foregoing propositions is that the prosecution, in my view, should have established that a proper identification was a sine qua non, namely that by holding a proper identification parade wherein P.W.1 should be made to identify in unmistakable terms the appellant, who after all in the circumstances of this case, was to him a complete stranger. By the police bringing the appellant and the deceased into the police station together with P.W.1 at the same time as P.W.3 admitted under cross-examination, any purported identification of the appellant thereafter by P.W.1 was a mere sham or a mockery of identification to bolster some non-existent administrative requirements in the investigation of the crime. Hence, the testimony of P. W.1 at page 47, lines 20 - 30 to the effect that:

"There was an identification parade, at where I identified the 1st and 2nd accused (the appellant) amongst the men on the line. I confirmed to the Police 1st and 2nd accused (the appellant) were those who robbed me and seriously attacked me."

in my opinion, failed woefully even to prove the case on the balance of probabilities, let alone that of beyond reasonable doubt. Failure on the part of the appellant to cross-examine P.W.1, the latter's evidence which it is submitted went unchallenged, would not in my judgment still relieve the prosecution from proving beyond reasonable doubt his (appellant's) participation in the commission of the crime. 5

What then are the considerations that govern a proper identification, one may ask? The answer may be derived from the principles enunciated in *Ikemson v. The State* (supra), quoted in extenso above which would include inter alia:

- (a) The description of the accused given to the police shortly after the commission of the offence; 10
- (b) The opportunity the victim had for observing the accused; and
- (c) What features of the accused noted by the victim and communicated to the Police marks him out from other persons. 15

In my view, the prosecution in the instant case has satisfied none of the three conditions listed above. Rather, what we have in the testimony of P.W.1 as shown in the trial court's Record at page 47, lines 19-24 is: 20

"At Panti was where I next saw 1st and 2nd Accused. There was an identification parade, at where I identified the 1st and 2nd accused amongst the men on the live (sic)"

and this without the matching evidence from a Police Officer or investigator who conducted such identification parade. Significantly, neither in the terse evidence of P.W.2 nor in that of P.W.3 who merely glibly said under cross-examination and re-examination at page 53, lines 25-30 and 34-35 respectively that- 25 30

"I was not first to arrest the accused person. This matter was earlier reported at Ikeja Police Station. The two accused and the complainant P.W.1 were brought together to me."

"Compl. P.W.1 was brought as complainant and the Accused as suspects." 35

would, with due respect, amount to a confirmation of the statement of P.W.1 showing that an identification parade did indeed take place or was

held, at which he identified the deceased and the appellant. This is the moreso, when P.W.1 did not make a prior statement of any distinguishing features by which he could recognise the appellant, or by giving a description of appellant or further still, in his testimony, stating how the identification parade was conducted, particularly the place, the number of persons
5 on the line and the positioning of appellant before he was picked out. In as much as a police officer who conducted the identification parade was not called to testify, it would amount to the removal of the carpet from under the feet of P.W.1 who alone testified unsupported by any independent piece of evidence as to the alleged identification. The case of the prosecution
10 became worse confounded when P.W.3 who was the police officer that handled the case at PANTI did not say that such parade was conducted by another officer to his knowledge or information which would in fact have amounted to hearsay. To suggest as the learned D.P.P has done in his brief and in oral submission to us in court that-

15 *"It is pointless, for the appellant on appeal to dispute hard facts which were not challenged by cross-examination. The testimony of P.W.1 has not been challenged let alone contradicted. It is settled law that if a finding of fact is not challenged, that finding whether it is right or wrong stands."*
is, with utmost respect, unsustainable and futile argument. Merely, placing
20 reliance on the cases of Nwabueze v. Okoye (1988) 4 NWLR (Pt.91) 664 and Okosi v. The State (1989) 1 NWLR (Pt.100) 645, for his proposition, does not and cannot, in my view avail him in the circumstances. Nor am I impressed by learned D.P.P's submission that the prosecution called three
25 witnesses as if it is not the quality of evidence emanating from such witnesses that matters but rather the number. It should be borne in mind that there is no rule of law which imposes an obligation on the prosecution to call a host of witnesses; all the prosecution need do is to call enough material witnesses to prove its case and in so doing, it has a discretion in the matter. See Okonofua & Another v. The State (1981) 6-7 S.C. 1 at 18;
30 Samuel Adaje v. The State (1979) 6-9 S.C. 18at 28 and Ali & Another v. The State (1988) 1 NWLR (Pt.68) 1 at 20. In the latter case, this court upheld the conviction of the appellant for the murder of a police officer in gory circumstances upon the credible evidence of a single eye-witness. In the case in hand, where only P.W.1 testified about a purported identifica-
35 tion parade of a robbery case where the appellant was not arrested at the scene of crime and evidence adduced through the lone witness (P.W.1) was of such a perfunctory nature that is unsupported regarding the appellant's identity, it will be most unsafe to convict thereon. To say therefore that the evidence P.W.1 was clear on the identification parade at Panti C.I.D. but

