

SUPREME COURT OF NIGERIA
1ST JULY, 1994. SC. 298/1991
CORAM: M. L. UWAI, I. L. KUTIGI, E. O. OGWUEGBU,
U. MOHAMMED, S. U. ONU, JJSC.

MICHAEL HAUSA APPELLANT
V.
THE STATE RESPONDENT

APPEALS - Findings of fact - By trial court based on credibility of witnesses - Whether appellate court will easily interfere.

CRIMINAL LAW - Murder - Allegation that the appellant shot and killed the deceased - Whether appellant was rightly convicted.

CRIMINAL PROCEDURE - Alibi - Where a witness saw appellant committing the offence charged - If the witness is believed - Whether the defence of alibi is demolished.

CRIMINAL PROCEDURE - Alibi - Appeals - Acceptance of two eye witness accounts - Whether Court of Appeal rightly upheld trial court's decision - By holding that the issue was one of credibility.

CRIMINAL PROCEDURE - Contradictions - Murder - Identification of Corpse - Where contradictions in the prosecution's case are minor - Whether trial will be vitiated.

CRIMINAL PROCEDURE - Proof beyond reasonable doubt - Murder - Whether from the totality of evidence adduced - There is any doubt as to the date of death, cause thereof and identity of the deceased.

CRIMINAL PROCEDURE - Alibi - Prosecution's failure to investigate appellant's defence of alibi - When not fatal.

EVIDENCE - Admissibility - Proper foundation - Statement to Police - Where no proper foundation was laid for its receipt as an exhibit - Whether admissible.

EVIDENCE - Dying declaration - Where the words used are not free from ambiguity - Legal implication.

EVIDENCE - *Statement to Police - Can only be used to discredit the maker - Where not so used - But merely received as identification - Whether the statement can metamorphose into an exhibit.*

FACTS

The Appellant was alleged to have murdered one Samuel Ariokoko (deceased) by shooting him with a gun. Appellant was charged with the offence of Murder before the defunct Bendel State High Court, Orerokpe. He denied the charge, raised the issue of alibi in his Statement to the Police recorded upon the Appellant's arrest, six months after the offence was committed. The Police did not investigate the issue of alibi raised. There seemed to be eye witnesses account as to Appellant's shooting of the deceased.

The trial court found the Appellant guilty as charged. His appeal to the Court of Appeal was dismissed. Appellant has further appealed to the Supreme Court to determine inter alia, whether his defence of alibi was properly investigated by the prosecution, and properly resolved by the two lower courts. Could the statement of a prosecution witness to the police tendered for identification purposes metamorphose into an exhibit?

HELD (Dismissing the appeal, Kutigi JSC dissenting)

1. Whether defence of alibi is demolished

Once the prosecution through its witnesses established that they (witnesses) saw the appellant committing the offence charged, a defence of alibi by the appellant raises the straight issue of credibility to wit; whether the evidence of the witnesses is believable and if believed, the alibi raised is logically demolished or fizzled into thin air and so doomed. (P. 175 L.7)

2. Whether issue of alibi was one of credibility

The two eye-witnesses accounts given by P. W. 2 and P. W. 3 not having been discredited but rather accepted by the trial court as wholesomely true and believable, alibi was completely ruled out. The court below was therefore on very firm ground when it affirmed the decision of the trial court by holding that the issue was one of credibility, namely, which set of witnesses on either side should the learned trial Judge believe; as ordinarily an appellate court will be slow to interfere with the findings of fact made by the trial court based on credibility of witnesses. (P. 177 L.22)

3. Statement to the Police - Use - Admissibility

Exhibit 'A' could only be used under the Evidence Act to discredit P.W. 3, its maker but since it was not so done but rather was received in evidence as Identification 'A' and later metamorphosed into Exhibit 'A' on the record, it was not properly received in evidence. Its reception and use in evidence, constitute the reception of inadmissible evidence which ought to be expunged from the records. (P. 178 L. 27)

4. Admissibility of statement - Need to lay proper foundation

In the instant case, Identification 'A' was put to P.W. 5, not as its maker who is P.W.3, and it was received in that form. No foundation was laid for its reception in evidence albeit that it found its way as Exhibit 'A' on the Record. As no effort was made to cross-examine the appellant or lay a proper foundation for its receipt as an exhibit, that document by its emergence from the blues became inadmissible and ought to have been excluded. (P. 179 L.27)

5. Minor contradictions

Heavy weather is being made by the appellant about the identification of the deceased's corpse and as to whether it was his body on which autopsy was performed on 26/1/87. Contradictions if any, are minor and have neither vitiated the trial, nor in any way occasioned a miscarriage of justice. (P. 181 L28)

6. Proof beyond reasonable doubt

From the totality of the evidence adduced before the trial court, which it accepted and which the court below affirmed, it seems clear and beyond question that the deceased died on 25/1/87 from gunshot wounds inflicted on him and that his corpse was properly identified to P.W. 4 by P.W. 1 leaving no room for doubt that the date of death, the cause thereof and the identity of the deceased were fully established at the trial. (P. 181 L.38)

7. Failure to investigate alibi - Whether fatal

In the instant case, failure on the part of the prosecution to have carried the investigation to Umoru in Ondo State, respecting alibi or to call such witnesses as German Ubogu, D.W.1 or any other named witnesses, is fatal to the prosecution's case. This is because the latter were not eye witnesses to the commission of the crime but only reacted to the alarm raised by P.W. 2. (P. 182 L.22)

8. Dying declaration

If the words used in the dying declaration are unclear, imprecise and not free from ambiguity, such a manifest contradiction would militate against its application. (P. 183 L. 19)

9. Murder - Whether conviction was proper

There are no reasons either in the oral argument canvassed or on the record to hold otherwise than that the appellant shot and killed the deceased and that he was rightly convicted as charged. (P. 183 L.35)

NOTABLE POINTS OF INTEREST

ONU JSC**1. Alibi - When there will be a duty on prosecution to investigate**

In other words, once alibi has been raised, the burden is on the prosecution to investigate and rebut such evidence in order to prove its case beyond reasonable doubt. The prosecution does not have to investigate every alibi however improbable. Albeit, where the story of the accused if believed is capable of providing a defence, there is a duty upon the prosecutor to investigate the story. Failure on the part of the prosecution to do so tantamount to an admission. (P. 175 L.28)

2. Proper use of statement to Police - Layonu's case referred to

Such a statement is not evidence of the facts contained in it and the only use to which the defence can put it is to cross-examine the witness on it and then if it is intended to impeach his credit, to put the statement in evidence for that sole purpose; Evidence Act, SS. 198 and 209. The defendant, or his counsel has no means of knowing whether the statement can be put to this use until he has seen it)" (P. 179 L. 17)

3. Prosecution not bound to call a host of witnesses

It is trite that the prosecution is not bound to call a host of witnesses in order to prove its case. (P. 182 L.5)

4. Dying declaration - When not admissible

The rule is that such a statement is not admissible in the absence of proof maker believed himself to be in danger of approaching death when he made it. (P.183L.11)

5. Inadmissible dying declaration - Existence of other evidence on which to convict

“While both the trial Court and the Court below made no definite findings as to whether the dying declaration was proved to their satisfaction, they were unequivocal that granted that the dying declaration is inadmissible (which is my conclusion in the case in hand where the actual words used are divergent and uncertain), there is a body of evidence adduced through P.W. 2 and P.W. 3 from which to come to the conclusion that the deceased was killed by the act of the appellant and lost no time in holding that he was therefore guilty of the murder of the deceased.” (P. 183 L.28)

UWAIS JSC

6. When failure to investigate alibi is not fatal

Therefore, these authorities clearly established that the failure to investigate the defence of alibi set up by the Appellant in the present case is not fatal to the case for the prosecution since the testimonies of P.W.2 and P.W. 3 who were eye-witnesses had been accepted and believed by the learned trial Judge. (P. 185 L.26)

7. Witnesses’s statement to police - Purpose of receiving it in evidence

The purpose to which statement made by witnesses, in criminal cases can be put are stated under sections 198, 209 and 210 of the Evidence Act. The statement made by a witness to the police should not and could not be received in evidence except for the purpose of contradicting the witness by way of cross-examination if the witness had said in his evidence-in-chief anything that is contrary to what was stated by him to the police. (P. 185 L.32)

8. Statement to Police - Improper use

It is significant that the record of appeal does not show that the statement made by the police was shown to P.W. 3 to identify it before he was cross-examined on it. Therefore, the statement was not and could not in the circumstance be tendered either for identification or to be in evidence since the foundation for doing so was not laid as provided by sections 198 and 208 of the Evidence Act. (P. 187 L.20)

9. Document marked for identification - Cannot be used in evidence

If a document is not admitted in evidence but marked for identification only, then, it is not part of the evidence that is properly before the trial Judge therefore

the trial Judge cannot use the document as evidence. (P. 189 L. 12)

10. Trial court not to assist any of the parties

“Finally, I need to stress that in the adversarial system of justice which we practise, as opposed to inquisitorial system, it is not the function of a trial court to assist any of the parties before it in presenting their case. To do so would be tantamount to the court jumping into the arena instead of being the umpire.” (P. 192 L.26)

KUTIGI JSC (Dissenting)

11. Tendering of statement to police - Satisfaction of the requirements

“The court of Appeal was with due respect therefore wrong to have held that counsel for the appellant never satisfied the requirements of the provision of Evidence Act for the statement (Exh. A) to be received in evidence. I think appellant’s counsel fully fulfilled the requirements of Section 210(c) (formerly section 209(c) of the Evidence Act Cap. 112 Laws of the Federation of Nigeria 1990, because having fully cross-examined P.W.3 on the former statement as shown above counsel was bound to tender the statement to impeach his (P.W.3) credit thereby”. (P. 187 L.3)

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12. Need to look at statement in the interest of justice

“I am clearly of the view that whether or not the requirements of the Evidence Act were satisfied, since the statement is before the court, we should look at and examine it. The interest of justice especially in a criminal trial should override any other consideration.” (P. 197 L. 10)

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13. Written statement of prosecution witness - Use thereof

“The principle I believe has always been that any written statement in the possession of the prosecution which was made by a witness called by the prosecution and which relates to any matter on which the witness has given evidence is not evidence of the facts contained in it and the only use to which the defence can put it is to cross-examine the witness on it and then, if it is intended to impeach his credit, to put the statement in evidence for that sole Purpose.” (P.197L.22)

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14. Need for convincing evidence of accused person’s identity

The importance of a proper and convincing evidence of identity of an accused on cannot therefore be over-emphasised. It is always important to have convincing evidence that the defendant or an accused person was the

offender because even an honest witness can still make a mistake, in addition, there are some witnesses whose evidence the court should approach with caution such as accomplices, witnesses who have some purposes of their own to serve including blood relations of a victim. (P.198 L. 10)

5 ***15. Inconsistency between a witness’s testimony in court and extra judicial statement***

It is settled law that where a witness makes a statement which is inconsistent with his testimony, such testimony is to be treated as unreliable while the statement is not regarded as evidence upon which the court can act.

10 Rather the court would be entitled to reject the inconsistent statement and the testimony. (P.198L.27)

16. Whether the case against appellant was proved

“My conclusion therefore is that the case against the appellant was not proved beyond reasonable doubt. And on the authority of Layonu & Ors v.

