

**SUPREME COURT OF NIGERIA**  
13TH SEPTEMBER, 1996. SC. 10/1993  
**CORAM:- S. M. A. BELGORE, A. B. WALI, I. L. KUTIGI,**  
**E. O. OGWUEGBU, Y. O. ADIO, JJSC.**

IFEANYI CHUKWU ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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***CRIMINAL PROCEDURE*** - Alibi - Where the plea is properly set up - It is not to be treated lightly - As the onus is on the prosecution to disprove it.

***CRIMINAL PROCEDURE*** - Alibi - Presentation of all materials needed to investigate the alibi - Failure to disprove the alibi - Whether fatal.

***EVIDENCE*** - Contradictions - In prosecution's case - Whether disregarding them - Will be perverse.

***MURDER*** - Alibi - Where not investigated - And the prosecution's case is Ml of contradictions - The conviction would be set aside.

**FACTS**

Before the Ibadan High Court, the appellant was charged and tried for the murder of one Aliu Mohammed, a night guard in the service of PW1. He was convicted as charged by the trial Court. The appellant raised a plea of alibi, supplied the police with all the material facts for the necessary investigation of the plea. But the police failed to properly investigate the defence of alibi. The prosecution's case was full of material contradictions.

Being dissatisfied with his conviction, appellant appealed to the Court of Appeal which affirmed his conviction by a majority judgment. Appellant has further appealed to the Supreme Court raising two issues.

**ISSUES FOR DETERMINATION**

“1. Whether the appellant was properly identified by P.W.1 and P.W. 3 in circumstances which were faulty and unsatisfactory as to warrant, or support conviction.

2. Whether the allegation against the appellant was properly investigated by the police and if a proper investigation of the allegation against the Appellant would have supported the charge, trial and conviction of the appellant murder.”

**HELD** (Unanimously allowing the appeal per lead judgment of **BELGORE JSC**)

***Alibi - Where the plea is properly set up***

1. The plea of alibi, when set up, sends the prosecution on a very important assignment. The police must investigate the alibi. Alibi as a plea presupposes that the accused not only claims he never committed the offence but that he was not at all at locus delectis. In an offence requiring physical presence, an alibi set up by the accused must be investigated by the prosecution. The alibi must not set the police on a prowl, like blandly saying the accused was not at the scene without details of his where about at the time of the commission of the crime in question. It must be definite as to time, place and the persons who know about the accused's whereabouts. Alibi is not to be treated lightly because the onus is on the prosecution to disprove it. (p. 1563 G)

***Presentation of all materials needed to investigate alibi***

2. In the present case the appellant presented the police with all they needed to investigate the alibi, to wit the claimed he was at home with his sister and mother; 2. that one co-tenant, Iya Ibeji, saw him and woke him up to switch off his radio; 3. he gave his address. P.W.7 went to the address, saw all these people - Iya Ibeji and the appellant's mother and sister but he testified that he forgot what they all told him. Certainly this witness, a police officer with criminal investigation section of the police did a bad job as it is either he never investigated the alibi or investigated it and did not like what he was told e.g. that the alibi was proved. This is fatal to the case for the prosecution as the alibi remained undisproved. (p. 1564 B)

***Evidence - Contradictions***

3. Thus with all these failures of the prosecution and shortcomings in the prosecution's case, Court of Appeal affirmed the decision of the trial Court. The evidence of P.W. 1 and P.W.2 are full of contradictions that it will be perverse to disregard the contradictions. The appellant was not arrested on 30th October but on 31st October 1986 by vigilantes led perhaps by P.W.3 whose evidence was full of contradictions that are irreconcilable as earlier explained. (p. 1564 F)

***Alibi - Where not investigated***

4. Finally, on the failure to investigate the alibi set up by the appellant and with the full particulars of his whereabouts' at the time of the commission of the heinous murder undisproved, the case for the prosecution cannot stand on

the evidence proffered at trial. For this reason and also for the shoddy identification by P.W.1, P.W.2 and P.W.3 on the contradictions in their individual evidence, I find great merit in this appeal and I allow it. (p. 1565 C)

## **NOTABLE POINTS OF INTEREST**

### **BELGORE JSC**

#### ***1. Material contradictions in evidence of prosecution***

Looking at the way and manner the appellant was accosted by P.W.3 and his friend who never testified coupled with all the contradictions, material contradictions as to the weapons used, dress of the appellant, role of P.W.2 after the crime and the manner the P.W.7 testified as an investigator who forgot the most essential things as to what material witnesses not called told him - it seems he even never took their statements - one is at a loss as to how prosecution's case could be proved. (p. 1563 F)

