

SUPREME COURT OF NIGERIA
28TH APRIL, 1995. SC. 183/1993
CORAM:- S.M.A. BELGORE, E.O. OGWUEGBU,
U. MOHAMMED, Y.O. ADIO, A.J. IGUH, JJSC.

IHEMEGBULAM ONYEGBU APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Alibi - Suspect to adduce detailed evidence of where he was - Whether appellant gave detailed information to Police - To warrant investigation of the alibi he raised.

CRIMINAL PROCEDURE - Alibi - Failure to investigate alibi - Whether fatal to prosecution's case - Where evidence that negated the defence was adduced.

CRIMINAL PROCEDURE - Corroboration - Sworn evidence of a child - Whether to be corroborated as a matter of law.

CRIMINAL PROCEDURE - Medical evidence - Murder - Sufficient nexus between death of deceased and appellant's act - Whether Medical evidence is essential.

EVIDENCE - Competence of a child to testify under oath - In criminal proceedings - Whether the age of PW1 imported an incapacity - To understand the nature of an oath.

FACTS

The deceased, Marbel Nnaoma, went to their farm with her son PW1 in the evening to collect vegetables. The appellant met her in the farm and demanded sexual intercourse with her. Deceased told him that it was an abomination to have sex in the bush. Appellant pounced on the deceased, threw her on the ground and started to stab her with a pen knife. She sustained injuries and blood was gushing out. PW1's plea to appellant to spare his mother was to no avail. He started running home to call his father PW2. As the PW 1 was running, appellant held him and gave him several stab wounds and he fell

down. He heard the voice of his father PW2 calling on the deceased. He responded and asked PW2 to come because appellant had killed the mother.

The deceased was found in a pool of blood and taken to the general hospital where she died in the night. Appellant was charged with the offence of murder. He denied the charge and pleaded alibi. The trial court disbelieved the plea of alibi found the appellant guilty as charged and sentenced him to death. Appellant's appeal to the Court of Appeal was dismissed. He had further appealed to the Supreme Court to determine inter alia, the effect of the prosecution's failure to investigate the appellant's defence of alibi, when from the record such a defence had been raised both to the police and at the trial.

HELD (Unanimously dismissing the appeal per lead judgment of OGWUEGBU JSC)

Alibi - Suspect to adduce detailed evidence of where he was

1. It is well settled by the decisions of this court and the courts of other common law countries that where an alibi is set up by an accused, the onus of establishing his guilt is still on the prosecution but the evidential or secondary burden is on the accused to adduce some evidence of where he was at the material time. The defence of an alibi ought to be set up at the earliest possible moment and ought to include a statement where the accused was at the time charged and with whom he also was. It is necessary to give the police details of his movements at the earliest possible time to prevent the possibility of the police engaging in a worthless exercise of investigating a bottomless defence. I agree entirely that the appellant did not give the police in Exhibit "A", detailed information as to his movements between 27:2:81 and 28:2:81 and the persons with whom he was apart from the statement that he arrived Obilaji, his village at 4.30 p.m. on 1:3:81. (p. 988 B)

Alibi - Failure to investigate

2. However, it does not always follow that once the prosecution failed to investigate an alibi, such failure is fatal to the case of the prosecution. The trial judge has a duty, even in the absence of investigation, to consider the credibility of the evidence adduced by the prosecution vis-a-vis the alibi. In the instant case, the prosecution discharged the burden of proof beyond reasonable doubt by calling evidence whose quantity and quality negative the defence of alibi. I have no doubt that the complaint of misdirection has not been established by the appellant. (p. 988 H)

Competence of a child to testify under oath

3. In the appeal before us, P.W.I (Ifeanyichukwu Nnaoma) gave evidence upon oath without any objection whatsoever from anybody including the defence counsel. It was the duty of counsel to raise an objection to any irregularity in the conduct of proceedings, more so, when it became clear that a particular step ought to have been taken. His age did not necessarily bi import an incapacity to understand the nature of an oath or any other form of incompetency. The section of the Evidence Act relied upon by the appellant as the basis of his complaint did not avail him. (p. 991 E)

Corroboration - Sworn evidence of a child

4. The evidence of P. W. 1 was given upon oath and was corroborated by the evidence of P.W.2,

P.W. 3 and P. W.4 in material particulars. One solitary witness if believed by the court can establish a criminal case even if it is a murder charge. The sworn evidence of a child need not as a matter of law, be corroborated, but it is desirable that the judge should warn himself of the risk of acting on the uncorroborated evidence of a young boy or girl though he may do so if convinced that the witness is telling the truth. There is no complaint that he did not warn himself. (p. 992 B)

Medical evidence - Murder

5. In this case however, there was sufficient nexus between the death of the victim and the act of the appellant which was corroborated. The victim died in circumstances in which there is abundant and credible evidence of the manner of her death. Medical evidence as to the cause of death is desirable, but it is not essential in all cases of homicide. (p. 992 D)

NOTABLE POINTS OF INTEREST

OGWUEGBUJSC

1. Opinion about a child witness and taking of an oath

The opinion about a child-witness is the “opinion of the court”. When a judge sits alone, he is undoubtedly the person whose opinion is relevant.