15 The State (supra), the appellant is entitled to an acquittal of the charge against him.” (P.199L.21)

17. Prosecution’s failure to investigate alibi- Whether fatal

“It is my view that this was one occasion on which failure to investigate or
20 check the alibi raised by the appellant cast great doubt on the reliability of the case for the prosecution. I am clearly of the view that the appellant on a preponderance of evidence discharged the evidential burden of proof of the defence of alibi raised by him and prosecution had not succeeded in demolishing that defence.” (P.202 L.9)

25 ***18. Whether court should read its own meaning into evidence***

“I say with respect that the Court was in error when it purported to read its own meaning into the evidence given by the witness. The witness was not asked to state the year that a particular visit took place as should have
30 been the case if the year was material to the prosecution’s case. It was not for the court to supply the date or year when none was suggested by the witness himself.” (P.203 L.22)

REPRESENTATION

35 Chief B.C. Akwiwu for the Appellant
S.O. Nwaka (Mrs.) D.P.P. Delta State for the Respondent

CASES REFERRED TO

The Queen v. Ayodele (1957) WRNLR 34	
The Queen v. Jonathan Ahie (1964) 1 All NLR 193	
Ntam v. The State (1967) 5 NSCC (1968) NMLR 86	
Gachi v. The State (1965) NMLR 333	
Adedeji v. The State (1971) 1 All NLR 75	5
Okonofua v. The State (1981) 6 - 7 S.C. 1 at 18	
Adaje v. The State (1979) 6 - 9 S.C 18 at 28	
Ali v. The State (1988) 1 NWLR (Part 68)	
Adio v. The State (1968) 6 S.C. 119 at 192	
Motunwase v. Sorungbe (1988) 5 NWLR (Part 92) 90	10
Adelumola v. The State (1988) 1 NWLR (Part 73) 683	
Sugh v. The State (1988) 1 NWLR (Part 77) 475	
Layonu v. The State (1967) 1 All NLR 210, (1967) NMLR 411	
Saidu v. The State (1982) 4 S.C. 41	
Agboola v. Olukade (1976) 2 SC. 183	15
Akunne v. Ekwunno (1952) 14 WACA 59	
Nalsa & Team Associate v. N.N.P.C. (1991) 11 S.C.NJ. 51	
Oke v. I.G.P. 14 WACA 645	
Oruwari v. The State (1985) 3 NWLR (Part 13) 486	
Ukwunnenyi v. The State (1987) 7 SCNJ 43	20
Okokor v. The State (1979) 5 S.C. 231	
R. v. Ogbuewu (1949) 12 WACA 483	
R. v. Weyeku (1943) W.A.C.A. 195	
Egonu v. Egonu (1978) 12 S.C. 11 at 129	
Alade v. Alemuloke (1988) 1 NWLR (Part 69) 207	25
Njovens v. The State (1973) 5 S.C. 17 (1973) N.M.L.R. 331 at p. 351	
Umani v. State (1988) 1 N.W.L.R. (Part 70) 274 at pp. 293 - 295	
Anokwu v. Commissioner of Police 1975 (1) N.M.L.R. 402	
R. v. Willis (1960) 1 W.L.R. 55	
Khan v. R (1967) 1 All E.R. 80	30
R v. Chapman (1969) 2 W.L.R. 1004	
Sanusi v. State (1984) 10 S.C. 166 at 198	
Adisa v. The State (1964) 1 All NLR 193	
Oje v. The State (1972) All NLR (Pt. 2) 385	
Eboghonome v. The State (1993) 7 NWLR (Pt. 306) 383	35
Ikono v. The State (1973) 5 SC. 231	
Obinga v. Police (1965) NMLR 172	
Yanor v. The State (1965) All NLR 19	
Eze v. The State (1976) 1 SC. 125	

STATUTES REFERRED TO

Evidence Act ss. Act ss. 198, 209, 33,199, 208

LEAD JUDGMENT BY ONU JSC

In the High Court of the defunct Bendel State sitting at Orerokpe,
 5 the appellant herein, Michael Hausa, was tried and convicted of the offence
 of murder contrary to Section 319(1) of the Criminal Code. The dismissal
 of his appeal by the Court of Appeal holden in Benin after being sentenced
 to death by trial court has led to the further appeal to this Court.

The brief facts of the case which are largely not in dispute are that
 10 on the 25th of January 1987, the appellant was alleged to have murdered
 one Samuel Ariokoko at Okpara Inland in Bendel (now Delta) State by
 shooting him with a gun. When he was arraigned before Edokpayi, J in the
 High Court holden at Orerokpe, he denied the charge and his statement to
 the police recorded some six months after the offence was committed and
 15 consequent upon his being apprehended, raised the issue of alibi. The
 learned trial Judge heard evidence from both sides and in a considered
 judgment delivered on 14th December, 1989 rejected, inter alia, the plea of
 alibi and proceed to convict and sentenced the appellant to death. Appellant
 was dissatisfied with judgment of the trial court and his appeal to the Court
 20 of Appeal sitting in Benin was dismissed on 25th of October, 1991.

Being further aggrieved by this decision, he has now appealed to this
 Court filing two grounds of appeal contained in his Notice of Appeal.

As later transpired, briefs of argument were filed and exchanged by
 the parties in accordance with the Rules of Court. The following four issues
 25 identified on behalf of the appellant for our determination:-

1. Whether the issue connected with the defence of Alibi raised by the
 Appellant both in his statement to the Police (Exhibit 'B') and in his oral
 testimony before the trial court was properly investigated by the prosecution
 and properly considered and or resolved by the trial Judge and upheld by the
 30 Court of Appeal.

2. Whether the statement of P.W. 3 dated 26/1/87 and referred to as
 "identification A" on page 15 line 4 and page 15 line 7 instead of being
 shown and treated as 'Exhibit "A" as shown on the Record of Appeal on
 pages 83 - 84 of the Record. Should the Court of Appeal not have resolved
 35 the issue in favour of the Appellant.

3. Whether there were material contradictions in the evidence of the
 prosecution witnesses.

4. Whether the Court of Appeal was right in upholding the trial court's decision that the prosecution had proved the charge against the Appellant beyond reasonable doubt.

The respondent on the other hand formulated three issues, namely-

1. Whether where the prosecution witnesses fix (sic) the Appellant with presence at the scene of crime where the Appellant raise (sic) a defence of alibi, is the issue one of credibility or must the Police all the same still go to investigate the alibi raised?

2. What is the signification of the provision of Sections 198 and 208 of the Evidence Act vis-a-vis the statement of P.W. 3 dated 26th January, 1987 referred to as Identification 'A' on page 15 lines 4 and 7?

3. Where there real material contradictions in the evidence of the prosecution witnesses?

At the hearing of the case on 7th of April, 1994, Chief Akwivu, learned Counsel for the Appellant, adopted his brief dated 30th April, 1992 and urged us to allow the appeal. Learned Director of Public Prosecutions of Delta State, Mrs. Nwaka, similarly adopted the respondent's brief and urged us to dismiss the appeal.

For the consideration of this appeal, I deem it necessary to stick to the four issues formulated at the instance of the appellant. On the first and second issues which I intend to consider together, the submission of learned Counsel is to the effect that the appellant's defence of alibi was particularly considered in the lead judgment of the court below as well as in that of Ogundare, J.C.A. (as he then was).

After recalling that the deceased's death occurred on 25th January 1987, it is deposed that appellant was arrested on 21st June, 1987. The appellant in his statement to the police (Exhibit 'B') and in his oral testimony before the trial court, had said that he was not at the scene of crime but rather at Umoru on 25/1/87 and that he was there between 20/12/86 and 1/3/87. Regarding what the prosecution did in relation to appellant's defence of alibi, what P.W.6 (Police Inspector Oghenekevbe) told the trial Court about America Ubogu was narrated in comparison with what P.W.5, Sergeant Joseph Oviahon, who investigated the alibi set up by the Appellant. Our attention was further adverted to the record, adding that the proper venue for the investigation of the alibi is Umoru village. It is also maintained that D.W. 5 was at Oko ljerhe in Okpara Inland talking to the father and mother of the appellant and went as far as to record their statements which, had they been favourable to the case of the prosecution, the two statements would have been before the court, at least to discredit

the evidence of D.W.1 and D.W.2 and to lay a foundation, at least of a feeble attempt by the prosecution to investigate the alibi. It is thus clear, it is contended, that no proper investigation of the defence of alibi was made by the prosecution. The case of OZAKI & ANOR v. THE STATE (1990) 1 SCNJ 76 was cited in support of the proposition. The failure of the Police therefore to investigate and check the reliability of alibi, it is argued, would raise a doubt in the mind of the tribunal and lead to the quashing of a conviction imposed in disregard of the requirement. All that appellant needs to do is to raise the defence and that once a person discharged the evidential burden of adducing evidence of alibi, it is the duty of the prosecution to disprove it. The duty of the trial judge, it is further maintained, is to test the evidence adduced by the prosecution and if there is doubt in his mind, for him to resolve same in favour of the appellant. The onus on the prosecution to prove the charge against the accused beyond reasonable doubt, it is further argued, never shifts and there is no onus on the accused to prove alibi beyond that of introducing the evidence of alibi. It is also further argued that the law is not that an accused person should evidence which outweighs the evidence of the prosecution on the issue of alibi; that the effect of such evidence is not dependent upon its preponderance, adding that, in the instant case, the trial Judge erred in his direction on the onus of proof and the standard of proof of alibi. The court below therefore erred, it is further argued, in affirming the conviction based on this misdirection. The cases of THE QUEEN v. AYODELE TURNER & ORS (1957) WRNLR 34; THE QUEEN v. JONATHAN AHIE (1964) NMLR.19 and ORTESE YANOR & ANOR. v. THE STATE (1965) 1 All NLR. 193, were cited in support thereof. The appellant, it is also maintained, gave enough information to the prosecution in Exhibit 'B' to enable them conduct a reasonable investigation of the alibi. We were then referred to several passages in the record and the case of PATRICK NJOVENS & 3 ORS. v. THE STATE (1973) 5 SC. 17; (1973) NNLRL 76111 93 to buttress their contention. It is further contended that the only eye witness to the shooting of the deceased, P. W.3 in Exhibit A which he made on 26/1/87 just a day after the shooting when the incident was yet fresh in his mind, did not see the Appellant but rather gave evidence of what he saw set out in the Record.

It is submitted in conclusion, that the investigation ought to have been done at Umoru in Ondo State and especially with D.W.2, America Ubogu. The cases of OZAKI & ANOR v. THE STATE (supra) UKWUNNENYI & ANOR. v. THE STATE (1987) 7 SCNJ were cited in support thereof.

There is no doubt that at the trial of the appellant, the prosecutor led evidence through P.W. 2 (Mrs. Oghomolele Ariokoko), the deceased's wife

and P.W.3 (Alfred Otomakere) i.e. the deceased's brother, that they saw the appellant in the light cast by security lights when the latter shot the deceased with a gun in the night of 25th January 1987 as he ran away with a gun in hand and a gallon banging from his shoulder. That when they heard the gunshot and P. W. 2 ran to meet the deceased from her kitchen, the deceased slumped to the ground, exclaiming, "Hausa has shot me. Hausa has shot me" with P.W. 3 sustaining injuries from the gunshot pellets. Thus, once the prosecution through its witnesses establishes that they (witnesses) saw the appellant committing the offence charged, a defence of alibi by the appellant raises the straight issue of credibility to wit: whether the evidence of the witnesses is believable and if believed, the alibi raised is logically demolished or fizzles into thin air and so doomed. See NJOVENS v. THE STATE (supra) See also HEMYO NTAM & ANOR. v. THE STATE (1967) 5 NSCCI; (1986) NMLR 86 where this court at page 88 of the later Report held -

"There are occasions on which a failure to check an alibi may cast a doubt on the reliability of the case for the prosecution. In a case however such as this where the appellants were identified by three eye-witnesses, there was a straight issue of credibility, and the Appeal Court unable to say that the Judge's findings of fact were unreasonable or cannot be supported having regard to the evidence."