### **WALI JSC**

#### ***2. Where prosecution's evidence is contradictory on a material issue***

Where the prosecution's evidence is found to be contradictory on a material issue the court should give the benefit of that doubt to an accused person that stems from the non-credibility of such evidence and discharge and acquit him. The prosecution's evidence is contradictory and unreliable that no reasonable tribunal would base any conviction on it. The conviction of murder and sentence of death are unsafe and unsatisfactory. They therefore ought to be set aside and in place thereof to enter a verdict of acquittal and discharge of the appellant. (p. 1569 E)

#### ***3. Identification - When the quality of evidence is poor***

The calling out of the appellant by the police from among those that were being held in police custody with him afforded P.W. 1 as well as P.W.3 the automatic chance of his recognition. This is a serious irregularity which raised a lurking doubt that an injustice might have been occasioned thereby rendering the verdicts of the trial court and the Court of Appeal unsafe and unsatisfactory. Where the quality of identification evidence is poor the Judge should return verdict of not guilty unless there is other evidence which goes to support the correctness of the identification. The evidence of identification can be poor even though it is given by number of witnesses. (p. 1570 A)

## **REPRESENTATION**

Chief Chuks Muoma for the Appellant

M. O. Ishola, Principal Legal Officer (Oyo State) for the Respondent

**CASES REFERRED TO**

- Yanor v. The State (1965) NMLR 337, 341, 342  
 Adedeji v. The State (1971) 1 All N.L.R. 751  
 B Nwosisi v. The State (1975) 6 S.C. 109  
 Asemakaba v. The State (1965) NMLR 317  
 Gachi v. The State (1965) NMLR 333  
 Ameh v. The State (1972) 6 and 7 SC 27  
 Adebayo v. Mrs. Ighodalo (1995) 5 SCNJ 23  
 C Ojiako v. Ewuru (1995) 12 KLR (Pt. 36) 2197  
 Thomas H. Weeder (1980) 71 C.R. ANP RPTS 228

**LEAD JUDGMENT BY BELGORE JSC**

The appellant was convicted of murder in the High Court of Oyo State sitting at Ibadan. The Court of Appeal, by majority decision, upheld the conviction and sentence of death of the trial court; thus the appeal to this court.

The appellant was accused of murder of one Aliu Mohammed, a night guard in the service of Solomon Oluyemi, Akinlawon, P.W.1. In the early hours of 30th October, 1986, the P.W.1 was in bed but not asleep and he heard some noise like that of people jumping over his fence. From the adjacent house and he got up to have a look. His premises, according to P.W.1, was well lit. He went to one of the far rooms to peep and saw “two of the strange men” climbing up the flight of stairs of his house with the deceased pursuing them. The deceased was holding a stick and the strange men who had got near the kitchen got hold of some empty bottles and attacked the deceased after breaking the bottles by hitting him on the head. The sharp edges of the broken bottles were used to hit the deceased on the head until he fell down in a pool of blood. By that time (when the deceased fell down), according to P.W.1, his wife and children had joined him in shouting for help to the other neighbours. Some of the neighbours came out and so did some of the night watchmen in the neighbourhood.

The P.W.2, Julius Oladejo Ojeshina, a tenant of P.W.1 on the ground floor said he heard some commotion outside and heard the voice of the deceased warning some people against jumping over the fence into their premises and he (P.W.2) had to peep through the sliding doors. He saw some movement leading him and his family shouting “thief! thief !” in Yoruba language. Some men, according to him passed in front of the door to the staircase leading to the first floor where P.W.1 lived; he saw

the deceased running after them and later he heard the sound of breaking of glasses. The neighbours had started coming out. He said he saw the accused (appellant) in a black pair of trousers and a white long sleeved shirt as according to him, the place was well lit that night. He “wanted to come out through the front door when ..... saw the present accused with a crate of Coca Cola bottles which he was throwing at the front B door to keep me inside.” According to this witness, this accused (appellant) ran towards the gate and after attempting to force it open and failed, he then called “Ayo, Ayo” and he and the person he called Ayo ran to the fence, the appellant thereafter helped “Ayo” to jump over the fence and the two ran away threatening to come back. They ran towards the University College C Hospital Secretariat Road, Ibadan. It was then the P.W.2 opened his door and “ran to the gate to open” it for his neighbours. He saw the deceased on the ground unconscious, bleeding from the head. Police on patrol later arrived at the scene and took the deceased to the Hospital, i.e. University College Hospital, Ibadan, where he was admitted but died between 0930 hours and 1000 hours. According to both the P.W.1 and P.W.2, the whole incident of the attack by the marauders occurred around 0130 and 0200 hours of 30th October, 1986. The two witnesses testified that they later heard there was somebody arrested and went to the police station where they saw the appellant and identified him as one of those E that attacked their house the night of the incident, but that was on 31st October, 1986. According to P.W.2 the appellant that he was able to identify at the police station was not wearing the same dress he wore when their house was attacked. The witness who said he came out to open the gate for the neighbours confessed under cross-examination that F he actually never came out when confronted with the statement he made to the police about his not going out. It is instructive to quote part of the evidence of this P.W.2 in cross-examination which runs as follows:

*“I made the statement now shown to me but I must have been confused when making the statement as I did not go out that night. I G would not know that our neighbours and other night guards arrested the first stranger they saw the following night because the robbers threatened to come back.”*

The P.W.1 saw three suspects attacking the house but he never described the persons he saw and why he definitely identified the appellant P.W.3, H Jimoh Amoo’s testimony was that he saw the appellant with two men and sometime later he heard the shout of “thief! thief!” and ran to the place. He saw the accused throwing bottles at all the night watchmen around. The second day, at night, he saw the appellant and challenged

him and called the neighbouring watchmen by whistle and arrested him. He was particularly vigilant as the brigands promised to come back so that when he saw the man (appellant) on 31st October, 1986 barely twenty four hours after the attack of the previous night they had to arrest him. The appellant volunteered to take P.W.3 and the other guards to where he was coming from but they refused; the appellant kept on asking if they (the guards) would kill him. After the attack on 30th October, 1986, P.W.4 was the one that led a team of police to the P.W.1 's house on the distress call and not on patrol. The attackers had left the scene where he saw broken louvre glasses on the floor. The accused told P. W.3 he was a driver but he was obviously not believed. P.W.4, the policeman, believed the P.W.3 and the other "night watchmen" were vigilantes. However, P. W.5 testifying for the prosecution positively identified the appellant as a fellow driver and that the police brought him to his place of work around the end of October, 1986. This witness was not cross-examined as his testimony favoured the appellant.

The P.W. 7, the investigating police sergeant recovered from the appellant a "white shirt and a pair of old brown pair of trousers that he wore that night". He also recovered from the scene of crime empty "double barreled shell" and fifteen empty bottles of small stout in a crate. He also recovered a bunch of keys from the appellant. On cross-examination, the P.W.7, a police sergeant, left to investigate a serious crime, had this to say:

*"The accused told me he was a driver. I asked for his driving licence but he told me one of the night guards who arrested him had the driving licence. I did not take him to the fifth prosecution witness.*

*I am not the only investigating police office in this case. Sergeant Balogun is one of us.*

*I visited the house of the accused and there met a fat lady and an aged woman claimed to be the sister and mother of the accused respectively. The accused did not tell me he was at home when the incident in this case happened. I cannot now remember where the accused said he was going the fateful night when I asked him where he was in the night. I cannot remember now if the accused had told me he was at home with the members of his family during the night of the killing of the deceased. The sister and mother did not volunteer any statement to me as they speak Ibo and I only understand Ibo faintly. I did not ask the accused's sister and mother to make a statement as to whereabouts of the accused.*

*I did not take the statement of 5th prosecution witness. The Investigating Officer at the State Central Investigation Department did. I took the statement of the third prosecution witness. I speak a bit of Yoruba language. I speak Yoruba well but not fluently. I do understand Yoruba*

language.

*I followed the accused to his wife at the University of Ibadan premises. She confirmed the story of the accused that he was coming from her shop on the night of his arrest. I tried my best to find out where the accused was in the night of 29th to 30th October before I transferred the case to the State's Central Investigation Department. Re-Examination:- Nil.* B

When the appellant's house was searched there was nothing incriminating found therein. The police never took in writing the statement of the appellant's wife, sister and mother. The appellant gave evidence in his own defence apart from making statement to the police voluntarily. He was consistent throughout. He set up alibi that he was not at the scene of crime C when the crime took place. He met the vigilantes on 31st October 1986 when he was coming from his wife's shop; the P.W.7 went to his wife's shop but never told the court what transpired as to the alibi in his discussion with the appellant's wife. He (P.W.7) could not even remember what she told him or what the appellant's sister and mother told him, an incredible situation of D a police officer investigating a murder case.