that it is conceded PW.2 and PW.3 said nothing about it when it is the bounden duty of the Police to have done the latter act by calling a witness to that effect, cannot be proof positive that PW.1's evidence amounted to unchallenged evidence. It is in this regard that Okosi's case (supra) ought to be distinguished from the one in hand. The prosecution's case hanging as it does on the unverified and scanty evidence of PW.1., a man ought not to hang upon such shaky and unproven facts, findings which, in my view, are in the instant case, perverse. There can therefore be no concurrent findings of fact of the two lower courts which, in the instant case, ought to be disturbed being perverse. See *Ogoala v. The State* (1991) 2 NWLR (Pt.175) 517. In saying all I have said above, I am not unmindful of the fact that there is no positive rule of law or practice of general application which requires the holding of identification parade on every occasion. Every case must be considered on the evidence adduced or to be adduced and its own particular (usually pre-trial) circumstance. Such that where, as in the instant case, an accused in addition to his not being arrested at the scene of crime pleads alibi, a proper identification parade ought to be conducted. See *Akpan Ikono & Anor. v. The State* (1973) 5 S.C. 231. Identification parades are usually conducted when the identity of a suspect (as indeed established in the instant case) is in doubt. As re-echoed by this court in cases such as *Bozin's case* (supra), *Okosi's case* (supra) and *Adamu v. The State* (1986) 3 NWLR (Pt.32) 865, to mention but a few, identification parade means a group of persons of identical size and common physical features assembled by the police from whom a witness identifies a suspect or suspects unaided and untutored. See also *Mbenu v. The State* (1988) 3 NWLR (Pt.84) 615. This court has so amply demonstrated in the above cases how to conduct effective identification that it cannot be said of the instant case that what indeed was mounted at the identification parade, if at all as held and as evinced in the evidence of PW.1, was a spontaneous one carried out at a most auspicious moment and at the earliest opportunity. See *Lawrence Ogbodi Obidika v. The State* (1977) 2 S.C. 21; *Matthew Orimoloye v. The State* (1984) 10 S.C. 138 at 143 and *Okputu Obiode & Ors v. The State* (1971) 1 All NLR 35 at 39. Cf. *Zekeri Abudu v. The State* (1985) 1 NWLR (Pt.1) 55; *Anyanwu v. The State* (1986) 5 NWLR (Pt.43) 612 and *Mbenu v. The State* (supra). It was Philimore, J. in *John Smith v. Evans* (1908) 1 Cr. App. R 203 at page 204 who in an analogous case castigated the police and remarked:

".....such methods as were resorted to in this case make the particular identification nearly valueless and police authorities ought to know that this is not the right way to identify."

What is more, the courts of this country have consistently held that when-
 ever the case against an accused depends wholly or substantially on the
 correctness of the identification of the accused which the latter alleges to be
 mistaken, the judge should warn himself of the special regard for caution
 before convicting the accused in reliance on correctness of the identifica-
 5 tion (See *Abudu v. The State* (supra); *Okosi v. The State* (supra); *Anyanwu*
v. The State (supra); *Ukorah v. The State* (1977) 4 S.C. 167 at 171,
Nwabueze v. The State (1988) 4 NWLR (Pt.86) 16 at 30-31 and *Mbenu v.*
The State (supra). The Courts below in the instant case, had a duty to
 quash the conviction and sentence of the appellant. See *Walter William*
 10 *Chadwick & 2 Ors. (1917) 12 Cr. App. R. 247*, a case in which identifica-
 tion was ruled unsatisfactory where a photograph was shown to a witness
 before an identification parade. There, Reading L.C.J. observed:

15 *"This is a singular case, the guilt on innocence of the appellants*
depends entirely on the effect of the evidence of identification."

If as asserted by P.W.3 in the instant case the deceased and appellant were
 brought into Panti C.I.D. office together with P.W.1, any later identification
 20 parade at which P.W.1 was alleged to have identified the appellant, such
 evidence of identification would be inept and valueless. To take an instance
 from one of the cases cited above, *Oputa, J.S.C* in *Nwabueze v. The State*
(supra) at pages 30-31 of the Report said:

25 *"Identification evidence has to be very carefully considered since it is*
usually a question for reconstruction, especially where a witness tries to
identify someone he had never seen or met before the day of the
incident. There are many possibilities of mistake arising either from error
of observation or error of recollection. There is however a difference
 30 *between a witness saying:-*

'I knew the accused before the date of this incident. It was he that I saw
on that material night: and a witness saying:- 'I saw someone that night
for the first time. I can identify him if I see him again.

