

SUPREME COURT OF NIGERIA
17TH APRIL, 1998. SC. 104/1996
CORAM: S. M. A. BELGORE, M. E. OGUNDARE, E. O.
OGWUEGBU, U. MOHAMMED, A. I. IGUH, JJSC.

AUGUSTINE ONUCHUKWU AND 2 OTHERS APPELLANT

V.
THE STATE RESPONDENT

***APPEALS** - Evaluation of evidence - Where there are clear contradictions in the evidence adduced by the prosecution witnesses - And the trial judge erroneously formed the impression that they are witnesses of truth - The appellate Court is entitled to re evaluate the evidence and make its own assessment.*

***ALIBI** - Onus - Is on the accused to prove where he was at the time of the incident - And once the defence is put up it is for the Police to investigate it properly - As failure to do so could lead to the conviction being quashed.*

***ALIBI** - Plea of alibi - Is demolished if the Prosecution adduces sufficient evidence - To fix the person at the scene of crime at the material time - But in the present case there was no such evidence.*

***CRIMINAL PROCEDURE** - Contradictions in evidence - Such that it cast reasonable doubt upon the guilt of the accused person - The accused person should not be convicted on the basis of such unreliable evidence.*

***CRIMINAL PROCEDURE** - Conviction - Could only follow where the charge against an accused has been proved beyond reasonable doubt - And it is the duty of the prosecution to prove the prisoner's guilt - Once there is reasonable doubt created by the available evidence the prisoner is*

entitled to an acquittal.

FACTS

The three appellants were convicted together with two others by Olike J. of Anambra State High Court for the offence of murder, contrary to s. 319 (1) of the Criminal Code. The fact which gave rise to this case is that there was a land dispute between the 1st appellant and his father, (the 4th accused who died in prison during the trial) on the one part and the 9th prosecution witness on the other part. The dispute led to a serious fight during which the 4th accused was injured. The 1st appellant, on hearing about the fight, made a report to the police. The Police arrested PW 9 and charged him to a Magistrate's Court in Ihiala for the offence of assault. The deceased, Samuel Ikejiobi stood surety for P.W.9 and he was released on bail. It was alleged that the act of the deceased angered the 1st appellant who issued a warning to the deceased to withdraw his suretyship for P.W.9 so that the court would revoke his bail and keep him in custody pending trial. The deceased refused to do so and this angered both the 1st appellant and 4th accused. On the 27th February, 1985, at about midnight, the deceased was shot dead in his house and the house was set on fire as a result of which the wife of the deceased and his two children were burnt to death. The matter was reported to the Police and after the completion of investigation, 8 accused persons were charged before the High Court with the murder of Samuel Ikejiobi (the deceased).

The 4th and 5th accused persons died in prison during trial. The 8th accused was discharged and acquitted by the High Court. The 1st, 2nd, 3rd, 6th and 7th accused persons were convicted and each of them sentenced to death. On appeal to the Court of Appeal the 6th and 7th accused who were 4th and 5th appellants before that court were discharged and acquitted. The appeals of the 1st 2nd and 3rd appellants were dismissed. Being dissatisfied, they have now appealed to the Supreme Court against the conviction and sentence passed on each of them. From the grounds of appeal and the issues raised by both the appellants'

and the respondent's counsel, the court found the following issues sufficient in determining the appeal.

ISSUES FOR DETERMINATION.

1. Whether the trial court as well as the Court of Appeal evaluated the evidence tendered before it at all/properly.

2. Were there material conflicts in the statements and evidence of prosecution witnesses which rendered their various pieces of evidence unreliable and can the conviction of the appellants based on such unreliable evidence be sustained and upheld.

3. Whether the defence of alibi raised by the Appellants in this case could not avail them given the circumstances of this case.

4. Whether the court below was right in upholding the conviction of the appellants based on remote, conflicting, doubtful and unreliable circumstantial evidence of the prosecution witnesses where there was no direct evidence whatsoever that the death of the deceased resulted from the overt act or omission of the appellants.

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

Evaluation of evidence

1. The learned trial judge cannot be right to form the impression that both PW1 and PW2 are witnesses of truth in view of the clear contradictions in the evidence each of them adduced before the trial court. It is settled law that where a trial judge fails to advert his mind to the evidence on record, the Court of Appeal is entitled to examine the evidence and make it's own assessment provided that such exercise does not call for making decision on the witnesses credibility - Okonofua and Anor. v. The State (1981) NSCC 233. I find it pertinent to re-evaluate the evidence of these key witnesses in view of the submission of each of the learned counsel for the appellants on the issue of conflicts in the evidence they respectively adduced for the prosecution. If the learned trial judge had evaluated the evidence adduced by the prosecution witnesses properly he would

have found the evidence of PW1 unreliable as well. But learned trial judge found that he was a witness of truth and believed him. The Court of Appeal affirmed such a finding. This is a witness who was said to be an eye witness but did not report what he saw soon after the incident until after about two months when the police invited him and recorded his statement. (p. 826 H & 828 F)

Contradictions in evidence

2. Where there are such contradictions and inconsistencies in the evidence before a Criminal Court, such as to cast reasonable doubt upon the guilt of the accused person, such accused person should be given the benefit of the doubt and not be convicted on the basis of such unreliable evidence - Onubogu and Anor. v. The State (1974) 9 S.C. 1; Akosile v. The State (1972) 5 S.C. 332. It is evidently clear that the identity of those who killed Samuel Ikejiobi and put his house on fire had not been known by the people of Umuorum Umudara Village where the deceased lived. Originally, the villagers suspected that the murder and arson were caused by unknown thieves. Hence the statement of PW2, the little girl, to the police that the intruders came and asked Samuel's wife to give them money. PW3 who received the report of the incident from PW1 and two others went and told the police that an unknown thief or thieves murdered Samuel Ikejiobi and set his house on fire killing his wife and daughter. It was after about two months when the investigation gathered momentum that witnesses came and concocted stories that they identified the appellants and others carrying guns, jerrycans and machetes going towards the house of the deceased. In the process of fabricating stories they contradicted themselves. It is my view that their evidence is unreliable. (p. 830 B)