There are also authorities establishing that competency is not a matter of age but of understanding and if a child understands the nature of an oath, the provisions of section 183 of the Evidence Act become irrelevant. (p. 990H)

2. Recording that a child witness understands the nature of an oath

The argument that it must be shown on the records that P. W. 1 was capable of

understanding the nature of an oath before he is allowed to take such oath is not provided for in section 183(1) of the Act. However, as a matter of practice, where a judge thinks that the case of a child witness should not be governed by the provisions of section 183(1), he should record a note to that effect stating that in his opinion, the child is capable of understanding the nature of an oath. (p. 991 D)

IGUHJSC

3. Sworn evidence of a child without complying with the preliminaries - effect

I should perhaps, stress that even if P. W. 1 were established to be a child, and I do not so hold, the effect of such evidence of a child who gave sworn evidence without compliance with the necessary preliminaries stipulated in sections 154 and 182 of the Evidence Act is not fatal to the proceedings. Such evidence is not rendered invalid thereby but may be relied upon and treated as the unsworn evidence of a child which under the law requires corroboration. It therefore seems to me that where an irregularity has occurred in the taking of the evidence of a child, the correct approach is not to expunge or disregard such evidence but to see whether it is sufficiently corroborated by other evidence implicating the accused person. (p.994D)

4. Alibi raised only in evidence - Duty of the prosecution

Where, however, an accused person did not raise the defence of alibi before his trial but in his evidence at the trial, the prosecution would naturally not be obliged at that late stage of the proceedings to investigate such a plea and would be entitled to rely on the evidence of its witnesses to disprove the alibi. And where the prosecution adduces sufficient, acceptable and credible evidence to fix the accused at the scene of crime at the material time, the latter's plea of alibi is thereby logically demolished. (p. 995 H)

REPRESENTATION

Dr. T. C. Osanakpo for the Appellant

Miss N. U. Chianakwalam. D.P.P Abia State for the Respondent

CASES REFERRED TO

Okosi v. The State (1989)1 N.W.L.R. (Pt. 100)642 at 659 - 660

Ozaki v. The State (1990)1 N.W.L.R. (Pt. 124)92 at 108

- Okon v. The State (1988)2 S.N.J. (1988) 1 N.W.L.R. (Pt. 69) 172
 Onwuere v. The state (1991)4 N.W.L.R. (R.I 88)428 at 448
 R. v. Liddle 21 Cr App R 3 at 13
 B Onafowokan v. The State (1987)3 N.W.L.R. (Pt 01)538
 Umani v. The State (1988)1 N.W.L.R. (R. 70)274
 R. v. Southern (1930)22 Cr. App R.O at 13
 R. v. Moscovitch (1924)18 Cr App R 37
 Alonge v. I.G.P. 4 F.S.C. 203
 R. v. Campbell (1956)40 Cr. App. R.95 at 102
 C Lori v. The State (1980)8 - 11 S.C.81 at 90
 The State v. Okoko (1964)1 All N.L.R. 423
 Queen v. Wilcox (1961) 1 All N.L.R. 631
 The State v. Obinga (1965) N.M.L.R. 1 72
 Osuolale v. Commissioner of Police (1974) 4 E.C.S.L.R. 451
 D R. v. Adamu (1954) 10 W.A.C.A. 161 at 162
 Woolmington v. D.P.P (1935) A.C. 462
 Yanor v. The State (1965) N.M.L.R. 337
 Nwosisi v. The State (1976)6 S.C. 109
 E Fatoyinbo v. Attorney-General, Western Nigeria (1966) W.N.L.R. 4 at 6

STATUTES REFERRED TO

Evidence Act (Cap. 112, L.F.N. 1990) s. 183(1), 155, 180, 181, 182
 Criminal Procedure Law Cap. 31 laws of Eastern Nigeria, 1963 s.2(1)

F

LEAD JUDGMENT BY OGWUEGBU JSC

The appellant herein was on 28:5:85 found guilty of the murder of Marbel Nnaoma and sentenced to death by Ononuju, J. sitting at the Umuahia Judicial Division of the High Court of the former Imo State.

G The appellant appealed to the Court of Appeal, Port Harcourt Division against the judgment. His appeal was unsuccessful and he has further appealed to this court.

H At the hearing of the appeal on 2:2:95, this court granted the appellant leave to file and argue four additional grounds of appeal. From the grounds of appeal, the following issues were formulated in the appellant's brief of argument:

“(1) Whether the appellant was properly convicted and sentenced to death for the crime of murder when the prosecution did not prove beyond

reasonable doubt the appellant's complicity in the cause of the deceased's death?

(2) *What is the effect of the prosecution's failure to investigate the appellant's defence of alibi, when from the record, such a defence had been raised by the appellant both to the police and at the trial?* B

(3) *Whether by virtue of S.183(1) of the Evidence Act (Cap. 112, L.F.N. ,1990), the sworn evidence of PW1, a child, was properly received, having regard to the fact that there was neither a preliminary inquiry nor a note in the record indicating that PW1, as a child witness was capable of understanding the nature of an oath?"* C

It will not be necessary for me to set out the two issues identified in the respondent's brief of argument. The two sets of issues overlap and I will determine the appeal on the issues formulated by the appellant.