The appellant described his encounter with P.W.3 and another night guard or vigilante as follows:

*"On my way home, I saw the 3rd prosecution witness and one other night guard sitting down. The third prosecution witness then called E me and asked me where I was coming from. I told him I was coming from my wife's shop at Agbowo where food and palm wine were being sold.*

*The third prosecution witness asked me my work and I told him I was a driver. He asked for something to show I was a driver.*

*I took out my driving licence from my back pocket and I showed F my driving licence to them. He saw my picture in the driving licence. The second night guard asked to see the driving licence but the 3rd prosecution witness said:-*

*"Se Driving Licence la maje ni", meaning "Is it driving licence we are going to eat" I understand Yoruba language. The other mate put G my driving licence in his pocket and the 3rd prosecution witness said -*

*"Ologbeni lojoko nibeyen" meaning "that I should go and sit down near them.*

*It was the third prosecution witness who put the driving licence H in his pocket and was walking away. That was why I told him and he began to blow his whistle and shout "Ole", meaning "Thief", "Thief". Many persons then came round and in spite of my plea that they should come with me to my house, they were not prepared to listen to me. The 3rd prosecution witness then hit me with a stick on the head. They were all*

*beating me up and later tied my two hands and my two legs respectively. One of the person then brought some quantity of cement which he put in water and gave me to drink. One person also said I should be given battery water. It was at that stage the police highway patrol then arrived, rescued me and took me to the Sango Police Station.*

**B** *The third prosecution witness first saw me and stopped me at about 9 p.m. When I was in the Police Station later, I made a statement to the police. I was charged with wandering as at that stage. I saw the 1st prosecution witness the following day at about 10. a.m. on 31st October, 1986. I was then in the cell in company of two others. Some of the persons that arrested me the previous night were at the police station before the 1st prosecution witness was around. Then the desk Sergeant asked who was the person arrested at Bodija, the previous day. I then stood up as I thought there was somebody to stand bail.*

**D** *When I stood up in the cell the people around began to shout "On niyen" "On niyen" meaning "That is He", That is He" The 1st prosecution witness then went away with the Sergeant."*

*The appellant maintained he was at home on the night of the murder and that on 31st October, 1986, he was accosted by P.W.3 and one other person whom the police even believed to be vigilantes around 2100 hours and not 2300 hours as was suggested in the cross-examination.*

**E** *The learned trial Judge, considering the evidence of P.W.2 who made conflicting statements as to whether he was present when the appellant was arrested and as to whether he opened his door to go to the gate to let in the neighbours after the attack on the deceased, found as a fact that this witness told one story to the police and another to the court. He held he would consider this witness' testimony along with the other evidence by the prosecution, but that it was negligible. On the alibi set up by the appellant, he held as follows:*

**G** *"As regards the evidence of the 3rd prosecution witness, it has been said he had a previous opportunity to meet the accused at 11 p.m. on 29th October, before seeing him again two hours later in the premises of the 1st and 2nd prosecution witnesses. That evidence appears to be set seriously against the alibi of the accused. It is trite law that a defence of alibi cannot be lightly disregarded. See R. v. Turner (1977) WRNLR 34.*

**H** *If however the prosecution produces stronger evidence against it, the defence will crumble - See R. v. Chadwick (1917) 12 CR. App. R 247 referred to with approval in Yanor & Anor. v. The State (1965) NMLR 337 at 341 to 343. See also Salisu & Ors. v. the State (1974) 4 U.I.L.R.401 cited by Learned State Counsel for the prosecution. In the case of Yanor*



& Anor. v. The State (1965) NMLR at 324, the Supreme Court said per Idigbe J.S.C.:-

*“Therefore while the onus is on the prosecution to prove the charge against an accused person, the latter has, however, the duty of bringing the evidence on which he relies for his defence of alibi; when such evidence has been adduced the court should consider it in the light of the evidence adduced by the prosecution in support of the charge against the accused and if in the end the court is unable to reach a decision on the question whether the evidence in support of the case for the prosecution is stronger than that produced in support of the alibi, the accused must be acquitted.”*

In view of the identification by the 3rd prosecution witness, it should be considered reasonable for the accused to call on his own sister, his mother and the said Iyabeji to testify on his behalf even though they have not made statements to the Police. It is to be said that in the Yanor case above, the trial court preferred the prosecution’s evidence that the accused was in the crowd that attacked the deceased and took part in the accused to the defence of alibi put forward by him. He was convicted and the Supreme Court upheld the conviction. The present accused should have, in my view, asked for witnesses summonses for his witnesses in support of the defence of alibi. See Adagba & 10 Ors v. C.OP. (1965) NMLR 475 at 478.