Alibi - Onus is on accused to prove where he was

3. For whatever it is worth, once an accused put up a defence of alibi it is imperative that the defence must be investigated. If an accused raises a defence of alibi the onus is on him to prove where he was at the time of

the incident and he has to call evidence to support his defence of alibi.¹ See Odili v. The State (1977) 1 SC. 1. Once a defence of alibi is put up it is for the police to investigate it properly because failure to do so could raise reasonable doubt in the mind of the tribunal and lead to quashing the conviction - Onafowokan v. The State (1987) 3 NWLR (Part 61) 538. B PW. 11 gave a feeble explanation on the alibi wherein he said that he investigated the defence of alibi put up by the 1st appellant when he visited his house at Okija and failed to trace the landlord and the lady teacher. The Court of Appeal referred to the evidence of PW. 1 and PW. C 2 who said they saw the 1st appellant at the house of deceased when the house was attacked and agreed with the trial court that the defence of alibi has collapsed - See Okosun v. Attorney General of Bendel State (1985) 3 NWLR (pt. 12) 283. Those witnesses (PW. 1 and PW. 2) have D been found in this judgment to have made such contradictory statements that no reasonable tribunal could convict on their evidence. This has left the defence of alibi put up by the 1st appellant intact. (p. 831 E)

Plea of Alibi - How demolished

4. Failure therefore to investigate the defence of alibi put up by the 3rd appellant has cast reasonable doubt on the reliability of the case for the

¹ A comparison between this statement and that of his lordship, Ogwuegbu JSC, at p. 844 F C and some other past SC decisions might make one wonder whether the apex Court has made contradictory statements on this issue. That may not be the case. In Peter v. The State (1997) 3 KLR (pt 49) 487, the Court held that the onus of proving alibi is on the accused. A consideration of Ogwuegbu JSC's statement at p. 844 C "that no burden is G placed on an accused to prove his alibi..." shows that the onus said to be on the accused is simply that of the accused establishing where he was. It is the failure of the prosecution to disprove the alibi by strong evidence that would make the court hold that the alibi has H been proved and not just the mere evidence by an accused as to where he was. Other recent SC decisions on alibi are:- Otti v. The State (1993) 6 KLR 1; Hausa v. The State (1994) 11 KLR 164; Onyegbu v. The State (1995) 4 KLR 978; Kwaghshir v. The State (1995) 4 KLR 777; Adele v. The State (1995) 2 KLR 426; and Chukwu v. The State (1996) 9 KLR (Pt. 44) 1555.

prosecution. A plea of alibi is demolished if the prosecution adduces sufficient evidence to fix the person at the scene of crime at the material time - Njovens and ors. v. The State (1973) 5 SC. 17. In the case in hand there is no evidence reliable to fix the appellants at the scene of the crime.

B (p. 832 H)

Criminal procedure - Conviction

5. It is unfortunate that some people have lost their lives in this criminal act. But it is a cardinal principle of justice that conviction could only follow where the charge against an accused person has been proved beyond any reasonable doubt. Throughout the web of criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. Once there is reasonable doubt created by the evidence given the prisoner is entitled to an acquittal. In consequence, it is my view that the doubt which manifested itself in the conflicting evidence of the prosecution witnesses must be resolved in favour of the appellants. (p. 833 C)

E

NOTABLE POINTS OF INTEREST

BELGORE JSC

1. When failure to investigate alibi will ground acquittal

The law on the issue of alibi is now clear. Once an alibi is unambiguously set up - whereby the accused person states clearly where he was at the time of the commission of the crime in question, with persons who were with him at that place, or who were aware of his presence there, well outside the locus criminis, the alibi must be investigated. Eze vs. State (1976) 1 SC. 125. To dismiss the alibi properly set up in this case with a wave of hand as "unreliable and I do not believe it", the police investigator abandoned a monumental duty and this renders the alibi uncontradicted. In such a situation the accused person's story must be believed and he will be entitled to discharge and acquittal. (p. 833 H)

OGUNDARE JSC

2. Ascription of credibility to a witness - Whose function

The two Courts below saw nothing wrong in the conduct of the prosecution and accepted PW11's disbelief of a witness who had not testified in court. I must say I am puzzled by the patronizing attitude of the Courts below to the prosecution in this respect. I would think that the ascription of credibility to a witness is the function of the court and not a police investigator. As it was in this case, however, the trial court condoned this glaring usurpation of its power. I see this as a dangerous development in the area of criminal justice. And it must be frowned at and not encouraged. (p. 840 E)

C

OGWUEGBU JSC

3. Alibi - No Burden of proof is placed on an accused person

No burden is placed on an accused person to prove his alibi once he has given the particulars of his whereabouts early. Where an alibi is set up as in this case, the primary onus of establishing the guilt of the accused person is on the prosecution. Only the evidential or secondary burden is on the appellant to adduce some evidence of where he was at the material time. The three appellants at the earliest opportunity gave the police reasonable information as to where they were and the persons with whom they were at the time charged. See Okosi & Or. v. The State (1989) 1 N.W.L.R. (Pt. 100) 642, Stanley v. Liddle (1928) 21Cr. App. R. 3 at 13 and Gachi v. The State (1965) N.M.L.R. 333. (p. 844 C)

D

F

REPRESENTATION

Chief Chidube Ezebilo for the 1st Appellant

Chief O. B. Onyali for the 2nd Appellant

C. C. Ezekwem for the 3rd Appellant

A. I. Agha, Director of Planning, Research and Statistics, Ministry of Justice, Awka, for the Respondent

G

CASES REFERRED TO

Okonofua v. The State (1981) NSCC 233.

Onubogu v. The State (1974) 9 S.C. 1

Akosile v. The State (1972) 5 S.C. 332.