The facts of the case presented by the prosecution are as follows:

In the evening of 28:2:81, the deceased went to their farm with her son (PW1) to collect vegetables. According to PW1, on their way to the farm, they met the appellant who greeted them. He asked the deceased where she was going and the latter told him that they were going to collect vegetables from their farm. The appellant told the deceased that he was returning from the farm also. While in the farm, the appellant met them and asked the deceased to come. The deceased told him to say whatever he wanted to tell her. Then the appellant demanded sexual intercourse with her. The deceased told him that it is an abomination to have sex in the bush. D E

On getting this reply, the appellant pounced on her, threw her on the ground and started to stab her with a pen knife which he brought out from his pocket. The deceased sustained injuries and blood was gushing out from the injuries. PW1 pleaded with the appellant to spare his mother who had done nothing to him when the appellant paid no heed, he started running home to call his father (PW2). As he was running, the appellant held him and gave him several stab wounds with the pen knife. The appellant finally left him and ran away, PW1 fell down. He heard a voice calling on his mother (the deceased). It was the voice of his father (PW2). He responded and asked PW2 to come because the appellant had killed the mother. The appellant came back, stabbed him on the chin, ran away and did not come back again. F G

PW2 (the husband of the deceased) arrived at the scene with his senior wife (PW3) and found the deceased leaning on the foot of a tree in a pool of blood. He saw stab wounds on both sides of her neck. He observed that her two ears had been cut off. All the clothes she wore and her necklace were on the ground. She was almost naked. He asked her how she came by the H

injuries. She told him something. He observed that PW1 had Slab wounds all over his body as well. PW1 also told him something.

He could not carry the deceased. He carried PW1 to the house and asked PW3 to look after the deceased. On getting home he alerted people at B home who accompanied him to the scene and carried the deceased out from the farm. The deceased who was still alive was taken to the General Hospital, Uzuakoli in a taxi. She died in the hospital on the night of the incident P.W.1 was also admitted and treated in the same hospital.

The incident was reported to the police and the appellant was at large. C A search party was organised and the appellant was caught in the bush on 3:3:81, brought to the village and later handed over to the police. The appellant told the police the spot where he dropped the pen knife which he used in Stabbing the deceased and P.W.1. The police recovered the knife at the spot PW4 (Friday Onuoha) was one of those who carried the deceased out from the D farm. He was also a member of the search party that caught the appellant.

The appellant volunteered a statement to the police (Exhibit "A") which was tendered through Police Constable Jimoh Adegbite (PW5).

In his defence the appellant denied causing the death of Marbel Nnaoma.

He admitted making Exhibit "A". He told the court that he was at Aboada E in the Rivers State on 28:2:81 with the Shell B.P. Instrument and Survey Section; that he came home on 1:3:81 and slept in the bush. He did not reach his home because he is in enmity with his father and that he was in the bush from 1:3:81 to 2:3:81 when he was arrested by the police in the night He stated that Exhibit "B" was not the knife he showed to the police.

F Under cross examination, the appellant testified that he left Aboada on 27:2:81 and arrived Oguta at 8 p.m. the same day. He slept at Ekene Dili Chukwu garage. He left Oguta at 1 p.m. on 28:2:81 and arrived Owerri at about 2 p.m. He left Owerri for Umuahia at 4 p.m. and arrived Umuahia at 6 p.m. He did not reach his home on 28:2:81 but slept in the Farm Settlement at Aforugiri G Umuahia. He slept alone under palm tress. He was in the Farm Settlement the whole of 1:3:81.

I will deal with the issue of alibi set up by the appellant first. The learned appellant's counsel submitted in his brief of argument that the prosecution failed to investigate the alibi raised by the appellant both in his state- H ment to the police and his evidence at the trial.

He contended that the learned trial Judge acknowledged that the appellant properly raised the plea of alibi and supplied particulars; that it was wrong to cast a further evidential burden of proof of such alibi on the appellant. He referred the court to the cases of Okosi v. The State (1989)1 NWLR

(pt.100) 642 at 659-600, *Ozaki v. The State* (1990)1 NWLR (pt.124) 92 at 108 and *Odili v. The State* (1977) 4 S.C. 1 at 6.

He further submitted that by failing to investigate the alibi that was properly raised, the prosecution should be deemed to have failed to rebut the appellant's alibi, and consequently, failed to prove its case beyond reasonable doubt. He urged the court to resolve this issue in favour of the appellant. B

The learned Director of Public Prosecution who appeared for the respondent argued in the respondent's brief that it is the duty of the appellant to give sufficient facts of his where about at the time of commission of the alleged offence. Since it is a matter peculiarly within his knowledge, he should give the police at the first opportunity, some useful information relating to the place where he was and the persons with whom he was. We were referred to the cases of *Gachi v. The State* (1965) NMLR 333 and *Okosi v. The State* supra. C

She also submitted that where an accused person did not raise the defence at the time of his arrest but at the trial of the charge against him, the prosecution would not be obliged to investigate the plea of alibi and could rely on the evidence of the prosecution witnesses to disprove the alibi. She further argued that if the prosecution adduces sufficient and acceptable evidence which fixes the accused at the scene of crime at the material time, the alibi is disproved. The cases of *Patrick Njovens & Ors. v. The State* (1973) NMLR 331 and *Ozaki v. The State* supra were cited and relied upon. D E