Otherwise, it is the duty of the prosecution through the agency of police investigation to check on the alibi and this, after the evidential burden, that is, adducing or eliciting some evidence tending to show that he was elsewhere other than at the scene of crime (which would be a matter peculiarly within the accused's knowledge) that rests on him, would have been discharged by him. See AKILE GAVHI & ORS. v. THE STATE (1965) NMLR 333.

In other words, once alibi has been raised, the burden is on the prosecution to investigate and rebut such evidence in order to prove its case beyond reasonable doubt. See ADEDEJI v. THE STATE (1971) 1 All NLR 75. The prosecution does not have to investigate every alibi however improbable. Albeit, where the story of the accused if believed is capable of providing a defence, there is duty upon the prosecutor to investigate the story. Failure on the part of the prosecution to do so tantamounts to an admission. See YANOR v. THE STATE (supra); OZULONYE v. THE STATE (1981) 1 N.C.R. 38 and IKONO v. THE STATE (1973) 5 S.C. 231.

In the instant case, true it is that appellant on being apprehended six months after the murder complained of, raised the issue of alibi. But as again that defence was the credible evidence of P. W. 2 and P. W. 3

to the effect that they saw the appellant quite apart from the fact that the deceased had called him by name as the person who shot him, following which he collapsed and died. In that circumstance, since the trial court believed the evidence of the above two witnesses - thus fixing the appellant at the scene of crime - the failure by the prosecution to
 5 investigate the plea of alibi by going to Umoru in Ondo State is not fatal to the prosecution's case. As this court had occasion to point out in PATRICK NJOVENS & ORS v. THE STATE (supra) at page 93 of NNLR.

*"If the prosecution adduced sufficient and accepted evidence to fix the person at the scene of crime at the material time, surely his alibi
 10 is thereby logically and physically demolished."*

The credit of the two eye-witnesses to the crime, P.W.2 and P.W.3, who said they saw the appellant perpetrate the offence was never of the appellant. The situation in the instant case is not too dissimilar to what obtained in the HEMYO NTAM v. THE STATE CASE (supra) in which
 15 three eye-witnesses testified against the appellants therein and this Court, before dismissing their appeals, pertinently observed at pages 87-88 of the Report:

*"Each of the appellants made a statement under caution after his arrest, setting up an alibi. The Police officer who took the statements was
 20 asked whether he had done anything to check their truth and said that he had not and it was submitted that for this reason justice had been denied to the appellants and there should at least have been a reasonable doubt as to their guilt.. There are occasions on which a failure to check an alibi may cast doubt on the reliability of the case for the prosecution, but in such as this where the
 25 appellants were identified by three eye-witnesses there was a straight issue of credibility and we are not able to say that the Judge's findings of fact were unreasonable or cannot be supported having regard to the evidence. If the alibis had been true it would have been open to the appellants to call witnesses in support of them and neither of them did so."*

30 It may be pertinent at this juncture to stress that there is no rule of law which imposes an obligation on the prosecution to call a host of witnesses; all the prosecution need to do is to call enough material witnesses to prove its case, and in so doing it has a discretion in the matter. See E. O. OKONOFUA & ANOR v. THE STATE (1981) 6-7 S.C. 1 at
 35 18; SAMUEL ADAJE V. THE STATE (1979) 6 - 9 S.C. 18 at 28 and ALI v. THE STATE (1988) 1 NWLR (Part 68) 1.

In the instant case, beside the alibi set up by the appellant, he testified on oath and called his eldest brother (D.W.1) and his father (D.W.2), in self defence. Be it noted that the America Ubogu who the

appellant alleged in his alibi lived at Umoru in Ondo State and with whom he stayed during the period covered by the alibi, is 1st D.W. Said the witness in his testimony on 30th June, 1989:

Before Christmas four years ago the accused came to meet me at Umoru. When he came he stayed with me in my house for about three months. He was weaving baskets and farming for people while he was staying with me at Umoru. The accused has not killed anybody before. (The underlining above is mine).

If by the above piece of evidence, the appellant's aim was to establish his alibi, he failed in that attempt for the sheer reason that before Christmas four years back in time from the time he was testifying on 30th June, 1989, would fall to time before Christmas of 1985. Hence, if the offence of murder for which the appellant was being tried took place in January 1987, the evidence rendered by 1st D.W. shot far wide off the mark when he said that before Christmas four years before the appellant went to stay with him in Umoru Village in Ondo State for three months. The evidence of D.W. 2 to the effect that:

"Sometime ago I was in my house when a woman and a policeman came to ask of the accused and I told them that he was not at home and that he went to Yoruba land"

being amorphous and imprecise supported no defence of alibi liable of investigation and disproof. The two eye-witness accounts given by P.W. 2 and P. W. 3 not having been discredited but rather accepted by the trial court as wholesomely true and believable, alibi was completely ruled out. See ADIO V. THE STATE (1968) 6 S.C. 119 at 192. The court below was therefore on very firm ground when it affirmed the decision of the trial court by holding that the issue was one of credibility namely, which set of witnesses on either side should the learned trial Judge believe; as ordinarily an appellate court will be slow to interfere with the findings of fact made by the trial court based on credibility of witnesses. See MOTUNWASE v. SORUNGBE (1988) 5 NWLR (Part 92) 90; ADELUMOLA V. THE STATE (1988) 1 NWLR (Part 73) 683 and SUGH v. THE STATE (1988) 2 NWLR (Part 77) 475.

Moreover, while in effect I agree that the prosecution had not investigated the defence of alibi set up by the appellant, since it was D.W.1, D.W.2 and D.W. 3 who would in any case have been asked about his whereabouts, and these people testified but failed to establish alibi, the same was unsustainable and unestablished.

Now, the statement of P.W.3 which was recorded by P.W.5 on 26/1/87 ostensibly featuring as evidence for the defence as "*idenification*

A", curiously found its way into the Record of Appeal as "Exhibit A". There is no evidence on record that when P.W.5 testified in examination in chief, cross-examination and re-examination, that the attention of P.W.5 was drawn to it or any of its contents either pursuant to Section 5 198 of the Evidence Act which provides that –

"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined without such writing being shown to him, or being proved; but if it is intended to contradict him by 10 the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him." or impeaching the credit of P.W.5, rather than P.W.3, its maker, by applying the provisions of section 209 of the Evidence Act which stipulates-
 "The credit of a witness may be impeached in following ways by any other 15 than the party calling him or with the consent of the court by the party who calls him –
 (a) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;
 (b) by proof that the witness has been bribed, or has accepted the offer of a bribe 20 or has received -any other corrupt inducement to give his evidence;
 (c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

In the case in hand, there is no outward show or an inference drawable that the maker of Identification "A", to wit: P. W 3, either in 25 his testimony in examination in chief, cross-examination or re-examination, has his attention drawn to it before it found its way surreptitiously into the record as Exhibit 'A'? My answer must of necessity be nil in so far as it constitutes inadmissible evidence. Exhibit 'A' could only be used under the Evidence Act to discredit P.W. 3, its maker, but since it was not 30 so done but rather was received in evidence as Identification 'A' and later metamorphosed into Exhibit 'A' on the record, I must say it was not properly received in evidence. Its reception and use in evidence, in my opinion, constitute the reception of inadmissible evidence which ought to be expunged from the records.

35 In the case of SAKALAYONU & ORS v. THE STATE (1967) 1 All NLR 210; (1967) NMLR 411, a case of murder having some political undertone that whose facts are distinguished in a way from the instant case the four appellants and five others were tried together. The other five were acquitted while the four appellants were convicted of murder.

At the trial, before the case for the prosecution was opened, counsel for the accused persons applied for statements made by persons interviewed by the authorities in connection with the case. Prosecuting counsel said that he was willing to apply for statements made by witnesses called by the prosecution when the time for cross-examining them came. The learned trial Judge, however, held that he would not grant such an application unless the defence counsel established that there were some discrepancies between the statement made to the police by a prosecution witness and the evidence being given before the court by such a witness.

On appeal, counsel for the appellants submitted that the defence was improperly deprived of the opportunity of testing the story told by the two women against the statements they had previously made to the police. The appeal Court ordered the release of copies of the statements to the defence counsel for him to see whether there were sufficient discrepancies to make it unsafe to uphold the convictions of any of the appellants.

It was held, inter alia, at pages 212 and 413 of the Reports respectively that

“Such a statement is not evidence of the facts contained in it and the only use of which the defence can put it is to cross-examine the witness on it and then if it is intended to impeach his credit, to put the statement in evidence for that sole purpose; Evidence Act, SS. 198 and 209. The defendant, or his counsel has no means of knowing whether the statement can be put to this use until he has seen it.....” Prosecuting counsel, whose traditional duty is not to secure a conviction but to see that justice is done, should put no hinderance in his way and the court, which exists to do justice, should make whatever order may appear necessary to enable him to put forward any defence that may be open to him.”

In the instance case, Identification ‘A’ was put to P. W. 5. not as its maker who is P. W. 3, and for its reception in evidence albeit that it found its way as Exhibit ‘A’ on the Record. As no effort was made to cross-examine the appellant or lay a proper foundation for its receipt as an exhibit that document by its emergence from the blues became inadmissible and ought to have been excluded. It was excluded in evidence then, and as at now, albeit that it found its way on to the Record.

In the not-too-dissimilar case of *SAIDU v. THE STATE*, (1982) 4 SC, 41 where an accused’s statement not hitherto tendered and received as an exhibit was at the trial referred to as having been so received and conviction founded thereon, this Court (per Nnamani, J.S.C.) at page 73 of the Report observed:

“The Statement Exhibit “C” was never in evidence before the trial court, and in my view, both the learned trial Judge and the learned

Justices of the Federal Court of Appeal wrongly assumed that it was .”

Allowing the appeal in that case (the SAIDU CASE (supra) mainly on that ground, Obaseki J.S.C who delivered the lead judgment of the Court said:

*“Since the conviction of the appellant was founded on the evidence of 2nd
5 P. W. and the confessional statement combined, the expunction of the
confessional statement is fatal to the conviction and the appeal succeeds.”*

In the instance case, while Identification “A” was before the trial court as a more or less innocuous, harmless and inept document and was never used to effect by the invocation of sections 198 and 209 of the Evidence Act, the
10 so-called Exhibit ‘A’ like in the SAIDU CASE (supra), not having been
tendered and received in evidence, was like the document Exhibit “C” which
presence in the Record is of no avail, evidence-wise; it is, to put it point-
bank, inadmissible and ought to be discountenanced. Idibge, J.S.C. stated
the law on the point in ABOLADE AGBOOLA v. SALAWU JAGUN

15 OLUKADE (1976) 2 SC. 183 thus:

*“There is no doubt, however, that a court is expected in all
proceedings before it to admit and act only on evidence which is admis-
sible in law (i.e under the Evidence Act or any other law or e n a c t -
ment relevant in any particular case) and so if the Court should inadvert-
20 ently admit inadmissible evidence, it has a duty generally not to act upon
it. When, however, inadmissible evidence is tendered it is the duty of the
opposite (or adverse) party or his counsel to object immediately to the
admissibility of such evidence; although if the opposite party should fail to raise
objection in such circumstances the court in civil cases may (and in criminal cases
25 must) reject such evidence ex proprio motu” (Underlining is by me).*

See also CAVOLLOTIGOVIANNI v. BONASOLUIGI Suit No. SC. 402/67.
of 31110/69 (unreported) and CHUKUWURAH AKUNNE v. MATHIAS
EKWUNNO & ORS. (1952) 14 WACA 59.