35 And in *Ikemson's case* (supra), the learned Justice it was too who
 said at pages 478 - 479 of the Report thus:-

"Where the witness's first acquaintance with the accused is during the com-
mission of the offence, then, an identification parade may be held. But

such a parade is not fool-proof. It is not a guarantee against the usual errors in reconstruction. The Criminal law is full of cases of mistaken identity - see the trial of Adolf Beck ed. E.R. Watson (Edinburgh 1924); the case of Walter Graham Rowland (1947) 32 Cr. App. R. 29. In Rowland's case (supra) there was an identification parade and Rowland was identified by three independent witnesses. Yet later, onwads confessed that he and not Rowland was the actual murderer. The Courts have therefore got to guard against cases of mistaken identity.....identification parade is not just the answer. The trial court should be satisfied that the evidence of identification proves beyond reasonable doubt that the accused before the court was the person who actually committed the offence charged." 10

In the instant case, I agree with the submission of learned counsel for the appellant that there exist substantial facts which when taken into consideration would create serious doubt as to the identity of the appellant as one of the robbers who on 7th September, 1981 attacked P.W.1. These substantial facts creating grave doubts include: 15

1. P.W.1 said in his evidence-in-chief that it was the deceased who attacked him and that after the deceased had dealt matchet blows on him, he managed to escape and ran away while the other attacker concentrated on his passenger. 20
2. In the fleeting moment of the sudden attack it is inconceivable that P.W.1 would have the opportunity of noting any distinguishing features of the robber who attacked the passenger on the other side of the car let alone recognising him. 25
3. The fact that the written statement and oral evidence of the deceased corroborated the story told by the appellant in his defence and statement that he was at all material times in Ibadan and only took the deceased and the car to his sister in Ibadan for her to buy the car thus leading to his and the deceased's arrest. Being not in Lagos appellant's alibi was not demolished. 30
4. The failure of the Police through their witness, P.W.3, to investigate the appellant's entire case but instead concentrated all his energy on the deceased as disclosed through the testimony of P.W.3 at page 52, lines 17-31 of the Record. 35
5. The fact that at page 53, lines 36-40 the prosecuting counsel had to ask for adjournment to call the police from Ibadan and which application was granted. On the date to which the case was adjourned, 11th October, 1984, a further adjournment was

procured at the prosecution's instance to 23/11/84. On the latter date, counsel had to close the prosecution's case without calling any policemen from Ibadan. The provisions of Section 148(d) of the Evidence Act as to "evidence which could be" and is not produced would, if produced, be unfavourable to the person who withholds it" would in my view have sway.

For the above reasons and the entire circumstances of the case in hand, the court below in my view, fell into a grave error when it held at page 192 lines 30-39 of the record as follows:-

"And although P.W.3 said in his evidence that P.W.1 and the two appellants were brought to him together at Panti C.I.D. Police Station, it is not clear whether they were together with other people or the circumstances under which they were brought. However, even if the appellants and P.W.1 were together and the identification parade attacked within the meaning and effect of the case of Bozin v. The State (1985) 2 NWLR (Pt.8) 465 at 479, the fact still remains that the positive and direct identification of the appellants on attack of P.W.1 at the scene which was sufficiently "lit, could not be faulted."

If the bringing together of the deceased and appellant with P.W.1 would as it was necessarily bound to do, affect the validity and efficacy of the identification, then the doubt raised ought to have been resolved by the lower court in favour of the appellant. If, however there was a positive and direct identification of the deceased and appellant on the date of the incident (which is not conceded), the fact that they were not arrested at the scene of crime and the fact that P.W.1 did not know them before the happening of the incident, was enough reason for an identification parade to be conducted during which P.W.1 would then fall back on his memory to aid him in the task of picking out his attackers. The court below having in a case which attracts capital punishment such as armed robbery that the instant case is, held at page 194, lines 7-22 that:

"It is pertinent to observe here that the investigation into this case has not been properly conducted. This has very much affected the prosecution of the case itself. For example it is the prosecution (sic) that the appellants were arrested and the stolen car recovered in Ibadan, but one, not even a Police man from Ibadan gave evidence at the trial. This information only appeared in the evidence of the appellants themselves and the statement to the Police by 1st appellant. There was not an iota of evidence from the

Police witnesses about the identification parade which was essential in a case like this. It was only P.W.1 who gave evidence on it. On the whole, the investigation by the police and the prosecution itself were not, in my opinion properly conducted."

ought not to have made a round about turn to hold in concluding its judgment that:-

"This does not however derogate from the findings of the learned trial Judge from the proved and accepted evidence at the trial."