On issue three, the learned appellant's counsel submitted that the PW1 was fourteen years old at the time he testified and that he testified under oath without the requisite preliminary inquiry as to whether he understood the nature of an oath as required by section 183(1) of the Evidence Act Cap. 112, Laws of the Federation of Nigeria, 1990. It was also submitted that it was imperative for the learned trial Judge while receiving the evidence of PW1 to have made a note to the effect that P.W.1 was capable of understanding the nature of an oath. He referred to the case of *Okoye v. The State* (1972) 12 S.C. 115 at 125-126 F G

The learned counsel for the respondent submitted that the age of PW1 did not appear anywhere during the proceedings in the court of trial; that the learned trial Judge who saw him testify did not perceive him as a child and even if PW1 were a child (which she did not concede), the effect of the evidence of a child witness who gave sworn evidence without compliance with the necessary preliminaries stipulated in sections 154 and 182 of the Evidence Act (now sections 155 and 185) is that the evidence would require corroboration. The court was referred to the case of *Okon & 2 Ors. v. The State* (1988) 2 S.C.N.J. (Pt.) 45 (1988)1 NWLR (Pt.69) 172. H

It was further submitted that corroboration was supplied by the evidence of PW2, PW3 and PW4 and that corroborative evidence is evidence which confirms in some material particular not only that the crime has been committed, but also, that it was the appellant who committed it. The case of *B Ngwuta Mbele v. The State* (1990) 4 NWLR (pt.145) 484 was cited by counsel.

On issue one, the learned appellant's counsel contended that the guilt or the appellant was not proved beyond reasonable doubt. He argued that apart from the evidence of PW1, there was no direct evidence from other prosecution witnesses to support the findings that the appellant attacked and stabbed the deceased; that the evidence of PW2 and PW3 were hearsay;

The inference drawn by the trial court that the injuries inflicted on the deceased were quite severe and that the deceased died of such injuries were not supported by any evidence on record. The case of *Onwumere v. The State* (1991) 4 NWLR (pt.186) 428 at 448 was cited and relied upon by counsel.

In reply, the learned respondent's counsel argued that the prosecution proved its case beyond reasonable doubt and that medical evidence though desirable, is not essential to establish the cause of death in a charge of murder and the absence of medical evidence in this case is not fatal to the case of the prosecution since the cause of death could reasonably be inferred from the evidence before the court.

How did the appellant herein satisfy the requirement of the law in respect of the alibi which he raised? In his statement to the police (Exhibit "A") the appellant stated:

"I have no hands in the killing of one Marbel Nnoma and the serious injury sustained by her son Ifeanyichukwu Nnoma alleged to have taken place on 28:2:81. I arrived Obilaji Umuede village on 1:3:81 at 4.30 p.m. and slept in the bush near the village....."

On Sunday 1st March, 1981 at Owerri, I bought two loaves of bread at sixty kobo each a bottle of schnapps for five naira and Agidi of 50 kobo some cooked eggs for 90 kobo. These sustained me until Monday night when I was caught... .."

In his evidence in court, the appellant testified as follows:

"On 28:2:81, I was not at home but at Ahoada in Rivers State with the Shell B.P. instrumental and survey section. I came home on 1:3:81 and slept in the bush. I did not reach home because I am in enmity with my father. That I wanted to kill my father and my mother because they said I was an Osu incarnate and not supposed to come to them. My people know about this. I was in the bush from 1:3:81 to 2:3:81 when I was arrested by the police in

the night as I was coming out from our house”

In answer to cross-examination by the learned State Counsel (Mr. Onukaogu), the appellant stated:

“I did not tell the police that I was in Ahoada Rivers State on 28:2:81. I left Ahoada on 27:2:81 and arrived at Oguta on the same 27:2:81. I slept at Ekene Dili Chukwu garage Oguta with the two night watchmen. I arrived at Oguta at 8 p.m. I left Oguta at 1 p.m. for Owerri and arrived Owerri at 4 p.m. and arrived at Umuahia at about 6 p.m. I was travelling from Ahoada to Obilaji Nkpa my village on 28:2:81, I did not reach my village but I slept at Farm settlement Aforugiri Umuahia under palm trees. I was in the farm settlement on 1:3:81 the whole morning and after.”