The case cited to us of NALSA & TEAM ASSOCIATE v. N.N.P.C. (1991)
30 11 S.C.N.J 51 in which this Court had enjoined courts of law to do substantial
and not technical justice and further, that irregularity which derives from a
breach of the rules of practice and procedure or an order of court made
thereon ought not to render the proceedings a nullity but a mere irregularity
and which the courts can order to be regularized, is in my view, not apposite
35 in the instant case.

In the light of all I have said above, my answer to issues 1 and 2
argued together, is accordingly resolved against the Appellant.

Issue 3 and 4 are in relation to the questions as to whether there have been
material contradictions in the case of the prosecution and as to whether the

court below was right in upholding the trial court's decision to the effect that the prosecution had proved the charge against the appellant beyond reasonable doubt. On contradictions, those submitted by learned Counsel for the Appellant as being immaterial are inter alia whether the body identified by P.W.4 and for which our attention was first adverted to the testimonies of P.W.1 and P.W. 4. The defence submission in this regard is that while the post mortem examination on the body of the deceased was performed at the hospital, P.W. 4 (Peter Ebireri), the Medical Practitioner who performed the autopsy talked of performing the same at Okpara Inland. It is therefore contended that whereas P. W.1 claimed that the post mortem examination took place at the hospital and not on 25th January 1987, P. W. 4 for his part asserted that it was performed "*at Okpara Inland in the Ariokoko 's residence and on the next day after the murder, being 26/1/87.*"

Secondly, it is contended that since murder occurred, in the early hours of the morning of 25/1/87 and it is strange that decomposition of the deceased's corpse should have already set in so short a period, both P. W.1 and P.W.4 must not have been talking of the same corpse.

Thirdly, that in relation to the dying declaration of the deceased, it was wrongly admitted against the interest of the appellant.

Fourthly, that with regard to whether the prosecution had proved the charge against the appellant beyond reasonable doubt, there are issues in the prosecution's case begging for reconciliation. For instance, he submitted, the plea of alibi by the appellant was not satisfactorily investigated; that the non-consideration of Exhibit 'A' by the learned trial Judge ought to be resolved in favour of the appellant; and finally, that the court below in its lead judgment abandoned its view of direct evidence in the identification of the appellant and coming down firmly on the side of circumstantial evidence.

I am of the view that heavy weather is being made by the appellant about the identification of the deceased' corpse and as to whether it was his body on which autopsy was performed on 26/1/87. I fully share the learned Director of Public Prosecution's view that contradictions if any, are minor and have neither vitiated the trial, nor in any way occasioned a miscarriage of justice. See OKE. v. I.G.P. 14 WACA 645 and PAKAPAKAYEORUWARI v. THE STATE (1985) 3 NWLR (Part 13) 486. The question one should ask and to which an answer is imperative, is whether in fact the deceased died as alleged by the prosecution when he died, and whether his corpse was actually identified by P.W.1 to P.W.4 the latter who carried out the post mortem examination? From the totality of the evidence adduced before the trial court, which it accepted and which the court below affirmed, it

seems to me clear and beyond question, that the deceased died on 25/1/87 from gunshot wounds inflicted on him and that his corpse was properly identified to P.W.1 leaving no room for doubt that the date of death, the cause thereof and the identity of the deceased were fully
 5 established at the trial. See IKEMSON & OTHERS v. THE STATE (1989) 3 NWLR (Part 110) 455. It is trite that the prosecution is not bound to call a host of witnesses in order to prove its case. The evidence of one credible witness if believed is enough. See ALI v. THE STATE (1988) 1 NWLR (Part 68) 1. All the prosecution needs to call is enough material
 10 witnesses to prove its case, and in so doing it has a discretion in the matter. See E.O. OKONFUA & ANOR. v. THE STATE (supra) at page 28. I think the learned trial Judge said it all, and his findings were rightly confirmed by the court below when he held-

*"I believe that Samuel Ariokoko did not die a natural death and that he was
 15 violently killed: I believe the 4th prosecution witness when he testified that the deceased died on 25/1/87 and that he (4th prosecution witness) performed the post mortem examination of the corpse of the deceased in the residence of the deceased on 26/1/87, and I believe 1st and 4th prosecution witnesses when they testified that the corpse of Samuel Ariokoko was identified to
 20 the 4th prosecution witness by the 1st prosecution witness before the 4th prosecution witness examined the corpse".*

Hence, in the instant case, failure on the part of the prosecution to have carried the investigation to Umuoru in Ondo State, respecting alibi or to call such witnesses as German Ubogu, D.W. 1, or any other named
 25 witnesses, is not (in my view) fatal to the prosecution's case. This is because the latter were not eye-witnesses to the commission of the crime but only re-acted to alarm raised by P.W.2. See DANLAMI OZAKI v. THE STATE (supra); UKWUNNENYI & ANOR. v. THE STATE (1987) 7 SCNJ 34. In addition, there is no law which prohibits blood relations from
 30 testifying for the prosecution where such a relation is the victim of the crime committed. See ADELUMOLA v. THE STATE (supra). The trial court had considered the totality of the evidence P. W.1, P. W.2 and P. W. 4 adduced before it to arrive at the conclusion it did and which the court below, rightly in my view, Confirmed. With regard to the dying declaration, it is common ground that the
 35 words used by the deceased on being shot as related by P.W.2 were, "*Hausa has shot me; Hausa has shot;*" In the words P. W. 3, they were, "*Hausa you have to shot me; Hausa you have shot me.*"

Now, the rule regarding dying declarations is contained in Section 33 of the Evidence Act which stipulates inter alia that-

“33. Statement, written or verbal, of relevant facts made by a person who is dead are themselves relevant in the following cases-

(a) When the statement if made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in crises in which the cause of that person's death comes into question; such statements are relevant only in trials for murder or manslaughter or culpable homicide of the deceased person and only when such person at the time of making such declaration believed himself to be in danger of approaching death although he may have entertained at the time of making it hopes of recovery.”

The rule is that such a statement is not admissible in the absence of proof but the maker believed himself to be in danger of approaching death when the made it. see ORAKPOR OKOKOR v. THE STATE (1967) NMLR 189; see also AKPANIKONO v. THE STATE (1979) 5 S.C. 231, where it was also held that where the court must rely on the account given by an eyewitness who heard a dying declaration made by the deceased, strict proof is required of the dying declaration in the exact words used by the deceased. See the cases of R. v. OGBUEWU (1949) 12 WACA 483 and R. v. WEYEKU (1943) 9 W.A.C.A. 195. Thus, if the words used in the dying declaration are unclear, imprecise and not free from ambiguity, such a manifest contradiction would militate against its application. In the instant case, P.W.2 testified that:-

“..... My husband shouted. “Hausa has shot me; Hausa has shot me.”

P.W.3 on the other hand testified as follows:-

“Hausa it is you that shoot me..... Hausa you killed me; Hausa you killed me”

“While both the trial Court below made no definite finding as to whether the dying declaration was proved to their satisfaction, they were unequivocal that granted that the dying declaration is inadmissible (which is my conclusion in the case in hand where the actual words used are divergent and uncertain), there is a body of evidence adduced through P.W.2 and P.W.3 from which to come to the conclusion that the deceased was killed by the act of the appellant and lost no time in holding that he was therefore guilty of the murder of the deceased”. See R. v. OGBUEWU (supra). In this wise, I will decline to interfere with the concurrent findings of the two lower courts. See EGONU v. EGONU (1978) 12 S.C. 111 at 129; ALADE v. ALEMULOKE (1988) NWLR (Part 69) 207.

The result of all I have been saying is that this appeal lacks merit, I accordingly dismiss it. I affirm the decision of the court below.

UWAIS JSC

5 I have had the opportunity of reading in draft the judgment read by learned brother Onu, J.S.C. I entirely agree with the judgment.

 It is the sole responsibility of a trial Court to make finding of fact because the court has the advantage of listening and watching the demeanour of witnesses as they testify. An appeal court lacks that
 10 advantage and therefore, has no business to re-evaluate the evidence adduced before the trial Court unless there is a complaint before it that the findings made by the trial court are erroneous or perverse.

 In this case the complaint being made by the Appellant are stated to relate to 4 issues, namely-

15 1. Whether the defence of alibi set up by the Appellant in his statement to the police was properly investigated by the police and properly considered by the trial court.

 2. Whether the statement made to police by P. W. 3 which was admitted for identification should have been admitted in evidence as an exhibit and
 20 the Court of Appeal should have held so.

 3. Whether there were material contradictions in the evidence adduced by the prosecution.

 4. Whether the Court of Appeal was right in holding that the case against the Appellant was proved beyond reasonable doubt.

25 It appears to me that none of these issues called for wholesome re-evaluation of the evidence adduced at the trial of the Appellant. Although the defence of alibi was not investigated by the police it is clear from the testimonies of P.W. 2 and P.W 3 that the Appellant was seen and identified as the assailant of the deceased. The evidence of P.W.3
 30 that he saw the Appellant shoot the deceased was corroborated by the evidence of P.W.2 who soon thereafter saw the Appellant running away from the scene of the crime holding a gun Clearly, these pieces of evidence established the presence of the Appellant at the time material to the commission of the offence with which he was charged. As both P, W. 2
 35 and P.W.3 were believed by the learned trial Judge, the defence of alibi set up by the Appellant becomes untenable, even though the police failed to investigate it. The absence of the investigation is not in the circum-

stances of this case fatal to the case of the prosecution – See Njovens & Ors. v. The State, (1973) 5 S.C. 17; (1973) N.M.L.R. 331 at p. 351 Hemyo Atam v. The State, (1967) 5 N.S.C.C. and Umani v. State, (1973) I.N.W.L.R. (Part 70) 274 at pp.293 - 295, In the case of Ntam v. The State, 1968 N.M.L.R. 86, which is similar to the present case, Brett, J.S.C. stated as follows:

“There are occasions on which a failure to check an alibi may cause doubt on the reliability of the case for the prosecution, but in a case such as this where the appellants were identified by three eye-witnesses, there was a straight issue of credibility and we are not able to say that the Judge’s findings of fact were unreasonable and cannot be supported having regard to the evidence.” (Underlining mine).

Moreover, in Njovens & Ors. v. The State, (1973) 5 S.C. 17, Coker J.S.C. made the following observation at p.65 thereof:

“There is nothing extraordinary or esoteric in a plea of alibi. Such a plea postulates that the accused person could have been at a scene of the crime and only inferentially that he was not there. Even if it is the duty of the prosecution to check on a statement of alibi by an accused person and to disprove the alibi or attempt to do so, there is no inflexible and/or invariable way of doing this. If the prosecution adduced sufficient and accepted evidence to fix the person at the scene of the crime at the material time. Surely, his alibi is thereby logically and physically demolished.” (emphasis mine).

Therefore, these authorities clearly established that the failure to investigate the defence of alibi set up by the Appellant in the present case is not fatal to the case for the prosecution since the testimonies of P.W 2 and P.W.3 who were eye-witnesses had been accepted and believed by the learned trial judge.