On identification of the appellant by P.W.1 and P.W.2, and also P.W.3, it is amazing that the unresolved contradictions in the evidence of these witnesses are believed. What the police recovered at the scene of crime was a crate of half bottles of stout, not of Coca Cola; further the bottles were not broken bottles. The police also found louvre panes, broken at the site, not Coca Cola bottles. The evidence of the appellant on oath and statements to the police has been consistent throughout. Looking at the way and manner the appellant was accosted by P.W.3 and his friend who never testified coupled with all the contradictions, material contradictions as to the weapons used, dress of the appellant, role of P.W.2 after the crime and the manner the P.W.7 testified as an investigator who forgot the most essential things as to what material witnesses not called told him - it seems he even never took their statements - one is at a loss as to how prosecution’s case could be proved.

**The plea of alibi, when set up, sends the prosecution on a very important assignment. The police must investigate the alibi. Alibi as a plea pre-supposes that the accused not only claims he never committed the offence but that he was not at all at locus delictis. In an offence requiring physical presence, an alibi set up by the accused must be investigated by the prosecution. The alibi**

**must not set the police on a prowl, like blandly saying the accused was not at the scene without details of his whereabouts at the time of the commission of the crime in question. It must be definite as to time, place and the persons who know about the accused's whereabouts. Yanor and Anor v. The State (1965) NMLR 337, 341, 342. Alibi is not to be treated lightly because the onus is on the prosecution to disprove it. In the present case the appellant presented the police with all they needed to investigate the alibi, to wit**

- 1. he claimed he was at home with his sister and mother;**
- 2. that one co-tenant, Iya Ibeji, saw him and woke him up to switch off his radio;**
- 3. he gave his address.**

**P.W.7 went to the address, saw all these people - Iya Ibeji and the appellant's mother and sister but he testified that he forgot what they all told him. Certainly this witness, a police officer with criminal investigation section of the police did a bad job as it is either he never investigated the alibi or investigated it and did not like what he was told e.g. that the alibi was proved. This is fatal to the case for the prosecution as the alibi remained undisproved. Adedeji v. The State (1971) 1 All NLR 751. Thus once the accused has put forward evidence to the prosecution to investigate the alibi it is for the prosecution to investigate the alibi and disprove it. If the prosecution faced with the defence of the alibi can investigate what the accused supplied as evidence, the court may believe or disbelieve upon the other evidence proffered by the prosecution, but failure to investigate is fatal to the case for the prosecution if the accused has supplied all the necessary facts Nwosisi v. The State (1975) 6 S.C. 109; Asemakahaa v. The State (1965) NMLR 317; Gachi & Ors. v. The State (1965) NMLR 333; Yanor v. The State (supra).**

**Thus with all these failures of the prosecution and shortcomings in the prosecution's case, Court of Appeal affirmed the decision of the trial court. The evidence of P.W.1 and P.W.2 are full of contradictions that it will be perverse to disregard the contradictions. The appellant was not arrested on 30th October but on 31st October 1986 by vigilantes led perhaps by P.W.3 whose evidence was full of contradictions that are irreconcilable as earlier explained. Seeing the appellant coming from Agbowo direction at night - it is immaterial whether it was at 9 p.m. or 11 p.m. - the P.W.3 stopped him aggressively in the vivid description of the appellant in his statements and evidence in court. The companion of P.W.3, who never testified, outrightly was not interested in the explanation of the appellant as to where he was**

coming from or whether he was a driver or not and he said:

*“Se driving licence la ma je ni?” (Is it driving licence we are going to eat?).*

He was there and then detained and the appellant was in real fear he might be killed or harmed as he kept asking them “are you going to kill me?” This is clear in the evidence. When P. W.3 seized his driving licence, the appellant struggled with him and P.W.3 and his other vigilantes descended on him shouting “thief” and “On niyen” in Yoruba, meaning “That is he” “That is he” (according to the Record of Proceedings at the trial court). He was beaten up and the police who came to the scene took him to their station for loitering. No identification parade was held and the whole attitude of P.W.1, P.W.2 and P.W.3 seemed to be to hold somebody responsible for the death of the deceased.

**Finally, on the failure to investigate the alibi set up by the appellant and with the full particulars of his whereabouts at the time of the commission of the heinous murder undisproved, the case for the prosecution cannot stand on the evidence proffered at trial. For this reason and also for the shoddy identification by P.W.1, P.W.2 and P.W.3 on the contradictions in their individual evidence, I find great merit in this appeal and I allow it** I set aside the decision of the Court of Appeal which affirmed the conviction and sentence of death passed by the trial court. In its stead enter a verdict of E discharge and acquittal.