Since it had found as a fact that there was no iota of evidence as to how the identification parade was conducted and a fortiori that that essential piece of evidence was lacking, it ought of necessity, to have acquitted and discharged the appellant.

It now remains to consider whether by the trial Judge's holding that "the evidence of the 1st and 2nd accused persons in no way convince me of their innocence" thereby a miscarriage of justice was occasioned.

Fully put, the statements attacked and credited to the learned trial Judge as set out in his judgment at page 70 of the trial court's record reads as follows:

"The pedantic statement of the 1st accused and the equally unconvincing statement and indeed the evidence of the 1st and 2nd accused persons, in no way convince me of their innocence."

It is the contention of the appellant that the above statements shift the onus of proof to him but it is the argument of the learned D.P.P. that the learned trial Judge is possessed of a discretion and indeed a duty to believe or disbelieve one evidence against the other, the evidence of the appellant or that of the respondent. What the trial Judge did, and what the Court of Appeal said eloquently it is maintained, is to exercise that discretion one way or the other unless such an exercise is shown to be perverse. What he has done, it added, is to understand the trial Judge's treatment of facts as an issue of shift in burden of proof but did not place the burden on the defence. The argument of the appellant, it is finally contended, is to build an effigy of the trial Judge's finding and purport to destroy it. Reliance was placed on the cases of Stephen v. State (1986) 5 NWLR (Pt.46) 982 (per Oputa, J.S.C.) and Onuaha v. State (1988) 3 NWLR (Pt.83) 460 by the learned D.P.P.

That the above statements do not bear the purports the learned D.P.P ascribed to them as set out above may be gleaned from the following

comments of the court below itself which saw in them after applying its searchlight thereto at page 193, lines 26 - 28 of the Record as follows:

"However, despite this apparent slip in the judgment of the learned trial Judge, I do not think that there was any miscarriage of justice that could go to vitiate the trial against the appellants."

The above reaction of the court below to what I consider an apparent misdirection on the part of the trial Judge at once raises the matter to the pedestal of a constitutional issue. In other words, the question, as to where the onus of proof lies in criminal cases is undoubtedly a constitutional question. This is because the Constitution of the Federal Republic of Nigeria, 1979 in section 33(5) provides thus:

"33(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty."

This section of the Constitution invests in every accused person a presumption of innocence. In other words, the accused person is not obliged to prove his innocence, rather, the law and our Constitution presume that he is innocent until the contrary is proved. Furthermore, in criminal cases culpatory evidence which is equally open to an interpretation consistent with innocence must be construed in appellant's favour. So held this court in *Okoro Mariagbe v. The State* (1977) 3 S.C. 47 at 52. That is why the principle is now firmly established, that the duty lies on the prosecution to prove its case beyond reasonable doubt and a general burden to rebut the presumption of innocence constitutionally guaranteed to the citizen. In the instant case, the statements complained of clearly cast the burden of proof on the appellant and so amount to a breach of his right to fair hearing. That being so, where as in the instant case, the trial court misdirects itself as to the onus of proof of the guilt of the appellant and subsequently convicts the appellant as has happened here, an appeal court is bound to set aside the judgment, being contrary to the construction. In the case of *Ogbu Nwagu v. The State* (1966) 1 All NLR (New Edition) 207 at 208, this court held in a murder appeal expatiating on the principle, thus:

"The trial Judge was of opinion that it was a sham and a poor after thought and concluded his judgment with these words-

'I am unable to hold from the evidence before me that the accused established either a defence of self-defence or of provocation. '

That, with respect, is a serious misdirection: for it puts an onus on the accused person to establish a defence as if, upon his admitting that he

killed the deceased, it became his duty to prove that he did so in circumstances of excuse or mitigation or else he was guilty of murder. Such an approach runs counter to the view which has prevailed since Woolmington v. Director of Public Prosecutions (1935) A.C. 462; the onus does not shift on to the accused person to establish any defence... .."