On the plea of alibi, the learned trial Judge said:

“In his evidence in court, the accused told a different story. He tried to put in the defence of alibi that on 28:2:81 he was not at Obilaji his village but in Ahoada in the Rivers State where he left for his village He mentioned no one who saw him nor did he state in Exhibit” A” where he was on 28:2:81 to enable the police cross-check on the story The accused is a liar and I do not believe him. In the present case the evidence of the eye witness PW1 and other prosecution witnesses that they saw the accused that morning of 28:2:81 in his father’s compound which were not challenged, are in my view, stronger evidence than the accused weak defence of alibi:and I therefore hold that the defence of alibi fails. “

Dealing with the plea of alibi, the court below held:

“The defence does not automatically fail simply because it was raised for the first time by the accused during trial because an accused person has a right to remain silent when arrested and declining making any statement to the police vide section 32(2) of the Constitution of the Federal Republic of Nigeria 1979; Odili v. State (1975) NSCC (pt. 11) 154..... In the case in hand, the prosecution’s failure to investigate the appellant’s alibi is not fatal to its case. The appellant on his own showing did not furnish the police with particulars or sufficient particulars that would have enable it to investigate the defence. At the trial when the appellant again raised the defence and supplied particulars, he did not discharge the evidential burden of introducing evidence in support of the defence. The learned trial Judge did not in the passages of the judgment referred above cast the burden of proof of the case on the appellant. The trial court was well aware that the burden of the guilt of the appellant is on the prosecutionThe trial court rightly considered the appellant’s weak

defence of alibi against the stronger evidence adduced by the prosecution.....I am entirely in agreement with the learned trial Judge in rejection of the defence of alibi.”

B Both the learned trial Judge and the court below were right in their statements of the applicable principles of the law on the plea of alibi set up by the appellant. The two courts correctly applied the law to the facts of the case and the evidence led.

 It is well settled by the decisions of this court and the courts of other
C common law countries that where an alibi is set up by an accused, the onus of establishing his guilt is still on the prosecution but the evidential or secondary burden is on the accused to adduce some evidence of where he was at the material time. The defence of an alibi ought to be set up at the earliest possible moment and ought to include a statement where the accused was at the time
D charged and with whom he also was. See the cases of Okosi v. The State (1989) 1 NWLR (Pt. 100) 642 at 659-600 and 666, R.v. Lobell (1957)41 Cr. App. R. 100 at 101, Gachi v. The State supra, R. v. Patrick Moran 3 Cr. App. R 25 and Ozaki v. The State (1990)1 NWLR (Pt.124) 92.

 It is necessary to give the police details of his movements at the
E earliest possible time to prevent the possibility of the police engaging in a worthless exercise of investigating a bottom less defence. It should be realised that this defence is the commonest of all defences and as rightly stated by Hewart, L.C.J. in R. v. Stanley Liddle 21 Cr. App. R. 3 at 13 that:

 “.....*There is nothing ex improviso about such a defence as*
F *that. It did not require ingenuity, but only ordinary common sense, to conceive that a person who was charged might be going to say that he was not the man.”*

 I agree entirely that the appellant did not give the police in Exhibit
“A”, detailed information as to his movements between 27:2:81 and 28:2:81
G and the persons with whom he was apart from the statement that he arrived Obilaji, his village at 4.30 p.m. on 1:3:81. If his evidence in court had been what he stated in Exhibit “A”, certainly, the failure of the police to investigate and check the reliability of the alibi would have been fatal to its case and this court would not have hesitated in quashing the conviction of the appellant. See
H Onafowokan v. The State (1987) 3 NWLR (Pt.61) 538.

 However, it does not always follow that once the prosecution failed to investigate an alibi, such failure is fatal to the case of the prosecution. The trial Judge has a duty, even in the absence of investigation, to consider the credibility of the evidence adduced by the prosecution vis-a-vis the alibi. See

Umani v. The State (1988) 1 NWLR (Pt. 70) 274. In the instant case, the prosecution discharged the burden of proof beyond reasonable doubt by calling evidence whose quantity and quality negated the defence of alibi. I have no doubt that the complaint of misdirection has not been established by the appellant.

The next complaint of the appellant is the admission of the evidence of a child (PW1) without conducting the required tests as to the child's understanding of the nature of oath and the need to tell the truth as required by section 183(1) of the Evidence Act.

The learned counsel for the appellant had argued in his brief that PW1 was a fourteen year old child when he testified on oath as PW3 before Alilionwu, J. of the blessed memory on 20:2:85 and that he testified again as PW1 before Ononuju, J. who heard the case de novo on 2:5:85. Learned counsel contended that Ononuju, J. should have made a note in the record book that he had complied with section 183(1) of the Evidence Act.

He submitted that non-compliance with section 183(1) of the Evidence Act was an irregular procedure, that the evidence of PW1 was wrongfully received and the conviction of the appellant led to a miscarriage of justice.

The learned counsel for the respondent in her brief, referred the court to section 2(1) of the Criminal Procedure Law Cap. 31 Laws of Eastern Nigeria, 1963 applicable in Abia State, section 154 and 182 of the Evidence Act (now sections 155 and 183)

Section 2(1) of the Criminal Procedure Law of Eastern Nigeria, 1963 applicable in Abia State States that a "child means any person who has not attained the age of fourteen years."

Section 183 of the Evidence Act. Cap. 112, Laws of the Federation of Nigeria, 1990 provides:

"183(1) In any proceedings for any offence the evidence of any child who is tendered as a witness and does not, in the opinion of the court, understand the nature of an oath, may be received, though not given upon oath, if, in the opinion of the court, such a child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) If the court is of the opinion as stated above in subsection (1) of this section, the deposition of a child may be taken though not on oath and shall be admissible in evidence in all proceedings where such deposition if made by an adult would be admissible.

(3) A person shall not be liable to be convicted of the offence unless

the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused.

(4).....”