H

Okosun v. Attorney General of Bendel State (1985) 3 NWLR (pt. 12) 283.

Odili v. The State (1977) 1 SC. 1.

Onafowokan v. The State (1987) 3 NWLR (Part 61) 538.

B Njovens v. The State (1973) 5 SC. 17.

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

Stanley v. Liddle (1928) 21Cr. App. R. 3 at 13

Gachi v. The State (1965) N.M.L.R. 333.

C **STATUTE REFERRED TO**

Criminal Code, s. 319(1)

LEAD JUDGMENT BY MOHAMMED JSC

D The three appellants were convicted together with two others by Olike J of Anambra State High Court of the offence of murder, contrary to Section 319 (1) of the Criminal Code. Originally, 8 accused persons were arraigned before the trial High Court for the same offence.
E Two died in prison during the trial, one was discharged and acquitted by the trial court and two others, Ireka Edingbo and Onodu Okeke succeeded in their appeal before the Court of Appeal and were both discharged and acquitted. The three appellants were not successful at the
F Court of Appeal. Their convictions and sentences were affirmed. Being dissatisfied with that decision they have now come before this court appealing against the conviction and sentence passed on each of them.

The fact which gave rise to this case is that there was a land dispute between the 1st appellant and his father, the 4th accused, who
G died in prison during the trial, on the one part, and the 9th witness for the prosecution, Valentine Obiekwe, on the other part. The dispute led to a serious fight during which the 4th accused was injured. The 1st appellant, on hearing about the fight between his late father and PW9, reported
H to the police. The Police arrested PW9 and charged him to a Magistrate's Court in Ihiala of the offence of assault. PW9 was remanded in prison custody by the order of the magistrate. The deceased, Samuel Ikejiobi, stood surety for PW9 and he was released on bail.

It was alleged that the act of the deceased angered the 1st appellant who issued a warning to the deceased to withdraw his suretyship for PW9 so that the court would revoke his bail and keep him in custody pending trial. The deceased refused to withdraw his suretyship for PW9 and this angered both the 1st appellant and 4th accused. On the 27th February, 1985, at about midnight, the deceased, Samuel Ikejiobi, was shot dead in his house and the house was set on fire. During the inferno the wife of Samuel Ikejiobi and his two children were burnt to death. On receiving a report the police went into action and after the completion of the investigation 8 accused persons were charged before the High Court of the murder of Samuel Ikejiobi. The 8 accused were: Augustine Onuchukwu, 1st appellant; Livinus Okorie, 2nd appellant; Ezekiel Ireka, 3rd appellant; Ezeanochie Onuchukwu, the father of the 1st appellant; Odogwu Obiora, Ireka Edimgbo, Onodu Okeke and Chukunyekwuom Okeke.

As I have mentioned above, 4th Accused, Ezeanochie Onuchukwu and the 5th Accused, Odogwu Obiora, died in prison during trial. Mr. Chukunyekwuom Okeke, the 8th Accused, was discharged and acquitted by the High Court. The trial High Court convicted the 1st, 2nd, 3rd, 6th and 7th Accused persons and sentenced each of them to death.

On appeal to the Court of Appeal, the 6th and 7th accused who were 4th and 5th appellants before the lower court were successful. They were discharged and acquitted. The appeals of the 1st, 2nd and 3rd appellants were dismissed.

On further appeal to this court the three appellants argued their respective appeals separately. The appellants, through their respective counsel, filed several grounds of appeal for the prosecution of the appeals file by the three appellants. The arguments advanced in those grounds are similar and the issues identified on those grounds are interrelated. I do not intend to reproduce each set of those issues since the points the appellants have grouse against the judgments of the lower courts are virtually the same. I will therefore consider their respective appeals together. After going through all the grounds of appeal and the issues

raised on them by both the appellants' and the respondent's counsel, I find the following six questions to be sufficient for the determination of the appeals filed by the three appellants:

1. Whether the trial court as well as the Court of Appeal evaluated the evidence tendered before it at all/properly.
2. Were there material conflicts in the statements and evidence of prosecution witnesses which rendered their various pieces of evidence unreliable and can the conviction of the appellants based on such unreliable evidence be sustained and upheld.
3. Whether the defence of alibi raised by the Appellants in this case could not avail them given the circumstances of this case.
4. Whether the court below was right in upholding the conviction of the appellants based on remote, conflicting, doubtful and unreliable circumstantial evidence of the prosecution witnesses where there was no direct evidence whatsoever that the death of the deceased resulted from the overt act or omission of the appellants.
5. Whether the finding of conspiracy/common intention as well as aiding and abetting by the Court of Appeal against the Appellants was not latently speculative and based on conjecture and suspicion.
6. Whether the charge of murder against the appellants had been proved beyond reasonable doubt.

I intend to consider the arguments of the appellants' respective counsel in respect of the points raised in issues 1 and 2 together. The complaint of the appellants in the Court of Appeal is that the trial court did not evaluate the evidence led by both the prosecution and the defence properly. Instead, the Court of Appeal proceeded in its judgment to make its own findings of fact on the evidence adduced before the trial court.

It is the submission of the learned counsel for the 3rd appellant that there were contradictions between the evidence of PW1, PW2, PW3 and PW5. Counsel argued that the contradictions were pointed out to the lower court but it did not regard them material. To illustrate such contradictions each learned counsel referred to the testimonies of PW1, PW2 and PW5 who said that they saw the 1st appellant in company of 2nd and 3rd appellants soon after the operation in which the deceased was shot

dead and his house set on fire. The witnesses told the trial court that they were all holding guns and jerrycans heading towards the house of the 1st appellant when the house of the deceased was on fire and other people were struggling to quench the fire.

On this issue, the arguments submitted by counsel of each of the appellants, although couched in a different style and manner, pointed out that the prosecution witnesses have all contradicted themselves in the evidence they gave before the trial court. For example, learned counsel for the 1st appellant explained the inconsistencies between the evidence of PW1 and PW5. PW1, in his testimony stated thus:

"When the house of Samuel was on fire some of the accused persons assisted in fighting the fire to prevent it from spreading to other houses nearby".