With regard to the statement of P. W. 3 which was admitted for identification only, it could certainly not be relied upon because its content were not in evidence. The purpose to which statements made by witnesses in criminal cases can be put are stated under section 198, 209 and 210 of the Evidence Act. The statement made by a witness to the police should not and could not be received in evidence except for the purpose of contradicting the witness by way of cross-examination if the witness had said in his evidence-in-chief anything that is contrary to what was stated by him to the police.

In Qjo v. The Queen, F.S.C. 93/1960 (unreported) Judgment delivered on 12th May, 1960, Hubbard, Ag. F.J. made the following remarks:

“There is one further matter to which reference must be made. In the record of the trial there appears, during the cross-examination of the

prosecution witness the following remark: 'Obisesan calls for the statement made to the Police by witness. Statement produced by Crown Counsel and handed to Obisesan who tenders it in evidence - not objected to and marked "A ". This document should never have been tendered in evidence. The only proper use to which it could have been put was the cross-examination on it of the witness. if he had said anything in his evidence which was contrary to what he said to the Police. There was no suggestion that he had done so, nor was he in fact cross-examined on it at all. The statement, even if it had contradicted the witness' evidence at the trial, could only have had the effect of discrediting that evidence it would not have been any evidence of its own truth (Phipson, 9th ed. 503). The learned Judge, however, referred to the statement and apparently treated it as corroborating the witness. This with respect, was an improper use to make of it."

(underlining mine).

Recently, in Musa Umaru Kasav. The State, SC. 212/1993, (unreported) judgment delivered on 3rd June. 1994. I stated the principles which apply to the admission of a statement in general to be thus:

"At common law, it is fundamental rule of evidence that hearsay evidence is inadmissible. (See also section 77 of the Evidence Act. Cap. 112) Former Statement of any person whether or not lie is a witness in the proceedings, may not be given in evidence if the purpose is to tender the statement as evidence of the truth of the matters asserted in them - see Privy Council decision in Subramaniam v. Public Prosecutor, (1956) 1 W.R. 965 at p.969 and R. v. Mclean, (1968) 2 Cr. App. R.80."

Now, in the light of the aforementioned, let me examine what happened in the trial court vis-a-vis the Appellant's complaint that "identification A". which was the statement made by P.W. 3 to the Police, should have been treated by the learned trial judge and the Court of Appeal, as an exhibit (i.e. Exhibit A) in the case. In his evidence-in-chief. P.W. 3 stated as follows:

"...At about 1a.m. on 25/1/87, I was sleeping in the house with my late brother together with his wife (P.W. 2) and children when my brother came to wake me up telling me that someone poured petrol into our house. We shouted and people came. We came out and we looked around the premises and nobody was seen. The 2nd P. W. then said that she could not sleep in the room in the house that night. She then took her children and went into the kitchen to sleep there with them. My brother and myself used cloth to dry up the petrol on the floor in the house and my brother told me that we should leave the house. We then opened the back door

to go out and as this was done accused called Hausa, came out from a nearby bush and fired gun at my brother and the pellets that went through my brother wounded me on the chest, belly and thigh. I saw the accused clearly that night. After the accused had shot at my brother, my brother tried to pursue the accused called Hausa before my brother fell down rolling in pains while I saw the accused person came to run pass. I later fell down and did not know what was happening around me or about me or with me again. Immediately the accused fired at my brother, my brother was shouting "Hausa you have shot me! Hausa you have shot me!!" I saw the accused person running away that night with the two electric globes of security lights outside our house and which lights were on that night.

In his cross-examination. P.W. 3 stated thus:-

"I made a statement to the police in this case. In my statement to the police I did not say that my brother told me to let us go into the bush and sleep. I did not tell the police that as we were going to the bush we saw some people coming and that my brother then advised that we sit down in the bush by the bush path. I was shot only one time that night and not twice..."

It is significant that the accord of appeal does not show that the statement made by the police was shown to P. W. 3 to identify if before he was cross-examined on it. Therefore, the statement was not and could not in the circumstance be tendered either for identification or to be in evidence since the foundation for doing so was not laid as provided by sections 198 and 208 of the Evidence Act (now ss. 199 and 209 of Cap. 112 of the Laws of the Federation of Nigeria. 1990) which state-

"198. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined without such writing being shown to him or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

"208. A witness may be cross-examined as to previous statements made by him in writing relative to the subject matter of the trial without such writing being shown to him, but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to these parts of the writing which are to be used for the purpose of so contradicting him:

Provided always that it shall be competent for the court at any time during the trial, to require the production of the writing for its inspection,

and the court may there-upon make use of it for the purposes of the trial as it shall think fit."

Be that as it may, when the police officer who took down the statement of P.W. 3 testified, he said under cross-examination-

5 *"I recorded a statement from 3rd P. W. This is the thumb impressed statement"*

and the following minutes followed immediately in the record of appeal:-

"Court: Mr. Eshalomi (counsel for the accused) seeks to tender the statement as an identification, and Mr. Akhiliero (for the prosecution) says that he has
 10 *no objection. The statement of the 3rd P. W. dated 26/1/87 is marked as identification "A". The 5th P. W. continues his answers to cross-examination and states as follows: I did not take any other statement from any other witness on 26/1/87 apart from identification "A"*
 (parenthesis mine)

15 Nothing more was heard or said about "identification 'A' until counsel for the accused came to address the trial court when-he wrongly ascribed statement to P. W. 2 instead of P. W. 3. This is what counsel said-

"That 3rd P. W. said that he was the only person at the scene when the deceased was shot and that confirms that the 2nd P. W. never came out
 20 *when she heard the gun shot that night. That when the 2nd P. W. made her statement to the police she never mentioned the name of the accused to the police. That all the 2nd P. W. told the police in her statement to the police was what she heard the deceased saying when he was shot. That failing to mention the name of the accused to the police at the earliest opportunity anti*
 25 *coming to mention the name of the accused in the court is an afterthought."*

This is curious, because when P. W. 2 testified and she was cross-examined nothing whatsoever was said by her about making a statement to the police or less still the contents of such statement. There was also no statement by P. W. 2 put in evidence or tendered for identification. This has further revealed the
 30 incompetence of the counsel for the accused with regard to how he was to deal with the statement - identification "A". The counsel said nothing in his address about the statement made by P. W. 3 (identification "A") on which the witness was asked some questions in cross-examination. It is, therefore, not clear as to the purpose for which the statement was tendered for identification.

35 In his judgment, the learned trial Judge (Edokpayi J.), adverted to the statement, as follows:-

"The learned counsel for the defence dealt at length on the contradictions he said existed between the statement of the 2nd prosecution witness (sic) to the police and her evidence on oath. It is sufficient for me to say here that

the statement which the 2nd prosecution witness made to the police was only identification in this case and was not made part of the evidence which I can look into in consideration of the issues for determination in this case, because that statement was never an exhibit before this Court .”

When learned trial Judge was right that identification “A” was not part of the evidence in the case which he could rely upon, he got muddled up and thereby misdirected himself, undoubtedly having been misled by the address of counsel for the accused, in considering the statement to have been made by P.W.2 instead of P.W. 3.

If a document is not admitted in evidence but marked for identification only, then, it is not part of the evidence that is properly before the trial Judge and therefore, the trial Judge cannot use the document as evidence, In *Anokwuv. Commissioner of Police*, 1975 (1) N.M.L.R. 401., Jones, S.P.J. (as he then was) observed on p.403 thereof –

“The record contains phrases such as “admitted for identification” and “identified” but we are not told what was so admitted or so identified. Since this is a practice not confined to the Chief Magistrate. Sokoto, we think we should comment on it/or general information. The phrase “admitted for identification” is wrong. A document is marked for identification. It is so marked when it cannot be admitted on the evidence so far. It is marked (usually with a letter or letters so that if it is later admitted in evidence as an exhibit then the record will show that it was to this document or object which has now been admitted as an exhibit that the witness was then referring. It will be seen from this that the marking which we sometimes see “Exhibit A for identification” is completely wrong. If it is an exhibit it can only be because it has been identified and its relevance shown in evidence. If that has not been done, then it has no business to be admitted as an exhibit of any sort. Perhaps the mistake arises from a misunderstanding of the term “for identification”. Its sense is not future as in, say, “for collection’ or “for every”. Its sense is present. The article is not admitted as an exhibit because its relevance has not been shown or for some other reason, but it is now being noted and marked so that its identity will be known when (if) later admitted. It is marked so as to identify it as the article to which the witness has referred”.

(underlining mine)

The proceedings, when identification “A” was so marked, (quoted above) do not show whether it was counsel for the accused or the court that asked or decided that statement of P.W.3, should be marked for identification instead of being admitted in evidence.

It appears from the testimony of P.W.5 under cross-examination, that the statement could have properly been admitted in evidence as P.W. 5 was the maker of the document, since it was him that took down the statement in writing. It is, therefore, a matter of conjecture if it was the trial judge, who by mistake, marked the statement, on his own, for identification instead of admitting it in evidence. If it was counsel for the accused that tendered it for identification, then, the mistake was his and cannot be corrected on appeal. In any event, the document could not have been used even if it had been admitted in evidence as an exhibit and not marked for identification, because the provisions of section 198 and 208 of the Evidence Act had not been satisfied. Had the statement been admitted as an exhibit, it could only be considered at best, as something that the investigating police officer obtained during his investigation and no more. So that it would have only been a proof of the fact that the statement had been made by the witness to the police and not a proof of the truth of its contents nor could it have been used to contradict or impeach the veracity or credit of P.W.3. See Subramaniam's case (supra); Musa Umaru Kasa's case (supra); R.v. Willis, (1960) 1 W.L.R. 55; Mawaz Khan & Anor. v. R. (1967) 1 All E.R. 80; R.v. Chapman, (1969) 2 W.L.R. 1004 and Sanusi v. State, (1984) 10 S.C. 166 at p.198.

In considering the complaint of the accused the Court of Appeal (Ogundare J.C.A., as he then was, Kolawole, J.C.A. and Adio, J.C.A. as he then was) held as follows per Adio, J.C.A.- *"The argument in the appellant's brief was that the learned trial judge in referring to the statement as identification "A" and in failing to observe that there was contradiction between the oral evidence of the 3rd P.W. and the said written statement. The argument in the respondent's brief was that the statement was not tendered as an Exhibit nor was it used to confront, contradict or to impeach the credit of the 3rd P. W. at any time. I think there is substance in the submission in the respondent's brief. The record showed that the aforesaid statement was tendered by the learned counsel for the appellant through one of the police officers who investigated the case and that it was after the 3rd P. W. had given his evidence, been cross examined and had left the witness box after concluding his evidence that it was tendered. The statement or any portion of it was not used by the learned counsel for the appellant to confront the 3rd P. W when he was giving evidence so as to enable him, if he could, to explain the inconsistency, if any, between his oral evidence and the statement. If what the appellant counsel intended to show or demonstrate was that there was inconsistency between the evidence of the 3rd P. W. and the statement and that for that reason, his oral evidence was unreliable, then the appellant's counsel had not followed the proper or appropriate procedure*

and had not complied with the relevant sections of the Evidence Act, on the point. In order to enable a court to hold that the oral evidence of a witness in court is unreliable as a result of inconsistency between it and a previous statement of a witness, the provisions of sections 198 and 208 of the Evidence Act must be complied with by calling his attention to those parts of the previous statement which are to be used for the purpose of 5 contradicting him. In short, the witness must be confronted in the witness box, while being cross-examined by the learned counsel, with the statement or those parts of the previous statement and it is when he is unable to give an acceptable explanation on the inconsistency that a court may hold that his oral evidence is unreliable... The procedural defect in the case was even 10 worse than that in Onafowokan's case (1986) 2 N. W.L.R. (Part 23) 496 at P.503)"