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### WALI JSC

I have been privileged to have a preview of the lead judgment of my learned brother Belgore JSC, in which he has dealt with the issues F raised in this appeal spaciously. I therefore propose to indicate with comparative brevity the reasons why I concur in his conclusion.

The complaint against the appellant by the prosecution was that in the early hours of 30th October, 1986, he in company of two other persons in an attempt to rob one Solomon Oluyemi Akinlawon, P.W. 1 G jumped into his house from the neighbouring premises. After jumping into the house of P.W.1 they climbed into the 1st floor where he was living together with his family. The deceased Aliu Mohammed who was the night guard of P.W.1 and on duty at the time, chased the appellant and his gang. He was then carrying his stick when the appellant and his gang H noticed that the deceased was pursuing them. They took some bottles from a coca-cola crate within the premises broke them and attacked the deceased with the same causing him fatal injuries on the head and body.

The appellant and his gang in trying to escape ran to the front

gate of the premises which was then locked, and having failed to force it open, they escaped by jumping over the wall fence. Meanwhile both P.W.1 and other inmates of the premises were shouting for help which attracted their neighbours to run to their aid. The police later arrived at the scene and took the injured night guard to the University College Hospital Ibadan where he later died.

On the same day at about 9 p.m. the appellant was passing through the same area when he was accosted by P.W.3 and his co-night guard who subsequently arrested him. He was later charged with the murder of the deceased, tried, convicted and sentenced to death.

The appellant's story was that he was returning from his wife's food shop at Agbowo when he was accosted by P.W.3 and his companion. They arrested him, beat him up and tied his two hands and two legs. It was at that stage that the police highway patrol arrived at the scene and rescued him and took him to the Sango Police Station Ibadan. He was charged with wandering. While the appellant was in the cell with other inmates at about 10 a.m. on 31st October, 1986, the desk police sergeant asked who was the person arrested at Bodija the previous day. The appellant responded by standing up and immediately thereafter the people around began to shout that he was the one. Among those around were P.W.1, P.W.3 and P.W.2. P.W.1. went with the police Desk Sergeant after the appellant was identified.

Against his conviction by trial court, the appellant appealed to the Court of Appeal. His appeal was dismissed by a majority decision of two to one.

The appellant has now further appealed to this court against the majority decision.

In resolving the appeal against the appellant the Court of Appeal adopted the issues formulated in the respondent's brief to wit:

1. Whether the Appellant was properly identified in the circumstances of this case.

2. Whether the defence of Alibi put up by the Appellant was adequately considered by the learned trial Judge.

3. Whether the conflict in the statement of P.W.2 and his evidence in court is enough to create doubt in the evidence produced by the prosecutor.

In the lead judgment of the Court of Appeal by Ayo Salami JCA and concurred in by R.D. Mohammed JCA, issues 1 and 2 were answered in the affirmative, while issue 3 was answered in the negative.

In the appellant's brief filed in this Court, the following issues

were formulated:-

*“1. Whether the appellant was properly identified by P.W.1 and P.W.3 in circumstances which were faulty and unsatisfactory as to warrant or support conviction.*

*2. Whether the allegation against the appellant was properly investigated by the police and if a proper investigation of the allegation against the appellant would have supported the charge, trial and conviction of the appellant for murder.*

As I said earlier my learned brother Belgore JSC has treated the two issues with thoroughness, and what I am going to contribute here is only to support and emphasize his articulate reasoning and admirable conclusions on the said issues.

In the brief filed by learned counsel for the appellant, Chief Chuks Muoma which he forcefully and admirably elaborated in his oral submissions, he correctly made the point that neither P.W.3 in their respective statements to the police gave any description of the appellant which would have enabled either of them to identify him.

In the evidence of P.W.1 and the statements he made to the police he did not give the slightest description of the appellant to enable him either recognise or identify him when he later saw him. All he said on this issue of identity is as follows:-

*“My premises were well lit. I went to the last room of my house and then saw two of the strange men climbing up the flight of stairs of my house and my night guard pursuing them. My night guard was holding his stick to strike them. The men got to the rear side of my kitchen, got hold of some empty bottle from the coca cola drinks crate at the back of the Kitchen, broke some bottles on the railing and attacked the night guard with the broken bottles by hitting him on the head with the sharp edges of the broken bottles until the night guard fell down in a pool of blood.”*