PW5 however, in his testimony, on this issue said; *"I did not see the persons I named while the house of Samuel was burning nor did they join in stopping the fire from spreading to other houses. I did not see them."*

Learned counsel for the 1st appellant also referred to two other statements made by PW1 which although believed to be true by the trial High Court were contradictory. The trial High Court believed that both PW1 and PW5 were near the house of the deceased at the time of the murder and they saw four men near the premises. Two of them were carrying jerrycans in their hands. In his statement to the police made after two months of the Incident PW1 said:

"As I was hiding within the banana stand, I saw four men among the four men were Augustine Onochukwu (1st Appellant) and Livinus Okorie 'M' and two persons who carried jerrycans each in their hands."

But in the evidence which PW1 gave in court during trial he gave another version wherein he said;

"Of the four men I saw, I could only recognise Augustine the 1st accused and 2nd accused Livinus Okorie. I could not recognise the other two people. The 1st and 2nd accused were carrying jerrycans. The other two had nothing".

It is quite clear that the two statements reproduced above are

not the same. The learned counsel for the respondent gave detailed replies to the arguments advanced by appellants' counsel in respect of the decision of the Court of Appeal to uphold the conviction of each of the appellants based on remote, conflicting, doubtful and unreliable circumstantial evidence from the prosecution witnesses. The learned counsel submitted that the death of the deceased resulted from overt act of the 1st appellant and his criminal colleagues and that the evidence of eye witnesses, PW1 and PW2 is overwhelming.

It is plain from the judgment of the trial High Court which the Court of Appeal upheld that the conviction of the appellants was based mainly on the testimonies of PW1 and PW2, a girl of 9 years. The conclusion of the trial court in respect of the evidence of those two witnesses is as follows:

"This witness (PW2) was (nine) 9 years old at the time of the incident when she made her statement to the police Exhibit B. She did not mention the names of the 1st, 2nd and 3rd accused persons as being at the scene as she made her escape. I carefully considered her evidence and satisfied that she is patently honest but confused in recollection. The trama (sic) of the incident will live with her for a very long time if not throughout life. I believe her evidence. But even if I disbelieve her on issue of whether she saw the 1st and 2nd accused persons at the scene, it is in evidence that as the perpetrators of the crime stepped out of the burning house into the village road, wicked, triumphant and satisfied of their savagery it was unbeknown to them that PW1 was hiding among plantain/banana stems as the full light of the moon fell upon them. Of the four that passed by he recognised with certainty and honesty the 1st and 2nd accused persons. Learned counsel made strenuous efforts to discredit the witness and urged the court to treat the evidence as concocted. I took care to watch the demeanour of this witness in the witness box while giving evidence and I formed the impression that he was a witness of truth. I accept his evidence in its entirety. See Okosi v. The State (1989) 1 N.W.L.R. (Part 100) 642. I believe him."

The learned trial judge cannot be right to form the impression that both PW1 and PW2 are witnesses of truth in view of the

clear contradictions in the evidence each of them adduced before the trial court. It is settled law that where a trial judge fails to advert his mind to the evidence on record, the Court of Appeal is entitled to examine the evidence and make it's own assessment provided that such exercise does not call for making decision on the witnesses credibility - Okonofua and Anor. v. The State (1981) NSCC 233. I find it pertinent to re-evaluate the evidence of these key witnesses in view of the submission of each of the learned counsel for the appellants on the issue of conflicts in the evidence they respectively adduced for the prosecution.

P.W.2, Mary Rose Nwadiolor, made two statements. The statement she made to the police was recorded seven days after the incident and was admitted in evidence during trial as exhibit B. In the statement she stated thus:

"On that night as we were sleeping I heard the noise of a gun and after they entered into the house and ask the Samuel's wife to give them money. The woman told them that she has no money. They then fired something and we began to feel something on our eyes. They then held me and Samuel's wife on the hand. Later I escaped from them. It was one man who came in with something on his face. Samuel's wife (sic) was begging them to live for God's name but they refused. I was not there when the fire is burning the house".

Learned counsel for the 2nd appellant in the 2nd appellant's brief, which he prepared, submitted that it was significant to note that in the statement, exhibit B, PW.2. made no attempt to mention the names of or describe any of the people she said had entered the house. She did not say that she would be able to identify any one. But in contrast with the above statement when PW. 2 came to give evidence in court, two years later she now said she could identify the person who came in. She narrated to the trial court how the intruder came into the house thus:

"As we were sleeping in the night of 27th February, 1985, we heard a gun shot and we woke up. By we, I mean Samuel's wife, Chijioke the last son of Samuel, Oguguo the daughter of Samuel and Eunice a co-maid. Somebody kicked the door and entered and flashed a torch light

and was looking for Samuel's wife. He caught her. I went to wake Chijioke and the man said if I touched him (Chijioke) he would kill me. As I tried to escape he caught and held me with Samuel's wife. I can recognise the person who held me and Samuel's wife. I can identify the person. (Witness moves to the door and points at the second accused Livinus Okorie) When he held me and Samuel's wife he asked Samuel's wife for money but Samuel's wife pleaded with him to leave her in the name of God as she had no money. At that stage I ran out of the house and saw Samuel lying outside. Apart from the torch light the second accused (the man) had a small gun".

PW.2 went further in her testimony and said that when she was running outside the house she saw 1st and 3rd appellants. It is relevant to observe here that in her statement to the police PW2 was talking of more than one person coming into the house of the deceased and asking for money. She said, "They entered the house they asked for money they then held me". However, when she came to give evidence she became wiser and said one man entered the house and she continued referring to one man. The man she was talking about was the 2nd appellant and she identified him in the court during the trial. She did not talk of more than one person coming into the house. However, she said that when she came out running towards her father's house she saw the 1st and 3rd appellants on the road near martin Igboeli's house. Another development in her evidence is that she could not identify the person whom she said earlier had come into the house covering his face. The two versions in the evidence of PW2 have made her testimony unreliable.