In my opinion, the Court of Appeal was right in so holding. I need to add that by section 209 of the Evidence act (now section 210 of Cap. 112 15 of the Laws of the Federation of Nigeria 1990) the credit of a witness may be impeached by *inter alia* putting in evidence a former statement made by the witness. The section provides –

"209. The credit of a witness may be impeached in the following ways by any party other than the party calling him or, with the consent of 20 the court, by party who calls him-

(a) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his 25 evidence;

(c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

Clearly, in this case, we are only concerned with the provisions of section 209(c). The question that arises is: how can the former statement of the 30 witness be proved? Happily, the answer has been provided in the case of Layonu & Ors. v. The State (1967) All N.L.R. 210 (Reprint) at pp.213 - 214 where Brett, J.S.C. stated thus:-

"... but in our experience the principle has always applied, as it was in R.v. Adebajo (1935) 2 W.A.C.A. 315, to any written statement in the 35 possession of the prosecution which was made by a witness called by the prosecution and relates to any matter on which the witness has given evidence. Such a statement is not evidence of the facts contained in it and the only use to which the defence can put it is to cross-examine the witness

on it and then, if it is intended to impeach his credit, to put the statement in evidence for that sole purpose.’ Evidence Act, ss. 198 and 209.”
(emphasis mine)

As already seen in the present case, P.W. 3 was cross-examined on the statement he made to the police (identification” A”). If the purpose of cross-examination was to discredit P. W. 3 or impeach his credit, the statement was not put in evidence through him (P.W. 3) nor through P.W.5, but was tendered for identification only. It is not the duty of the learned trial Judge to admit the statement in evidence if counsel for the defence tendered it for identification only. And if the statement was for identification only, it was not evidence that the trial judge could act upon – see *Anokwu v. Commissioner of Police*, (supra) and *Layonu & Ors. v. The State* (supra). The defence did not indicate, in its address to the trial court, for what purpose P.W. 3 was cross-examined on the statement. Therefore, the requirement of section 209 (c) of the Evidence Act has not been satisfied and for that reason this Court cannot examine the contents of identification “A” and, then hold that the testimony of P.W. 3 had been contradicted by his statement to the police, identification” A”. To do so will infringe the law of evidence. The facts in the cases of *Adebanjo* (supra) at p.327 and *Layonu & Ors.*(supra) are distinguishable from those of the instant case. While in those cases the statement of the accused or witness was not made available to the defence when requested, in the present case no such request was made and the prosecution made the statement available, when P.W. 5 was being cross-examined, and that was why it was possible to tender it for identification. “Finally, I need to stress that in the adversarial system of justice which we practice, as opposed to inquisitorial system, it is not the function of a trial court to assist any of the parties before it in presenting their case. To do so would be tantamount to the court jumping into the arena instead of being the umpire.” The accused was represented by counsel who was supposed and indeed assumed, to know the law and the procedure. Therefore, when the statement of P.W. 3 was tendered for identification only, the trial court had no business to say that it was admitting the statement in evidence as an exhibit instead of marking it for identification as intended by the defence.

It is for these and the reasons contained in the judgment of my learned brother Onu, J,S,C, that I too will dismiss this appeal and confirm the decision of the Court of Appeal, which in turn affirmed that of the trial court. The appeal is hereby dismissed.

KUTIGI JSC

In the High Court of former Bendel State holden at Omerolipe the appellant pleaded not guilty to the following charge-

STATEMENT OF OFFENCE

MURDER, contrary to section 319(1) of the Criminal Code Cap. 48 Vol. 11, Laws of Bendel State of Nigeria, 1976. 5

PARTICULARS OF OFFENCE

MICHAEL HAUSA (Male) on the 25th day of January 1987 at Okpara Inland in the Orerokpe Judicial Division murdered one SAMUEL ARIEKOKO.

The prosecution called a total of six witnesses to prove the charge against the appellant. For the defence, the appellant testified for himself and two other witnesses testified on his behalf. In a reserved judgment the learned trial Judge after due consideration of the evidence led before him found the appellant guilty as charged and sentenced him to death. He rejected the evidence of the appellant and his witnesses thereby rejecting appellant's defence. 15

Dissatisfied with the judgment of the learned trial Judge, the appellant appealed to the Court of Appeal, Benin City. Only two main issues were formulated for determination in that court. They read –

“(1) Were the issues connected with the defence of alibi raised by the appellant in his statement (Exhibit ‘B’) and in his oral evidence duly considered and properly and or correctly resolved by the learned trial Judge?”

“(2) Was the learned trial judge right in holding that the prosecution had proved the charge against the appellant beyond reasonable doubt?”

The Court of Appeal resolved the issues against the appellant and dismissed the appeal. The appellant has now further appealed to this Court against the judgment. 25

Briefs of argument were filed and exchanged by the parties. At the hearing these briefs were adopted and relied upon. Chief Akwiwu learned counsel for the appellant has submitted four issues for consideration in his briefs. These can conveniently be reduced to two as follows – 30

“(1) Whether there were material contradictions in the evidence of the prosecution witnesses and ‘whether the Court of Appeal was right in upholding the trial court’s decision that the prosecution had proved the charge against the appellant beyond reasonable doubt.’ 35

(2) *Whether the issue connected with the defence of alibi raised by the appellant both in his statement to Police (Exhibit "B") and in his oral testimony before the trial court was properly investigated by the prosecution and properly considered and or resolved by the trial Judge and upheld by the Court of Appeal.*

5 But before I delve into the above issue, I would like to state the facts of the case. They are to be found in the evidence of the single eye witness WILFRED OTOMAKERE who testified as P.W. 3. His evidence can be found on pages 10 - 12 of the record. Testifying on page 10 he said-

10 *"I am Wilfred Otomakere. I was living in Okpara Inland with my late brother. I was then a student. I know the accused person. I know the deceased. He was my brother called Samuel Aridioko. I know the 1st and 2nd P.W.s. The 1st P.W. is my brother and the 2nd P.W. was my late brother's wife. About 1 a.m. on 25/1/87 I was sleeping in the house with my late brother together with his wife and children when my brother came to*
 15 *woke up telling me that someone poured petrol into our house. We shouted and people came. We came out and we look around the premises and nobody was seen. The 2nd P.W. then said that she could not sleep in the room in the house that night. She then took her children and went into the kitchen to sleep there with them. My brother and myself used cloth to dry up*
 20 *the petrol in the floor in the house and my brother told me that we should leave the house. We then open the back door to go out and as this was done, the accused called Hausa, came out from a nearby bush and fired a gun shot at my brother and the bullet that went through my brother wounded me on the chest, belly and thigh. I saw the accused clearly that night. After the*
 25 *accused had shot at my brother, my brother tried to pursue the accused called Hausa before my brother fell down and did not know that was happening around me or about me or with me again. Immediately, the accused fired at my brother, my brother was shouting "Hausa you have shot me! Hausa you have shot me!" I saw the accused person running away that*
 30 *night with the two electric globes of security lights outside our house and which lights were on that night."*

The only other material witness was one Oghomelele Ariekoko, the widow of the deceased. She testified as P.W. 2. She did not witness the
 35 shooting. But when she heard the sound of a gun, she said she saw the appellant "running past her kitchen with a gun in his hand and a gallon hanging from his shoulder." She said when she got to her husband, he was lying on the ground shouting "Hausa has shot me! Hausa has shot me! She said her husband and his brother were both wounded. She said she was able

to see Appellant on the night in question with the aid of electric light outside their house.

Dr. Peter Ebineri conducted post mortem examination on the dead body. He discovered "pellet holes from the right shoulder to the thigh. The pellet holes were over 24 in number." The pellets were not seen by him as "the tissues were already decomposed." In his opinion the deceased died of gunshot wounds. The evidence of other witnesses was simply to the effect that the deceased died on the spot after the gun shot. Medical evidence was therefore not necessary as in such situation the court was in a position to infer the cause of death (see KUMO v. THE STATE (1968) NMLR 227, LORI v. THE STATE (1980) 8-11 S.C. 81, KATODANADAMU v. POLICE (1956) 1 FSC 25).

The appellant on the other hand contended both in his evidence before the court and his extra-judicial statement to the Police (EXHIBIT "B"), that between 20/12/86 and 1/3/87 he was with his senior brother, America Ubogu, at Umoru village in Ondo State. He denied killing the deceased. His brother and father who testified as D.Ws 1 & 2 respectively confirmed that the appellant stayed with D.W. 1 for three months during Christmas. I shall now return to the two issues above.

Issue 1- Contradictions in the Evidence of Prosecution Witnesses

As already demonstrated above the material prosecution witnesses in the case are P.Ws 2 & 3, the widow and brother of the deceased respectively. It was only P.W. 3 who said he witnessed the shooting, while P.W. 2 said it was from her kitchen that she saw the appellant running away with a gun in his hand. So we are really concerned with the evidence of P.W.3 here.

P.W.3 in his evidence had stated thus-

"We then opened the back door to go out and as this was done the accused called Hausa come out from a nearby bush and fired a gun shot at my brother....."

Under cross-examination he said -

"I made a statement to the police in this case. In my statement to the police I did not say that my brother told me to let us go into the bush and sleep. I did not tell the police that as we were going to the bush we saw some people coming and that my brother then advised that we sit down in the bush by the bush path..... before I was shot that night I did not see people coming out from the bush. I told the police in the statement I made to the police that I saw the accused on the day of the incident....."

When Police Sergeant No. 668874 Joseph Oviahon gave evidence as P.W.5 he testified to the effect that during his investigation he recorded a statement from P.W. 3 on 26/1/87. He recognised the statement. Appellant's counsel then sought to tender the statement as "*an identification*". The State Counsel raised no objection. The Court there and then admitted the statement and ordered it to be marked as "*identification A*". I think this is wrong. The mistake was clearly that of appellant's counsel who applied to tender it as "an identification" instead of "an exhibit". For all its purposes, the statement should have been marked as "Exhibit A", the 3rd P.W. himself having admitted making the statement to police earlier on. It is therefore an error to have marked the statement as "identification A" proper marking should have been "Exhibit A", the purpose being to discredit the witness (P.W.3) and it will be so marked.

Appellant's complaint here now is that the lower court failed to evaluate the contents of Exhibit A vis-a-vis the oral testimony of P.W.3, the only eye witness in the case. That there are material and sufficient discrepancies in statement (Exh. A) and the evidence of P.W. 3 to have rendered the evidence unsafe to uphold the conviction of the appellant.

In his statement to the Police which he made at the earliest opportunity when everything was fresh in his memory on 26/1/87 the day of the incident, P.W. 3 stated amongst others in EXHIBIT A as follows-

"From there my brother said we should go and sleep in one small bush near our house. As we come out of the house, I saw some people coming, then my brother told us to sit in that small bush, before my brother finish saying this, the people fired at us."

It will be observed that P. W.3 had virtually denied everything in the quoted passage above under cross-examination. There was therefore every necessity to impeach his character by seeking to tender the previous statement made by the witness in "Exhibit A" careful comparison of his testimony with Exh. A would in my humble view have raised a reasonable doubt in the mind of the court regarding particularly the identification of the appellant who was never mentioned in Exhibit A. In fact nobody was named in Exh. A.