X X X X X X X X X XXXXXX XX X

*“At that stage, the present accused came to the main door of the house, shook it vigorously but the door did not give way. The front of the house was also well lit as there were three electric lamps there as a result of which I could see the accused clearly. The accused could not open the door, but then he took some bottles and began to use them to break the window pairs of the doors of the house. He broke six pairs of the window. By that time, the neighbours and the other night guards had approached our gate but the gate to the premises was locked. The accused then went back to the fence and jumped over it to the adjacent premises in company of his two other accomplices with whom he had earlier jumped into my*

*premises. He and the other accomplices went through the other premises where blocks were then being made and walked into the main road the, University of Ibadan Secretariat Road in front of our house. The accused and his accomplices continued to threaten to come back to my house again."*

P.W.3, the other witness on whose evidence the learned trial Judge relied on as regards the recognition or identification of the accused, said thus:

*"I remember 30th October, 1986. About 11 p.m. in the night previous to the incident, the accused came to us night guards. There were two of us, night guards. We challenged the accused and his two other companions then and asked them where they were coming from. The accused then asked us if we would arrest a robber if we found one. We later went to the deceased night guard and left him for our beats. Soon after, we began to hear the shout of "thief ' .*

*We night guards went to the direction of the boy and came to the gate of the 1st and 2nd prosecution witnesses where we found the gate shut. We found the present accused then within the premises by the gate asking us if we were about to shoot. Some other neighbours were around. When we found the accused by the gate he was throwing out bottles at us night guards and some other neighbours. It would then be about 1 a.m. I could see what was going on because I was outside the premises. Some police men later came to the scene and took away the deceased. It was during the following night that we saw the accused and arrested him. When he got to where he first saw us the previous night he threw a bottle at the spot. It was then I told my co-workers that that man had come again. When he got to where we were, we stopped him and arrested him".*

F Reading through these pieces of evidence there was no iota of the appellant's description in them.

P.W.1 did not state the angle he was standing to the gate and the distance which enabled him to identify the appellant. He did not also say that he came to the assistance of P.W.3 and his colleague when the latter were apprehending the appellant. This is a serious contradiction to the testimony of P.W.3 in which he said under cross examination.

*"We are particularly vigilant during the night of 30th to 31st October, 1986 as the robbers promised to pay a return visit. The 1st and 2nd prosecution witnesses joined in helping us to arrest the accused when he was arrested."*

It was also part of the prosecution's evidence that empty bottles contained in a coca cola kept in P.W.'s house were picked by the assailants including the appellant, broken and used in causing fatal injuries to the deceased. This was the evidence given by P.W.1 and P.W.3. But the

evidence of P.W.4. Inspector of Police Olumide Kayode contradicted that P.W.1 and P.W.3. He testified thus:

*"I inspected the premises of the houses and saw broken pieces of louvre glasses in the premises."* ‘

P.W.4 was among the team of the policemen that visited the scene of the Crime. He did not say that he saw pieces of broken bottles as asserted by B P.W.1 and P.W.3.

P.W.7, Sergeant Fidelis Ofana said in his evidence that:

*"I remember 31st October, 1986. On that day at about 1 p.m. I was on duty when a case of murder involving the death of Aliu Mohammed a night guard at Irepodun Street - the house of the 1st prosecution witnesses was referred to me for investigation..... I later visited the scene in the company of the informant - 1st prosecution witness ..... He also showed to me empty broken bottles used on the deceased."*

The same witnesses later in his evidence said:-

*"In the course of my investigation ..... I took over fifteen small stout bottles found at the scene. The empty bottles were allegedly used by the assailants."*

This is another serious contradiction in the prosecution's evidence. The witness said he was shown pieces of broken bottles at the scene by P.W.1 but what he said he collected and tendered in evidence E were "small empty stout bottles found at the scene." He did not say any of the small bottles of stout was broken.

Where the prosecution's evidence is found to be contradictory on a material issue, the court should give the benefit of that doubt to an accused person that stems from the non-credibility of such evidence F and discharge and acquit him.

The prosecution's evidence is contradictory and unreliable that no reasonable tribunal would base any conviction on it. See Ameh v. The State (1972) 6 and 7 SC; Kalu v. The State (1988) 4 NWLR (Pt.90) 503, Ojo Adebayo v. Mrs. F. Ighodalo (1996) 5 NWLR (pt.450) 507; (1996) 5 SCNJ 23 and Ojiako v. G Ewuru (1995) 12 KLR (Pt. 36) 2197; (1995) 9 NWLR (pt 420) 460.

The conviction of murder and sentence of death are unsafe and unsatisfactory. They therefore ought to be set aside and in place thereof to enter a verdict of acquittal and discharge of the appellant.