B Section 155(1) of the Evidence Act Cap. 112, Laws of the Federation of Nigeria, 1990 which replaces section 154(1) of the old law provides as follows:

“155(1)All persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions by reason of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.” (Italics is for emphasis)

D Other relevant sections of the Evidence Act dealing with the taking of oral evidence and touching on the issue under consideration deserve mention. They are sections 180, 181 and 182. They provide as follows:-

“180 Save as otherwise provided in sections 182 and 183 of this Act, all oral evidence given in any proceedings must be given upon oath or affirmation administered in accordance with the provisions of the Oaths Act.

E *181. Where an oath has been duly taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, does not for any purpose affect the validity of such oath.*

F *182(1) Any court may on any Occasion, if it thinks it fit and expedient receive the evidence, though not given upon oath, of any person declaring that the taking of any oath whatsoever is, according to his religious belief, unlawful, or who, by reason of want of religious belief, ought not, in the opinion of the court, to be admitted to give evidence upon oath.”*

G If PW1 was fourteen years at the time he testified as contended by the learned appellant’s counsel, and if the word “*child*” in section 2(1) of the Criminal Procedure Law bears the same meaning as “*child*” in section 183(1) of the Evidence Act, then PW1 was not a child within section 183(1) of the Evidence Act. Therefore, the contention of the learned appellant’s counsel is self-defeating.

H I must also point out at this stage that section 183 (1) of the Evidence Act deals with unsworn evidence of a child produced as a witness in a criminal proceeding who cannot be and is not sworn because he cannot understand the nature of an oath. That is not the case in the appeal before us.

 The opinion about a child-witness is the “*opinion of the court*”. See R. v. Southern (1930) 22 Cr. App. R. 6 at 13. When a Judges its alone, he is

undoubtedly the person whose opinion is relevant. That explains why emphasis is laid in the above provisions of the Evidence Act on the phrases:

“If the court is of the opinion”, “in the opinion of the court”, “unless the court considers that” and “if the court thinks fit and expedient.”

There are also authorities establishing that competency is not a matter of age but of understanding and if a child understands the nature of an oath, the provisions of section 183 of the Evidence Act become irrelevant. See Parke B. in R. v. Perkins (1840) 173 E.R. 884 at 886, R.v. Michael Moscovitch (1924) 18 Cr. App. R. 37 and John Okoye v. The State supra.

A great deal depends on the opinion of the Judge who sees and hears the witness. Where a child is incapable of understanding the nature of an oath, the procedure in section 183 (1) must be followed but where the child is capable of understanding the nature of an oath, the Judge must comply with section 180 as is the case in the present proceedings. Section 183(1) imposes an extremely delicate task on the Judge.

The argument that it must be shown on the records that PW1 was capable of understanding the nature of an oath before he is allowed to take such oath is not provided for in section 183(1) of the Act.

However, as a matter of practice, where a Judge thinks that the case of a child witness should not be governed by the provisions of section 183(1), he should record a note to that effect stating that in his opinion, the child is capable of understanding the nature of an oath.

In the appeal before us, PW1 (Ifeanyichukwu Nnaoma) gave evidence upon oath without any objection whatsoever from anybody including the defence counsel. It was the duty of counsel to raise an objection to any irregularity in the conduct of proceedings, more so, when it became clear that a particular step ought to have been taken. His age did not necessarily import an incapacity to understand the nature of an oath or any other form of incompetency. The section of the Evidence Act relied upon by the appellant as the basis of his complaint did not avail him.

I am satisfied as the courts below, that PW1 spoke the truth and his evidence was supported by that of PW2, PW3 and PW4 who met him and the deceased at the scene and he (PW1) reported the incident leading to the death of Marbel Nnaoma to these witnesses.

The first complaint of the appellant in this appeal which I decided to consider last is that the appellant was not properly convicted and sentenced to death when the prosecution failed to prove its case beyond reasonable doubt. I find no substance in the contention of the learned appellant’s counsel on this issue. The court of trial believed the evidence of PW1 who was an

eye witness to the murder. PW2 and PW3 as well as PW4 were at the scene soon after the incident and saw the injuries inflicted on the deceased and PW1. From the farm, the deceased was taken to the hospital and she died in the hospital on the night of the incident. PW4 is also a member of the search party that caught the appellant where he was hiding in the bush and handed him to the police.

The evidence of PW1 was given upon oath and was corroborated by the evidence of PW2, PW3 and PW4 in material particulars. One solitary witness if believed by the court can establish a criminal case even if it is a murder charge. See *Alonge v. I.G.P.* (1959) 4 F.S.C. 203. The sworn evidence of a child need not as a matter of law, be corroborated, but it is desirable that the Judge should warn himself of the risk of acting on the uncorroborated evidence of a young boy or girl though he may do so if convinced that the witness is telling the truth. See *R. v. Dossi* (1918) 13 Cr. App. R. 158 at 160 and *R. v. Campbell* (1956) 40 Cr. App. R. 95 at 102. There is no complaint that he did not warn himself.