It was clear that it was "*people*" who fired at them and *not* the appellant. This might have explained the discovery of over 24 bullet holes in the body of the deceased as revealed by P. W.4's evidence. It could also have explained the injuries sustained by P. W. 3 himself on his chest, belly and thigh if it is remembered that both P.W. 2 & 3 said that only *one shot* was fired on the day. The gun allegedly used was never tendered nor described in evidence. The court was therefore never in a position to say whether or not the single shot from the gun could have caused the multiple

injuries described by P. W. 4 Enough of that.

“The Court of Appeal was with due respect therefore wrong to have held that counsel for the appellant never satisfied the requirements of the provisions of Evidence. I think appellant’s counsel fully fulfilled the requirements of section 210(c) (formerly section 209(c) of the Evidence Act cap. 112 Laws of the Federation of Nigeria 1990, because having fully cross-examined P.W.3 on the former statement as shown above counsel was bound to tender the statement to impeach his (P. W3) credit thereby” (See ADISA v. THE STATE (1964) 1 All NLR 193). Be that as it may, I am clearly of the view that whether or not the requirements of the Evidence Act were satisfied, since the statement is before the court, we should look at and examine it. The interest of justice especially in a criminal trial should override any other consideration”. In LAYONU & ORS v. THE STATE (1967)

All NLR 210 the statement was not received in evidence and the Supreme Court ordered its production and examined it itself. Now Section 210(c) reads-

“The credit of a witness may be impeached in the following ways by any party other than the party calling him or with the consent of the court by the party who calls him

– (c) by proof of former statements inconsistent with any part of his evidence which is liable to be, contradicted.

“The principle I believe has always been that any written statement in the possession of the prosecution which was made by a witness called by the prosecution and which relate to any matter to which the witness has given evidence is not evidence of the facts contained in it and the only use to which the defence can put it is to cross-examine the witness on it and then, if it is intended to impeach his credit, to put the statement in evidence for that sole purpose” (See for example R.v. ADEBANJO 2 WACA 315 ADISA v. THE STATE (supra) LAYONU & ORS v. THE STATE (1967) All NLR 210 ONUBOGU & ORS. v. THE STATE (1974) 1 All NLR (PT. 2) 5 BOY MUKA v. THE STATE (1976) 9 & 10 SC, 305

In LAYONU & ORS (supra) the Supreme Court ordered the production of copies of the statements before it and on comparison discovered discrepancies between the statements and the evidence of the material witness which eventually led to the acquittal of two out of four appellants - the two acquitted appellants were not named by the witness in the earlier statement made to police.

In OKOLO & ORS v. THE STATE (174) 1 All NLR 466 defence counsel used with success the complainants’ statement to police in addition to her deposition to show that her evidence on the identity of those who

robbed her and also on the plate number of the motor vehicle they alighted from was unreliable. Her explanation of the discrepancy between her statement and her evidence was worthless.

Also in OJE v. THE STATE (1972) ALLNLR (PT. 2) 385 the principal witness
 5 said in his deposition that with his torch light he saw the deceased carried on the shoulder and that the body of the deceased covered the face of whoever was carrying her. At the trial he testified that the defendant's face was not covered by the body. The Supreme Court quashed the conviction.

The importance of a proper and convincing evidence of identity of an
 10 accused person cannot therefore be over-emphasized. It is always important to have convincing evidence that the defendant or an accused person is the offender because even an honest witness can still make a mistake. In addition there are some witnesses whose evidence the court should approach with caution such as accomplices, witnesses who have some purposes of
 15 their own to serve including blood relations of a victim.

I have already stated above that P.W. 3 in EXH. A never mentioned the name of appellant or any name at all as the person or persons who fired at the deceased and himself. EXH. A was made on 26/1/87, the day of the incident. It was some two years later when he was testifying in court on 19/
 20 4/89 that he said he saw the appellant fire at the deceased. The Court of Appeal was therefore clearly wrong when it held per Adio J.C.A. (as he then was) on page 146 of the record that –

*“In any case there was no inconsistency between the evidence of the 3rd P. W. and his previous statement on the question of seeing the
 25 appellant immediately after the gun shot.....”*

Exhibit A did not go merely to the character of the witness but to the fall in issue, and a witness' evidence on the facts in issue is always liable to be contradicted. In this case P.W. 3 was a principal witness for the prosecution, he was in fact the only one who witnessed the shooting. It is
 30 settled law that where a witness makes a statement which is inconsistent with his testimony. such testimony is to be treated as unreliable while the statement is not regarded as evidence upon which the court can act. Rather the court would be entitled to reject the inconsistent statement and that testimony (see example R. v. GOLDER (2960) 1 WLR 1169, EGBOHONOME
 35 v. THE STATE (1993) 7 NWLR (PT. 306) 383. So once the evidence of P.W. 3 is discharged and goes, the only evidence left which “implicates” the appellant is that of P.W. 2, wife of the deceased. She said after the shooting or firing she saw the appellant “holding a gun and a gallon pass by her kitchen.” Her evidence at the highest level is therefore circumstantial. She did

not see the appellant shoot the deceased or anybody for that matter. It is settled that circumstantial evidence can only ground conviction where it is unequivocal, positive and point irresistibly to the guilt of an accused person (see *OLADEJO v. THE STATE* (1987) (8 - 11 S.C. 204). Circumstantial evidence herein is very weak and unreliable. The case of the prosecution was also not improved any further by the mere fact that she said the deceased was shouting "Hausa you have ". That did not qualify as a dying declaration since there was no positive evidence that the deceased believed that he was going to die made the statement as required under section 33(1)(a) of the Evidence Act (see *IKONO v. THE STATE* 1973) 5 SC. 231). The incident took place in the night although both P.Ws 2 & 3 claimed that there was electric light in the area P.W. 2 herself said she was inside the kitchen when she heard the sound of a gun and saw the appellant passing by. Her identification of the appellant is in my view not free from doubt just like the evidence of P.W. 3 who was with the deceased when the incident happened. Either way if the learned trial judge and the justices of the Court of Appeal had discovered that P. W. 3 never mentioned the name of the appellant in Exh. A there is a reasonable possibility that they might have declined to convict on the strength of his testimony. They would also have declined to convict on the circumstantial evidence of P. W. 2 which would not in anyway have been sufficient to convict the appellant. *"My conclusion therefore is that the charge against the appellant was not proved beyond reasonable doubt. And On the authority of LAYONU & ORS v. THE STATE (supra), the appellant is entitled to an acquittal of the charge against him"*. Issue 1 therefore succeeds.

Issue 2 - The Defence of Alibi

The appellant in his extra-judicial statement (EXH.B) to the police dated 21/6/87 said inter alia –

"I later travelled to my brother's place by name America Ubogu in Umoru village near Sobo town in Ondo State. I put up with my brother mentioned, above. I did some clearing of farms and weaving baskets. I left there on the 20th December 1986 and came back to my village Oku-Ijare on 1st March, 1987. I do not know anything about the killing of late Samuel Arikoko."

Testifying on page 19 of the record the appellant stated -

"Between 24th and 27th of January 1987 I was at Umoru with my senior brother is called America Umoru is near Usobe in Ondo State. My senior brother is called America Ubogu. I went to Umoru on 20/12/86. I stayed there for three months and came back on 1/3/87. When

I was in Umoru I was weaving baskets and clearing farm for people. When I came back from Umoru village I heard that the police was looking for me.....”

The senior brother of the appellant, America Ubogu testifying as D.W.1 stated on page 22 of the record thus-

5 *“The accused used to come to visit me at Umoru. Before Christmas four years ago the accused came to meet me at Umoru. When he came he stayed with me in my house for about three months. He was weaving baskets and farming for people while he was staying with me at Umoru”*

10 The father of the appellant one Mr Ubogu also testified as D.W.2. his evidence on page 23 reads in part-

*“1st D. W. lives at Umoru where he works. The accused normally goes to Umoru to visit the 1st D. W. Sometime ago I was in my house when a woman and a policeman came to ask of the accused and I told them that he was not at home, and that he went to Yoruba land. The policemen then
15 arrested me and the mother of the accused person and took us to the Police Station where I told the police again that the accused was with his brother in Yoruba land. I then told the police to go and look for him in Yoruba land and they said they have no vehicle and so I gave them thirty naira for transport telling them that if that was not enough the 1st D. W. would give
20 them more money when they got to Yoruba land.”*

Under cross-examination on page 24 he said –

*“I did not tell the police in my statement that I did not know where the accused was. I was the person who sent for the accused at Umoru when he came I took him to the Police station. The accused was with his brother at
25 Umoru at the time I sent for him to come.”*

The only evidence against that of the appellant and his witnesses was supplied by Police Inspector Josiah Oghenekevbe (P.W.6). He was the officer who investigated the case. Giving evidence from pages 15 of the record, he said –

30 *“On 26/1/87 I was on duty in the Divisional Crime Division of the Nigeria Police Station Orerokpe when a case of murder which was formerly been investigated by Isiokolo Police Post was referred to me for completion. I took statement from some of the witnesses and visited the scene of crime that very day at Okpara Inland. We went for the arrest of the accused person
35 in Oko-Ijerhe in Okpara Inland. On our arrival the accused escaped. On 21/6/87 the father of the accused person brought him to me at the Nigeria Police Station Orerokpe.*

In view of Exh. B, I contacted the parents of the accused person who

made useful statements to me as to the movement of the accused person during the period of this incident. I investigated the alibi set up by the accused person in Exhibit 'B' and found the alibi false. The father of the accused person told me that the accused person did not go anywhere and that the accused person was only hiding from us. He denied the alibi set up by the accused person mother of the accused person told me that she fed the accused person in their home in their village on the day of the incident." Under cross-examination he said –

"I was not the policeman who started the investigation of this case. The father of the accused person brought him to the police station and handed him over to me. I do not know anybody called America Ubogu. I did not Umoru village during my investigations- I did not find out if there was anybody called America Ubogu."

From the sequence of events as narrated by the appellant, D.W 2 and the inspector (P.W.6), it was clear that on 25th January 1987 when the offence was allegedly committed, the appellant could not be found in his village. When the police visited the father's place, he (D.W.2) told them that the appellant was living with his brother at Umoru village in Yoruba land. The police said they had no vehicle to travel and he gave them transport money to Umoru. It is clear from the record that from that 26th January, 1987 up to the 29th June, 1987 when D.W. 2 the father, took the appellant to the Police Station, no policeman went to Umoru village to look for the appellant for arrest. For six months the police did nothing to trace a murder suspect. And if they did anything at all, the police investigator P.W. 6 did not tell the court. Rather it was on 29/6/87 after recording Exhibit 'B' from the appellant that the Police (P.W.6) decided to investigate the alibi. He was undoubtedly hearing of the alibi for the second time, the first occasion was when he visited the father (D.W. 2) on 26/1/87. How did P.W. 6 investigate the alibi one may ask? The appellant stated in Exhibit 'B' that he was with his

"brother by name America Ubogu in Umoru village near Sobo town in Ondo State..... I left here on the 20th December, 1986 and came back to my village Oku-Ijari on 1st March 1987."

Under cross-examination above P.W. 6 flatly admitted that during investigation he did not go to Umoru village. He also did not know anyone called America Ubogu. This to me is a tacit admission by the prosecution that the alibi was never investigated. Instead, P.W.6 told the court that he went to ask D.W. 2 whether or not appellant's story was true knowing fully well that Umoru village actually existed. I do not know if P.W. 6 did remember

to ask D.W. 2 whether or not the appellant (America Ubogu) lived and worked in Umoru. I believe D.W.2 would have answered in the affirmative and this would have exposed P.W.6 as an untruthful witness that he was. Again P. W. 6 said he went to appellant's mother to find out whether or not 'Exh. 'B' was true and that the mother told him that he gave appellant food
5 on 26/1/87. Some six months ago. But alas, the prosecution completely failed to call the mother to give evidence on the point as important as it was to their case.