The court below in my judgment, was therefore in error when in 5 the instant case, it held that no miscarriage of justice had arisen to vitiate the judgment of the trial court. Indeed, once an accused has demonstrated that a trial Judge has misplaced the onus of proof in his judgment and therefore violated the accused's fundamental right to fair hearing, he (the accused) need not go further to prove a miscarriage of justice before the 10 judgment would be set aside. The miscarriage of justice itself is inherent in the violation of the fundamental right. So held this court in Adigun v. A.G. of Oyo State (1987) 1 NWLR (Pt.53) 678. I therefore share learned counsel for the appellant's view and accordingly hold that it is unnecessary in the instant case, to show any miscarriage of justice once it is shown, as indeed 15 has been shown, that the trial court misdirected itself as to the onus of proof in this particular case. It is my firm view therefore that the trial court's decision is therefore vitiated and once vitiated, it would stand declared as a clear misdirection and afortiori, the decision of the court below which affirmed it. The second issue will in the result be answered in the negative by 20 me.

The consequence of all I have been saying is that this appeal being meritorious succeeds and it is allowed. The judgments of the courts below are both accordingly set aside. I will in respect of the appellant therefore enter a verdict of discharge and acquittal. 25

KARIBI-WHYTE JSC

I have had the privilege of reading the judgment of my learned 30 brother, Onu, J.S.C. I entirely agree with his reasoning in the judgment and the conclusion that this appeal be allowed. I do not consider it necessary to add to the reasons so comprehensively set out in the judgment of my brother Onu, J.S.C. which accord with my views.

I also therefore hereby allow this appeal. The conviction and sen- 35 tence of the appellant is hereby set aside.

OMO JSC

I have had the opportunity of reading in draft the judgment of my learned brother Onu, J.S.C. I entirely agree with him that this appeal should succeed for the reasons which he has fully set out therein.

5 In this case there was definitely a need for holding an identification parade. Not only was one not held, but the investigating police officer told an untruth by stating that one was indeed held. No evidence was led to show how the parade was assembled, how the appellant got into it, and the very process of identification. Before a conviction can be sustained
10 where an identification parade is held, the ingredients of a proper parade must be satisfied vide Ikemson v. The State (1989) 3 NWLR (Pt.110) 455.

For these and the fuller reasons set out by Onu J.S.C. in his lead judgment, which I adopt as mine, I also hold that this appeal has succeeded. The appeal of the appellant is allowed, and conviction and sen-
15 tence of the appellant is hereby set aside.

KUTIGI JSC

20 I read before now the judgment just delivered by my learned brother Onu, JSC I agree with his conclusion that the appeal has merit and ought to succeed. It is accordingly allowed. The appellant is discharged and acquitted.

MOHAMMED JSC

I entirely agree that this appeal should be allowed for the reasons given in the lead judgment of my learned brother, Onu, J.S.C. I adopt his opinions on all the issues for determination in this appeal as my own.

30 The main issue, which has been quite well considered in the lead judgment, is the question of identity of the appellant, as one of those who took part in the robbery. The facts of this case cast doubt as to whether the victim, P.W.1 Mr. Adebisi Olabisiye, could properly identify the appellant as one of the robbers who attacked and robbed him of his car on 7th
35 September, 1981, along Allen Avenue, Ikeja. In his evidence before the trial court P.W.1 said:-

"It was the 1st accused who had matcheted and cut me during the operation. 1st accused forced the door open and demanded my keys. The 2nd

accused was busy with the other door where the passenger was."

It should be noted that the 2nd accused is the appellant in this appeal. The first accused had died in prison after his conviction in the High Court. Since neither of the accused was arrested at the scene of the crime and, with the appellant's flat denial of having taken part in the robbery, an identification 5 parade may be useful to the prosecution. It is however not in every case that an identification parade is necessary to identify a culprit - see *Orimoloye v. The State* (1984) 10 S.C. 138; (1984) N.S.C.C. Vol. 15, 654.

Consideration of other factors touching the quality of the evidence of a witness at an identification parade is essential. In a case where the witness had a fleeting glance of the accused, during which he could not 10 even identify the dress the accused was wearing, it calls for caution before the trial court could convict. It is relevant to establish how long did the witness have the accused under observation and whether the distressed condition of the witness during the commission of the crime would be an 15 impediment to clear identification of the accused. The angle where the witness was standing during the commission of the crime, which facilitated his perception of the scene should also be considered.

It is my opinion that even if the identification parade, in this case, had been conducted properly (which is not the case here) P.W.1 could not 20 properly identify the person who attacked the passenger in his car, taking into consideration the position he was during the robbery and the fact that it took place in the night.

For the above and the fuller reasons given by my learned brother, Onu, J.S.C., in the lead judgment, I allow this appeal. The appellant is 25 discharged and acquitted. Appeal allowed. Conviction and sentence set aside.