If the learned trial judge had evaluated the evidence adduced by the prosecution witnesses properly he would have found the evidence of PW1 unreliable as well. But learned trial judge found that he was a witness of truth and believed him. The Court of Appeal affirmed such a finding. This is a witness who was said to be an eye witness but did not report what he saw soon after the incident until after about two months when the police invited him and recorded his statement. I have recorded earlier in this judgment the inconsistent statements PW1 made about the people he saw carrying

jerrycans. He further added another confusion to his testimony where he said;

"I told the police that as I was hiding (sic) the 1st and 2nd accused whom I recognised passed by armed with guns. I left my hiding place when they passed".

From the above PW1 has now recognised the 1st and 2nd appellants and he said now, they were both carrying guns.

PW1 and PW2 are not the only witnesses whose testimonies are in conflict with one another. The evidence of PW3 and PW11 could not be relied upon to convict any of the accused of the offence charged. In his testimony PW3 narrated to the trial court what PW1 and two others reported to him about what happened in the night of the incident, thus:

"I made a statement to the police which was in English. It was written by me. I told the police that Edwin Igboeli, Cosmas Oroegwu and Ndianekwute Ifeanyi were the people sent from Umuarom-Umudero with a message. They reported to me what happened in late Samuel's house. As a result of what they told me I walked across the road and reported to the police. They met me in my house on the Onitsha-Owerri road opposite the Police station. I received the information between 3-5 a.m on the morning of 28/2/85.

I reported to the police at the counter".

It is clear from the extract of the evidence of PW3, reproduced above, that PW1 had reported to him what he observed with his own eyes in the night of the incident. I mentioned earlier that PW1 had told the Court that he identified 1st and 2nd appellants going into the house of the deceased. However, when PW11, the police investigator, gave evidence he told the court that PW3 who was the complainant in the case had reported to the police and stated that an unknown thief or thieves set the house of Samuel Ikejiobi on fire at about 1 a.m. on 28/2/85 and that the corpse of Samuel Ikejiobi his wife, Catherine Ikejiobi and his daughter, Uzoma Ikejiobi, were found in the burnt house.

If PW3 had indeed received a report from PW1, who identified 1st and 2nd appellants moving into the house of Samuel Ikejiobi before the outbreak of the fire he (PW3) would tell the police the information he

received from PW1 and he would reveal that the 1st and 2nd appellants had taken part in the criminal act. Which evidence is to be believed when the key witnesses have contradicted themselves and each has made a statement inconsistent with the evidence he had given before the trial court? **Where there are such contradictions and inconsistencies in the evidence before a Criminal Court, such as to cast reasonable doubt upon the guilt of the accused person, such accused person should be given the benefit of the doubt and not be convicted on the basis of such unreliable evidence - Onubogu and Anor. v. The State (1974) 9 S.C. 1; Akosile v. The State (1972) 5 S.C. 332.**

It is evidently clear that the identity of those who killed Samuel Ikejiobi and put his house on fire had not been known by the people of Umuorum Umudara Village where the deceased lived. Originally, the villagers suspected that the murder and arson were caused by unknown thieves. Hence the statement of PW2, the little girl, to the police that the intruders came and asked Samuel's wife to give them money. PW3 who received the report of the incident from PW1 and two others went and told the police that an unknown thief or thieves murdered Samuel Ikejiobi and set his house on fire killing his wife and daughter. It was after about two months when the investigation gathered momentum that witnesses came and concocted stories that they identified the appellants and others carrying guns, jerrycans and machetes going towards the house of the deceased. In the process of fabricating stories they contradicted themselves. It is my view that their evidence is unreliable.

The issue of alibi is another defence which the lawyers for the appellants submitted that had not been properly considered by the court below. I will deal with this issue, taking the defence put up by each appellant separately.

Learned counsel for the 1st appellant submitted, in 1st appellant's brief, that the 1st appellant made a statement to the police, exhibit G, that on the night of the incident he slept at Okija in his house. He mentioned that his Landlord, Ignatius Oramba, one Celestine Ibeauchi and a lady

teacher, Miss Tine Obiakaeze, would testify to that. The wife of the 1st appellant gave evidence for his defence and confirmed that the 1st appellant slept with her in his house on the night of the incident. PW.7 seemed to have confirmed the defence of alibi put up by the 1st appellant where he told the trial court that he saw the 1st appellant at Okija in the evening of the incident. B

The police did not interview any of the witnesses mentioned by the 1st appellant who could confirm or deny that the 1st appellant slept in his house at Okija on the night of the incident. A worthless evidence given by the prosecution on the issue of alibi set up by the 1st appellant is where the police investigating officer gave a hearsay evidence and both the trial court and the lower court agreed with him. In that testimony PW. 11 said, C

"The outcome of my investigation into the alibi is that I disbelieved him and charged him to court because Celestine Ibeauchi who is supposed to be an independent witness said that he saw the 1st accused at about 9 p.m. that night and the offence was committed at about 2 a.m." D

For whatever it is worth, once an accused put up a defence of alibi it is imperative that the defence must be investigated. If an accused raises a defence of alibi the onus is on him to prove where he was at the time of the incident and he has to call evidence to support his defence of alibi. See Odili v. The State (1977) 1 SC. 1. Once a defence of alibi is put up it is for the police to investigate it properly because failure to do so could raise reasonable doubt in the mind of the tribunal and lead to quashing the conviction - Onafowokan v. The State (1987) 3 NWLR (Part 61) 538. E F

PW. 11 gave a feeble explanation on the alibi wherein he said that he investigated the defence of alibi put up by the 1st appellant when he visited his house at Okija and failed to trace the landlord and the lady teacher. The Court of Appeal referred to the evidence of PW. 1 and PW. 2 who said they saw the 1st appellant at the house of deceased when the house was attacked and agreed with the trial court that the defence of alibi has collapsed - See Okosun v. Attorney General of Bendel State (1985) 3 NWLR (pt. G H

12) 283. Those witnesses (PW. 1 and PW. 2) have been found in this judgment to have made such contradictory statements that no reasonable tribunal could convict on their evidence. This has left the defence of alibi put up by the 1st appellant intact.