It is my view that this was one occasion on which failure to investigate or check the alibi raised by the appellant cast great doubt on the reliability
10 of the case for the prosecution. (See NTAM & ANOR v. THE STATE (1986) NMLR 86; YANOR & ANOR v. THE STATE (1965) ALLNLR 199). OBINGA & ORS v. POUCE (1965) NMLR 172).

I am clearly of the view that the appellant on a preponderance of evidence discharged the evidential burden of proof of the defence of alibi
15 raised by him and prosecution had not succeeded in demolishing that defence (See EZE v. THE STATE (1976) 1 SC 125, NJOVENS & ORS v. THE STATE (1973) 1 NNLR 76). It was not enough for the Court of Appeal per Adio J.C.A (as he then was) to have merely stated on page 139 that-
20 "The question then is whether it was shown that the learned trial Judge was wrong in accepting the evidence of the 2nd P.W. and the 3rd P.W. What happened really was that the evidence of the appellant's brother and his father which if true would have discredited the evidence of the 2nd and 3rd P.Ws as worthless. The evidence of the appellant's father was, *inter alia*, that the appellant was not living with him, that the last
25 time he saw the appellant was about one year to the time that the police visited him, and that he could not account for the appellant's movement. The situation was equally bad in the case of the brother of the appellant who testified that the appellant last visited him about four years to the time that he was giving evidence in 1989. That meant that the last time
30 that the appellant visited him was in 1985 but the incident occurred in 1987. The learned trial judge was therefore right in rejecting the evidence of the appellant's father and brother."

In the above passage the learned justice was saying that the evidence of D.Ws 2 & 3 was worthless because-

35 1. D.W. 2, the father, said during cross-examination on page 23 that
"I saw the accused last about a year before the policeman and the woman came to ask of him from me in my house"
and that the witness also said he could not account for the appellant's

movement. While I agree that the D.W. 2 said he saw the appellant about a year before the police came to him, there is nowhere on the record where he said he told the police that he could not account for the movement of the appellant. In fact under cross-examinations he denied the suggestions when he said.

"I did not tell the police in my statement that I did not know where the accused was". He continued 5

"I was the person who sent for the accused at Umoru and when he came took him to the police station."

I cannot therefore see how D.W.2's evidence was rendered worthless in these circumstances. 10

2. D. W .1, the brother, in his evidence in chief said

"Before Christmas four years ago the accused came to meet me at Umoru."

Under cross-examination he said

"The accused visited me twice at Umoru. The last time he came to visit me he spent his Christmas with me before he said he was going home." 15

The Court of Appeal in its efforts to demolish the defence of alibi raised by the appellant said if the witness (D.W.1) saw the appellant about four years from the time he was testifying in June 1989, the appellant must have visited D.W.1 in 1985, while the offence was committed in 1987. I say with respect that the Court was in error when it purported to read its own meaning into the evidence given by the witness. The witness was not asked to state the year that a particular visit took place as should have been the case if the year was material to the prosecution's case. It was not for the court to supply the date or year when none was suggested by the witness himself. But if there was any ambiguity in that statement, I believe the ambiguity was removed and cleared when under cross-examination the witness stated that the last time the appellant visited him he spent his Christmas with him. 25

The alibi raised by the appellant in Exh, B and in his evidence was that he was with his brother at Umoru village between 20/12/86 and 1/3/87 when the offence was allegedly committed on 25th January 1987. Here again I am unable to see what rendered the evidence of the witness worthless. I am of the view that the evidence of the witnesses was not read as a whole before attempts were made to mutilate or destroy same as shown above. 30

Both the High court and the Court of Appeal were therefore in error to have held that the evidence of D.Ws 1 & 2 were worthless. Certainly their evidence was cogent and to the point and did establish the defence of alibi

raised by the appellant.

Ogundare J.C.A. (as he then was) in his own contribution said of D.W.1-
"This witness gave his evidence on 30/6/89. It is difficult on this evidence, to say that the witness was talking of Christmas 1985 or Christmas 1986"

5 forgetting as pointed out above that under cross-examination the witness had explained that

"the last time he (accused) came to visit me he spent his Christmas with me before he left that he was going home"

10 which was the message of Exhibit B. The witness was never asked and he never gave any year 1985 or 1986 or any year at all.

Of D.W. 2 the learned Justice said-

15 *"The appellant in Exhibit B said he returned to the village on 1/3/87 but when he learnt he was alleged to have killed the deceased, he ran away for fear of being beaten by the police. He came out of hiding to surrender himself to the police presumably on 21/6/87. In my view, it must be in respect of the second going away that D. W testified up."*

20 But if I may ask on whose evidence was this finding based? D. W. 2 never talked of any second going. The appellant also neither in Exh. B nor in his evidence say he went to Umoru again after 1/3/87. The evidence led at the trial was that he was in Umoru between 20/12/86 and 1/3/87. It is not within the province of a court of law to manufacture its own evidence or malt findings not based on evidence before it. There was no doubt that the lower courts' attitude to the defence of alibi was greatly influenced by the evidence
 25 of P. W. 2 & 3 who claimed to have seen the appellant at the scene of the crime on the fateful night. As demonstrated above their claim cannot be sustained as it is fraught with suspicion and danger. The identification of the appellant could clearly have been mistaken or a mere conjecture. So although the appellant had the evidential burden of proof of his alibi, the
 30 burden was discharged by a preponderance of evidence, while the burden of proving the charge against the appellant beyond reasonable doubt remained throughout on the prosecution (see YANOR V. THE STATE (supra): GACHI & ORS v. THE STATE (1965) NMLR 333). The prosecution in my view completely failed to discharge its own burden of proof. The appellant is
 35 therefore entitled to an acquittal. Issue 2 also succeeds.

The issues having been resolved in favour of the appellant, this appeal succeeds and it is hereby allowed. The judgment of the trial High Court convicting the appellant of the offence of murder and sentencing him to death is hereby set aside. The judgment of the Court of Appeal confirming

the said conviction and sentence is equally set aside. The appellant is discharged and acquitted.

OGWUEGBU JSC

I have had the advantage of a preview of the draft of the judgment just delivered by my learned brother Onu, *J.S.C.* and I agree with his reasons and conclusions. I, too, will dismiss the appeal. 5

The issue of identity in the appeal boils down to that of credibility of the witnesses which is within the province of a trial court. The learned trial Judge saw, heard and watched the demeanour of P.W. 2, P.W.3, D.W.1 10 in the witness box. His judgment reflected a thorough sifting of the evidence before him. The P.W.2, P.W.3 and the appellant knew themselves very well before the incident. The testimonies of P.W. 2 and P.W. 3 were convincing and there was no mistake. I am unable to see any evidence of doubtful identification in this case. This court cannot therefore usurp that function 15 of learned trial judge. See *Abimbola Sanyolu v. The State* (1976) 5 S.C. 37 at 44 and *Adelumola v. The State* (1981) 1 N.W.L.R. (pt. 73) 683 at 690.

It would have been a little different if the prosecution failed to investigate the alibi and D.W. 1 and D.W 2 did not testify. In *Ntam & or. v. The state* 118) N.M.L.R. 86 at 85, this court held that although there are 20 occasions on which failure to check an alibi might cast doubt on the reliability of the case of the prosecution but where the appellants were identified by three eye witnesses, the issue was that of credibility.

The failure of the police to investigate the so-called alibi did not lead to any miscarriage of justice in this case moreso, when D.W. 1 and 25 D.W.2 testified and their testimonies were considered along with those of P.W.2 and P.W.3.

Identification "A" is the statement made to the police by P. W. 3. We were urged to admit it as an exhibit thereby regularising what the appellant's counsel claimed to be a procedural mistake of counsel. He 30 contended that the statement is vital and gave some insight into the identity of the "people" who must have fired the gun that killed the deceased and that a proper evaluation of the contents could have raised some doubts about the identity of the murderer.

The courts below having failed to consider the said "exhibit", we 35 were called upon to do so in order to do substantial justice. The third witness

for the prosecution (p.W.3) testified on 19:4:89. On 12:5:89, PW5 Sergeant Joseph Oriahon testified. He recorded the statement of P.W.3. In answer to cross-examination by the learned counsel for the appellant, the witness said:

"I recorded the statement from P. W.3. This is the thumb impressed statement.

Court: Mr. Eshalomi seeks to tender the statement as identification and Mr. Akhiliero says that he has no objection. The statement of the 3rd P.W. dated 26:1 :87 is marked as identification "A". The 5th P. W. continues his answers to cross-examination....."

From the above minutes of the learned trial Judge, it is quite clear that the learned counsel for the appellant tendered the statement for the purpose of identification only and it was so marked by the trial court. The provision of sections 199 and 209 and of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990 were not complied with assuming that it even admitted as exhibit which was not the case. In criminal proceedings such as this, the inconsistency goes to credibility and the earlier statement cannot be treated as evidence of the truth of its contents. See R. v. Golder (1960) 1 W.L.R. 1169.

In the case of the Queen v. Akanni (1960) 5 F.S.C. 120 at 121, during the cross-examination of the second prosecution witness, the following remarks appeared in the record of trial:

"Obisesan calls for the statement made to the police by witness. Statement produced by Crown Counsel and handed to Obisesan who tenders it in evidence - not objected to and marked "A".

This court held that the document should never have been tendered and received in evidence. The only proper use to which it could have been put was the cross-examination on it of the witness, if he had said anything in his evidence which was contrary to what he had said to the police. This would have given him the opportunity to explain it if he could. See the Queen v. Joshua (1964) 1 All N.L.R.l.

In the appeal before us, Identification "A" was neither identified by the P.W. 3 nor tendered through him. No use was made of it to contradict him. In fact he had given evidence-in-chief and cross-examined even before the statement was tendered for identification through P. W.5. Nothing more was done with it until the address of counsel for the appellant and the judgment.

Curiously enough, the learned counsel for the appellant made no mention of Identification "A" in his closing address. In his said address, he was referring to the contradictions in the evidence of P. W. 2 in court and her statement to the police. The said statement of P. W. 2 was not before

the trial court.

The learned trial judge was led into believing that the P.W. 2 was the maker of Identification "A" by the learned appellant's counsel. That notwithstanding, he stated in his judgment that the statement which the P.W.2 made to the police was only an identification in the case and was not made part of the evidence which he could act upon in the consideration of the issue for determination in the case as the statement was never an exhibit before the court. 5

This court cannot therefore treat Identification "A" as an exhibit in the case for non-compliance with the provisions of sections 199 and 209 of the Evidence Act. I am also satisfied that the prosecution proved its case against the appellant beyond reasonable doubt. This court will not interfere with the findings of fact made by the trial court as the decision has not been shown to be unreasonable and could not be supported having regard to the evidence. 10 15

It was for the above reasons and the detailed reasons given in the lead judgment learned brother, Onu, J.S.C. that I, too would dismiss the appeal. The appeal is accordingly dismissed by me. The judgments of the courts below are affirmed. 20

MOHAMMED JSC

I have had the privilege of reading in draft, the lead judgment of my learned brother Onu JSC and I agree that the conviction and sentence of the appellant for the offence of murder contrary to section 319(1) of the Criminal Code should be affirmed. For the reasons given in the judgment of my learned brother, Onu JSC, I shall dismiss this appeal. It is accordingly dismissed. 25

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