In this case however, there was sufficient nexus between the death of the victim and the act of the appellant which was corroborated. The victim died in circumstances in which there is abundant and credible evidence of the manner of her death. Medical evidence as to the cause of death is desirable, but it is not essential in all cases of homicide. See *Lori v. The State* (1980) 8-11 S.C. 81 at 97, *Akpuenya v. The State* (1976) 11 S.C. 269 at 278 and *Essien v. The State* (1984) 3 S.C. 14 at 18.

This is a clear case of brutal murder against a woman who refused to yield to the sexual desires of the appellant in the bush which is an abomination according to the custom of the community. The appellant must have intended the natural consequences of his action.

From all I have said, this appeal fails and it is hereby dismissed. The conviction and sentence confirmed by the court below are affirmed.

G _____

BELGORE JSC

I cannot discern any mitigating circumstance to lead to interfering with the decision of the lower court which affirmed the conviction and sentence of death of the trial court. For the full reasons contained in the judgment of my learned brother, Ogwuegbu, J.S.C., with which I am in full agreement, I also dismiss this appeal as totally lacking in merit.

H _____

MOHAMMED JSC

I have had the opportunity of reading, in draft, the judgment of my learned brother, Ogwuegbu, J .S.C., just read, and I agree with him that this appeal is devoid of any merit and should be dismissed. The appellant has no reason whatsoever to savagely attack Marbel Nnaoma in the bush. The evidence of PW1 who was an eye witness and a child was direct and positive and the testimonies of PW2 and PW3 had amply corroborated it. The appellant deserves no mercy for this brutal murder. The appeal is dismissed.

ADIO JSC

I have had the benefit of reading, in draft, the judgment just delivered by my learned brother, Ogwuegbu, J.S .C. and I am entirely in agreement with it. The appeal fails and it is also dismissed by me. I affirm the judgment of the court below confirming the conviction and sentence imposed by the learned trial Judge.

IGU JSC

I have had the privilege of reading in draft the lead judgment just delivered by my learned brother, Ogwuegbu, J.S.C. I agree entirely with him that there is no merit whatsoever in this appeal.

The appellant was on the 28th May, 1985 convicted for the offence of the murder of one Marbel Nnaoma on the 28th day of February, 1981 at Obilaji Umuede Nkpa, Bendel in the Umuahia Judicial Division of Abia State. His appeal to the Court of Appeal, Port Harcourt Division was now the 15th June, 1993 dismissed. The appellant has now appealed to this court.

There is abundant evidence on record that the appellant inflicted several stab wounds on both the deceased and PW1 as a result of which the deceased died. PW1 gave an eye witness account of this barbarous attack on the deceased which was occasioned by her refusal to succumb to the appellant's overture for sexual intercourse with her in the bush.

One of the questions raised by the appellant in this appeal is whether by virtue of section 183(1) of the Evidence Act, the sworn evidence of PW1, described by the appellant as a child, was properly received, having regard to the fact that there was neither a preliminary inquiry nor a note on record to indicate that the said PW1 was capable of understanding the nature of an oath. The complaint is that PW1, alleged to be 13 years old, testified on the 2nd May, 1985 without the court complying with the provisions of sections

154 and 182 of the Evidence Act.

The first point that must be made is that there is nothing whatever in the record of proceedings to indicate the exact age of PW1 as at the date he testified before the trial court. It cannot be over-emphasized that a court cannot be invited to speculate on possibilities which are not supported by any evidence. See *The State v. Ibong Udo Okoko & Another* (1964)1 All NLR 423, *Queen v. Gabriel Adaoju Wilcox* (1961)1 All NLR 631, *Ileshi Onwe v. The State* (1975)9-11 S.C. 23 at 31-32.

The appellant was represented by counsel during his trial but there was no suggestion by him under cross-examination that PW1 was under age. Not even the learned trial Judge before whom PW1 testified considered him, from the record of proceedings, as a child. I am therefore unable to accept, in the absence of any concrete evidence, that PW1 was at all material times a child within the meaning of section 2(1) of the Criminal Procedure Law, Cap. 31, Laws of Eastern Nigeria, 1963, applicable in Abia State.

I should perhaps, stress that even if PW1 were established to be a child, and I do not so hold, the effect of such evidence of a child who gave sworn evidence without compliance with the necessary preliminaries stipulated in sections 154 and 182 of the Evidence Act is not fatal to the proceedings. Such evidence is not rendered invalid thereby but may be relied upon and treated as the unsworn evidence of a child which under the law requires corroboration. See *Okon and 2 others v. The State* (1988) 2 SCNJ (Pt.1) 45 (1988) 1 NWLR (Pt.69) 172 and *Simon Okoyomon v. The State* (1973) 1 NMLR 292. It therefore seems to me that where an irregularity has occurred in the taking of the evidence of a child, the correct approach is not to expunge or disregard such evidence but to see whether it is sufficiently corroborated by other evidence implicating the accused person.

In the present case, the evidence of PW1 was amply corroborated by the testimony of PW2, PW3 and PW4. On the evidence of PW4 in particular, it was the appellant who told the police the spot where he dropped the knife with which he stabbed PW1 and the deceased. The police proceeded to this spot and indeed recovered the knife therefrom. I cannot therefore accept the contention of the appellant that the trial court was wrong to have convicted the appellant on the evidence of PW1 or that the court below was in error to have affirmed the conviction of the appellant by the trial court.