B The second appellant's defence of alibi was not investigated. PW. 10, the police investigator, told the trial court that he did not investigate the claim of the 2nd appellant that on the day in question he slept in his house. PW. 10 explained;

C *"At the time the second accused made statement (2nd appellant's statement Exhibit F) and claimed he slept in his house at night I could not investigate the claim because the area was deserted following the incident. I could not even see the wife with whom he claimed he slept".*

D The second police investigator, PW 11 also told the trial court that he searched for the wife of the 2nd appellant to find out whether the 2nd appellant left his room during the night or whether she woke him up but all efforts to trace her proved abortive. In short, the defence of alibi put up by the 2nd appellant was not investigated. And as I have found E above, since the evidence of the key prosecution witnesses is unreliable the trial court was in error to rely on those testimonies in rejecting the defence of alibi put up by the 2nd appellant.

F The Court of Appeal referred to the issue of alibi argued by the 3rd appellant's lawyer and observed as follows:

"On the above submission it is clear that PW. 11 did not investigate or was unable to investigate the alibi set up in the 3rd appellant's statement Exh. J."

G The lower court thereafter opined that even though the 3rd appellant's defence or plea of alibi was not investigated by the police or the prosecution, the evidence of PW.2, PW.4 and PW.5 who were eye witnesses and who saw the 3rd appellant at the scene of the crime had effectively neutralised his plea or defence of alibi. I have since disclosed H that the evidence of the key witnesses who identified the 3rd appellant and others is contradictory, inconsistent and unreliable. **Failure therefore to investigate the defence of alibi put up by the 3rd appellant has cast reasonable doubt on the reliability of the case for the pros-**

ecution. A plea of alibi is demolished if the prosecution adduces sufficient evidence to fix the person at the scene of crime at the material time - Njovens and ors. v. The State (1973) 5 SC. 17. In the case in hand there is no evidence reliable to fix the appellants at the scene of the crime.

The three issues i.e. the failure to evaluate the evidence correctly, contradictions and inconsistent evidence which I discussed above and the failure of the prosecution to investigate the defence of alibi put up by the appellants are enough to determine the appeal filed by each of the appellants. I need not consider the remaining issues since the three issues which I appraised above in this judgment have established that the charge framed against the appellants has not been proved beyond reasonable doubt taking into consideration the evidence adduced. **It is unfortunate that some people have lost their lives in this criminal act. But it is a cardinal principle of justice that conviction could only follow where the charge against an accused person has been proved beyond any reasonable doubt. Throughout the web of criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. Once there is reasonable doubt created by the evidence given the prisoner is entitled to an acquittal.**

In consequence, it is my view that the doubt which manifested itself in the conflicting evidence of the prosecution witnesses must be resolved in favour of the appellants. Accordingly, the appeal filed by each of the three appellants against the judgment of the Court of Appeal in which the lower court affirmed the conviction and sentence passed on each of the appellants is hereby allowed. The conviction and sentence pronounced on each of the three appellants are set aside. They are each accordingly discharged and acquitted.

BELGORE JSC

The law on the issue of alibi is now clear. Once an alibi is unambiguously set up - whereby the accused person states clearly where

he was at the time of the commission of the crime in question, with persons who were with him at that place, or who were aware of his presence there, well outside the locus criminis, the alibi must be investigated. Eze vs. State (1976) 1 SC. 125. To dismiss the alibi properly set up in this case with a wave of hand as "unreliable and I do not believe it", the police investigator abandoned a monumental duty and this renders the alibi uncontradicted. In such a situation the accused person's story must be believed and he will be entitled to discharge and acquittal.

Thus, once alibi is raised the prosecution must investigate it to ascertain its veracity or otherwise. Failure to so investigate renders any conviction unsatisfactory as the case would not have been proved beyond reasonable doubt. Adedeji v. State (1971) 1 ALL NLR 75; Nwosu v. State (1986) 4 NWLR (Pt 35) 438.

In the instant case the appellant at the earliest opportunity denied having any part to play in the crime and raised the alibi as to his whereabouts. This the investigator refused to investigate, insisting that he never believed the appellant; it is the function of the Court to believe or disbelieve any evidence, not the investigator. I find great merit in this appeal and for the fuller reasons in the judgment of Mohammed J.S.C., I allow it. I set aside the decision of the Court of Appeal which affirmed the conviction and sentence of the trial Court on the appellants. In its stead I enter a verdict of discharged and acquittal.

OGUNDARE JSC

I was privileged to read in advance the judgment of my learned brother, Mohammed JSC just delivered. I agree with his reasoning and conclusion that the appeal of each of the Appellants in this appeal has merit. I need, however, make some observations on two principal issues canvassed in this appeal.

The facts and the issues arising for determination have been fully set out in the judgment of my learned brother. I need not repeat them here again.

1. Evaluation of Evidence of Prosecution Witnesses

The Appellants contend both in their written Briefs and in the oral arguments of their learned counsel that the learned trial Judge failed to properly evaluate the evidence of the key prosecution witnesses - particularly PW1 & PW2 - on which he based the conviction of the Appellants and that the Court below was in error not to have disturbed the findings of the trial Court based on such faulty evaluation of evidence. Learned counsel for the Respondent argued to the contrary.

It is crystal clear from the judgment of the trial Court that the learned trial Judge relied heavily on the evidence of PW1 Edwin Igboeli and PW2 Mary Rose Nwadiakor in particular, in convicting the Appellants. He observed on PW1 thus:

"Learned counsel made strenuous efforts to discredit the witness and urged the court to treat the evidence as concocted. I took care to watch the demeanour of this witness in the witness box while giving evidence and I formed the impression that he was a witness of truth. I accept his evidence in its entirety. See OKOSI V. THE STATE (1989) 1 NWLR (Pt. 100) 642. I believe him."