The appellant in his uncontradicted and undiscredited evidence H did not only deny being a participi criminis in the offence committed, but gave a comprehensive account of his movements in his cautioned statement to the police which is also consistent in all relevant materials with his evidence in court. He afforded the police in good time, the opportu-

nity to investigate the alibi he raised, which they woefully failed to do.

The calling out of the appellant by the police from among those that were being held in police custody with him afforded P.W.1 as well as P.W.3 the automatic chance of his recognition. This is a serious irregularity which raised a lurking doubt that an injustice might have been occasioned thereby rendering the verdicts of the trial court and the Court of Appeal unsafe and unsatisfactory.

Where the quality of identification evidence is poor the judge should return a verdict of not guilty unless there is other evidence which goes to support the correctness of the identification. The evidence of identification can be poor even though it is given by number of witnesses. The witnesses may only have had the opportunity of a glance or a longer observation made in difficult conditions - See Turnbull & Ors. (1976) 63 CRR. 132; (1977) Q.B. 224 and Thomas H. Weeder (1980) 71 C.R. ANPR pts 228.

Apart from the unusual recognition or identification of the appellant, there was no other evidence which went to support the correctness of the identification. The prosecution even visited the home of the appellant in search of a connecting evidence with the attempted robbery but found none - See Adamu & Ors. v. The State (1991) 4, NWLR (Pt187) 530.

The appellant in his statement to the Police gave the particulars of his whereabouts on 30th October, 1986. He stated:-

*"Yesterday 30th October, 1986 at about 8 p.m. I closed from Dugbe with the vehicle which I drive for my master named Sumaila although I can not now remember the registration number but I can identify it at the owners premises anything time. I went straight from Dugbe to Sango Ibadan where I washed the vehicle and took it to the owner at Orita U.I. at 9 p.m. of 30/10/86. I left his place to my wife's shop at the same Orita U.I. She is by name Ikem and she sells food and drinks. I left her shop at about 11 p.m. and going home on foot to Bodija to Iso Pako where I lived. On getting to Irepodun area Bodija Ibadan, I met and saw two nightguards. I was halted and I stopped and they asked me where I was coming from and I told them I was coming from my wife's place at Orita U.I. and that I am a Professional driver."*

The appellant substantially repeated the same story in his evidence in Chief, the excerpt of which reads:-

*"On that day I was coming from my wife's shop. My wife's name is Ikem Chukwu, two of us were returning to my house that day. The two of us were myself and Ikem. I was waiting for her in our shop until we closed. She was later told me she was not following me again. She saw me off for some distance. That was why she did not come with me to the house that night. On*



*my way home, I saw the 3rd prosecution witness then called me and asked me where I was coming from. I told him I was coming from my wife's shop at Agbowo where food and palm wine were being sold.*

*The third prosecution witness asked me my work and I told him I was a driver."*

Despite vigorous cross examination by the prosecution the ap- B  
pellant remained firm and consistent in his evidence, which remained  
undiscredited. There was no serious attempt by the prosecution to inves-  
tigate the alibi raised in good time by the appellant. The primary purpose  
of an alibi is to alert the prosecution to the facts raised therein and upon  
which an accused person may rely as a defence; so that the prosecution C  
may have the opportunity before the trial of making such investigations  
as they think fit. *Ozaki v. The State* (1990) 1 NWLR (Pt. 124) 92.

It is for these and the fuller reasons in the lead judgment of my  
learned brother Belgore JSC that I also hereby allow the appeal and enter  
a verdict of acquittal and discharge in the appellant's favour. D

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#### KUTIGI JSC

I read in advance the judgment just delivered by my learned brother  
Belgore, J.S.C. with which I agree. There is no doubt at all that the Police  
Investigators messed up the investigation as revealed by the evidence. The E  
blunders highlighted in the lead judgment were fatal to the prosecution's  
case. I will therefore allow the appeal and set aside the decisions of the lower  
courts but affirm the minority judgment of Ogundere, J.C.A. of the court be-  
low. The appellant is discharged and acquitted.

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#### OGWUEGBU JSC

The judgment just read by my learned brother Belgore, J.S.C.  
was made available to me in draft. I agreed with his reasoning and con-  
clusion. I adopt them as mine. I hereby allow the appeal, set aside the  
conviction and sentence of death imposed on the appellant. G

A verdict of discharge and acquittal is hereby entered by me.

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#### ADIO JSC

I have had the benefit of reading, in advance the judgment just  
read by my learned brother, Belgore, J.S.C., and I agree that this appeal H  
has merit and I too allow it I abide by the consequential orders.

Appeal allowed.