On the issue of alibi raised by the appellant, the law is settled that where an accused person has disclosed an alibi before his trial and the prosecution has taken no available steps to verify or disprove it, the court may hold that the prosecution has failed to prove its case beyond all reasonable

doubt. See *The State v. Edward Obinga and others* (1965) NMLR 172, *Osuolale and others v. commissioner of Police* (1974) 4 ECSLR 451, *R. v. Anthony Johnson* 46 Cr. App. R. 55, *R. v. Modem* 12 WACA 224, *Ozaki v. The State* (1990) 1 NWLR (pt. 124) 92 at 108 and *Adedeji v. The State* (1971) 1 All NLR 75. This is because failure by the Police to investigate and check the reliability of an alibi, properly and timeously put up by an accused person, would raise reasonable doubt in the mind of the court and must in an appropriate case lead to the quashing of a conviction imposed in disregard of this requirement. See *Onafowokan v. The State* (1987) 3 NWLR (Pt. 61) 538.

The point must be made that even where the facts of a case are peculiarly within the knowledge of an accused person, there is no rule of law that the burden of establishing any defence based on those facts shifts to such an accused person. See *R. v. Spurge* (1961) 2 All E. R. 688 at 692, *R. v. Ainadu Adamu* (1954) 10 WACA 161 at 162, *Woolmington v. D.P.P* 1935 A.C. 462 etc etc. While the onus is on the prosecution to prove the charge against an accused person, the latter has the duty of bringing the evidence on which he relies for his defence of alibi. See *Lawrence Odidika and Another v. The State* (1977) 2 S.C. 21 at 24, *Yanor and Another v. The State* (1965) NMLR 337, *Nwosisi v. The State* (1976) 6 S.C. 109 etc. The law on the defence of alibi is that the jury should be directed that they should not disregard evidence of alibi unless there is stronger evidence against it and the burden is on the accused person to adduce evidence on which he relies for the defence. See *Obiode v. The State* (1970) 1 All NLR 35 at 40, *Yanor and Another v. The State*, *Supra*, *Ibe v. The State* (1992) 5 NWLR (Pt 244) 642 at 649, *Nwosisi v. The State supra* etc.

But in raising the defence of alibi, an accused person has the evidential burden or the duty to adduce reasonably sufficient particulars or facts as to his whereabouts at the time of the commission of the alleged offence since these are matters peculiarly within his knowledge. See *Akile Gachi v. The State* (1965) NMLR 333 and *Obiode v. The State* (1970) 1 All NLR 35. The prosecution or indeed the Police are by no means magicians nor are they expected to go on a wild goose chase and with no sense of direction in order to investigate a bare or an alleged alibi with no facts in support thereof. An accused person selling up the defence of alibi is duty bound to provide to the Police, and this at the earliest possible opportunity, some concrete information relating to the place he was and the persons if any, with whom he was to assist them investigate his plea. See *Okosi v. The State* (1989) 1 NWLR (pt. 100) 642, *Adio v. The State* (1986) 3 NWLR (pt. 31) 714 and *Eze v. The State* (1976) 1 S.C. 125. Where, however, an accused person did not raise the defence of alibi before his trial

but in his evidence at the trial, the prosecution would naturally not be obliged at that late stage of the proceedings to investigate such a plea and would be entitled to rely on the evidence of its witnesses to disprove the alibi. See *Fatoyinbo v. Attorney-General, Western Nigeria* (1966) WNLR 4 at 6, *Ntan v. The State* (1968) NMLR 86 at 87-88, *Umani v. The State* (1988) 1 NWLR (Pt.70) 274. And where the prosecution adduces sufficient, acceptable and credible evidence to fix the accused at the scene of crime at the material time, the latter's plea of alibi is thereby logically demolished. See *Patrick Njovens and Others v. The State* (1973) 1 NMLR 331 and *Danlami Ozaki v. The State* (1990) 1 NWLR (Pt.124) 92.

In the present case, the appellant in his written statement to the Police merely claimed that "*he arrived Obilaji, Umuede Nkpa on 1/3/81 at 4.30 p.m.*" but gave no further details. He therefore furnished the Police with no sufficient particulars that would enable them to investigate his plea of alibi. It was only in his testimony before the court that he belatedly claimed he was at Ahoada town in Rivers State from where he returned to Obilaji Umuede Nkpa on the 1st March 1981. The learned trial Judge disbelieved him on the point.

As against the said claim by the appellant was the clear and accepted evidence from the prosecution that the appellant was not only present at the scene of crime at all material times but that he single handedly committed the brutal and senseless murder of the deceased by giving her several stab wounds because the deceased turned down his love overtures. There was, in the circumstance, ample evidence from the prosecution which unmistakably fixed the appellant at the scene of crime at all material times thus demolishing his plea of alibi which the learned trial Judge, quite rightly, rejected. I entertain no doubt that the court below was right in upholding the conviction of the appellant by the trial court. It is for the above and the more detailed reasons contained in the lead judgment of my learned brother, Ogwuegbu, J.S.C. that I, too, dismiss this appeal as totally un meritorious and affirm the decisions of the courts below.

H