And on PW2, a young girl of 9 years at the time of the evidence, the learned Judge commented:

"I carefully considered her evidence and satisfied that she is patently honest but confused in recollection. The trauma of the incident will live with her for a very long time if not throughout life. I believe her evidence."

With respect to the learned Judge I do not think he adverted his mind to salient weaknesses in the evidence of these witnesses that must, of necessity, weaken the efficacy of their evidence and render same unreliable. PW1 in his evidence, testified thus:

"I returned from work in the evening of that day 27th Feb., 1985 between 7-8p.m. The deceased, are my cousin. Martin Igboeli and myself were chatting with the deceased. As we were chatting outside as a fence separates our compound one Augustine unuomba came to see me. I went in to see Augustine Unomba who left at about 8.30p.m. When he left I walked across to the deceased compound and after a while I took leave of him. I share a common fence with the deceased and we could

- discuss across the fence. I took leave of him and he said he was still with some people. The people I saw were the 3rd accused Ezekiel Ireka and the 6th accused Ireka Edinagbo. I then went into my house to sleep. About 11-12 midnight I heard gun shot and woke up. I sat on my bed*
- B** *listening to know from which direction the gun was fired. I heard a voice shouting 'where is the woman'. The other voice responded that 'I have got her at the backyard'. At that stage the woman was shouting calling on my cousin Martin Igboeli to come to her aid for she was dying, I*
- C** *opened my door and came outside. (One of the men armed with a gun and torch light ordered me to run away or he will 'get me down'. I then ran along the family way to the main road. The man flashing the torch but I could not recognise him. When I ran out it was into a banana plantation where I hid myself.*
- D** *It was dry season and the moon was bright on that day. The weather was also clear. As I was shivering I saw the first accused father Ezeanochie Onuchukwu standing in front of his house holding something in his hand which I could not recognise. At that stage all the people in our com-*
- E** *pound had fled and I looked up and saw flames going up from Samuel the deceased house.*
- I was still there and saw four people bearing some thing in his (sic) hand. Of the four men I could only recognise Augustine the first accused and*
- F** *the second accused Livinus Okorie. I could not recognise the other two people. The first and 2nd accused were carrying jerry cans. The other two had nothing. They all came out from the house of the deceased and moved towards the house of the first accused. When they got there the first accused and two others entered the house of the first accused and the*
- G** *second accused Livinus continued to his house.*
- At that stage, I came out from where I was hiding and as our people raised alarm on not hearing any more shots people gathered.*
- While I was hiding I did not hear other statements apart from the ones I*
- H** *told the court.*
- I met my people as they were desperately looking for water to put out the fire on the deceased house to prevent it from spreading to our house. I called my cousin Martin and narrated to him what I saw and where the*

people I saw entered.

After I told him what I saw some others mostly Umuakpa people confirmed that they also watched and saw the same. We decided to go for the police as the people we saw shot guns and we knew they were armed."

This witness played a vital role in setting investigation afoot. According to the evidence of PW3, Ichie Tobias Ifezue Nwadiakor it was PW1 (among others) who immediately after the event leading to the death of the deceased, reported what happened to PW3 in consequence of which the latter lodged a report to the Police.

PW3 testified thus:

"I made a statement to the police which was in English. It was written by me. I told the police that it was Edwin Igboeli, Cosmas Oroegwu and Ndianekwute Ifeanyi were the people sent from Umuarom-Umudero with a message. They reported to me what happened in late Samuel's house. As a result of what they told me I walked across the road and reported to the police. They met me in my house on the Onitsha-Owerri road opposite the police station. I received the information between 3-5 a.m. on the morning of 28/2/85. I reported to the police at the counter."

The report PW3 made to the police was to the effect that unknown thieves broke into the house of the deceased, killed the deceased and set his house on fire resulting in the death of other inmates of the house. The questions may be asked: What account of the incident did PW1 make to PW3 in the early hours of that morning? If his account to PW3 were as stated by him in Court would PW3 have lodged the report he made to the Police? The answer to the latter question must obviously be in the negative. It is significant to note that PW1 did not make a statement to the police until about a month after the incident. And when asked in cross-examination why he delayed so long before making a statement to the police, he answered:

"I made my statement on 22nd March, 1985 when the State C.I.D. Sergeant Odunze came to me. I did not make any statement to Ihiala police."

Surely if the two Courts below had adverted their minds to the circumstances surrounding the evidence of PW1 they would not have readily

relied on his evidence in convicting the Appellants. It is not impossible that the dubious role this witness played in this case has resulted in the real culprits of the dastardly crime escaping justice.

I now turn to PW2. In her statement to the Police (Exh. B) B made five days after the incident she gave the following account of the incident leading to the death of the deceased and the burning of his house.

"On that night as we were sleeping I heard the noise of a gun and after they entered into the house and ask the Samuel's wife to give them money. The woman told them that she had no money. They then C fired something and we began to feel something on our eyes. They then held me and Samuel wife on the hand. Later I escaped from them. It was one man who came in with something on his face. Samuel house (sic) was begging them to live for God's name but refused. I was not there D when the fire is burning the house."

This account is consistent with a case of unknown armed robbers striking that night. In her evidence in court given two years after the incident, however, she testified;

"I know one Samuel Ikejiobi. He is now deceased. He died at E Umuakpa in Umudare in Ihiala L.G.A. He died on 27th February, 1985. I was then living with him. As we were sleeping in the night of 27th February 1985 we heard a gun shot and we woke up. By we, I mean F Samuel's wife, Chijioke the last son of Samuel, Oguguo the daughter of Samuel and Eunice a co-maid. Somebody kicked the door and entered and flashed a torch light and was looking for Samuel's wife. He caught her. I went to wake Chijioke and the man said if I touch him (Chijioke) he would kill me. As I tried to escape he caught and held me with G Samuel's wife. I can recognise the person who held me and Samuel's wife. I can identify the person. (Witness moves to the dock and points at the second accused Livinus Okorie). When he held me and Samuel's wife he asked Samuel's wife for money but Samuel's wife pleaded with him to H leave her in the name of God as she had no money. At that stage I ran out of the house and saw Samuel lying outside. Apart from the torch light the second accused (the man) had a small gun.

Before I ran out of the room the man (2nd accused) sprayed

something into the room, which itched my eyes and nose.

Samuel's wife was the first to escape from the man and when he (2nd accused) was pursuing her I ran away and saw Samuel lying outside. I was running to my father's house at Umudara and saw Augustine (the first accused) and Ezekiel (the 3rd accused) on either side of the road. I saw them on the road near Martin Igboeli's house. There was moon light on the night of the incident and I saw the 1st and 3rd accused as they raised their heads and shoot something that frightened me and I ran away. It was the fence made of palm leaves they shook. It was Augustine the first accused who shook the fence. The 3rd accused Ezekiel did nothing. It was the first accused who frightened me. I ran to my father's house."

Her memory appears to have sharpened with age. She could now recognise the attacker who, according to her first account, covered his face! And the two Courts below acted on the evidence of such a witness to convict, her tender age notwithstanding. With respect to their Lordships of the Courts below, prudence ought to have informed them not to rely on the evidence of PW2.

Without the evidence of PW1 and PW2 the convictions of the Appellants cannot be sustained. Strangely enough the Court below (that is, the Court of Appeal) did not regard the evidence of PW1 strong enough to sustain the conviction of the 7th accused (5th Appellant in the Court of Appeal) whose appeal on that score was allowed. But the Court relied on the evidence of the same witness in sustaining the convictions of the present Appellants. A case of contradiction or double-standard?

2. ALIBI:

In his statement to the police (Exh. G) the 1st Appellant gave an account of his movement on the night of the incident. He stated:

"I slept in my house at Umuofor, Okija where I live in the night of 27/2/85. My wife by name Prisca Onuchukwu, one Celestine 'm' father's name unknown who lives with my landlord Ignatius Oramba (m) one lady teacher at St. Mary's Primary School Okija by name Miss Tina Obiakaeze knew that I slept in my room at Okija on 27/2/85."

PW11 Richard Odinze investigated the plea of alibi set up in the state-

ment. He testified thus:

"I investigated the alibi contained in the statement of the first accused Exhibit G. that is to say I visited his house at Okija and obtained statements from his wife one Prisca Onuchukwu and from one Celestine Ibeabuchi. I could not trace the landlord and a lady teacher he mentioned in her statement. The outcome of my investigation into his alibi is that I disbelieved him and charged him to court because Celestine Ibeabuchi who is supposed to be an independent witness said that he saw the 1st accused at about 9p.m that night and the offence was committed at about 2 a.m.

..... I have no other reasons(s) for disbelieving the alibi of the 1st accused."

By the account given in his evidence PW11 seemed to admit that one of those mentioned in Exh G and interviewed confirmed the 1st Appellant's account. Rather than produce the witness in Court to testify and for the Court to come to its decision whether or not to ascribe credibility to the witness PW11 arrogated to himself the function to believe or disbelieve the person interviewed. In the event, he disbelieved her and told the Court so. The two Courts below saw nothing wrong in the conduct of the prosecution and accepted PW11's disbelief of a witness who had not testified in court. I must say I am puzzled by the patronising attitude of the Courts below to the prosecution in this respect. I would think that the ascription of credibility to a witness is the function of the court and not a police investigator. As it was in this case, however, the trial court condoned this glaring usurpation of its power. I see this as a dangerous development in the area of criminal justice. And it must be frowned at and not encouraged.

On the evidence, it cannot be said that the prosecution dislodged the plea of alibi set up by the 1st Appellant and investigated by the Police and found to be substantiated. On this ground alone, the plea of alibi of the 1st Appellant must be sustained.

The case of the 2nd and 3rd Appellants is different. Their own alibi was not investigated. However, as the evidence of PW1 and PW2 which would have fixed them at the scene of the crime and thereby

dislodged their alibi, has now been adjudged by me to be unreliable, it cannot be said that the case against them was proved beyond reasonable doubt. In the circumstance, they are each entitled to an acquittal.

In conclusion, I too allow the appeal of each Appellant. I set aside the conviction for murder and the sentence of death entered against each Appellant. In their stead, I acquit each Appellant of the offence of the murder of Samuel Ikejiobi and discharge each accordingly.

OGWUEGBU JSC

I have had a preview in draft of the judgment just delivered by my learned brother Mohammed, J.S.C. I am in complete agreement that the appeal be allowed. My learned brother has fully discussed all the issues raised in the appeal and I only wish to add a few words of my own on the issue of alibi raised by the appellants and glossed over by the courts below.

The 1st appellant Augustine Onuchukwu who was the 1st accused in the High Court raised a plea of alibi in his statements to the police (Exhibits "E" and "G"). In Exhibit "E" dated 3-3-85, he said in part:

"..... I have no knowledge of the killing of Samuel and his families. Nor have I any knowledge about the burning of his house. I was not at Umudara when the incident happened, I was at Okija where I stay. It was the police detective who arrested me that told me that Samuel had been murdered, when I was arrested at my school at Ihembosi Girls Secondary School."

In exhibit "G" made on 8-3-85, the 1st appellant said:

"I have made statement to the police at Ihiala in respect of this case on 3-3-85. I maintain all I said in the statement. I learnt that the incident took place at Umudara, Ihiala in the night of 27-2-85. I was arrested at my working place at Girl's' Secondary School, Ihembosi, Ihiala L.G.A. on 28-2-85 around 12.45 p.m. I slept in my house at Umuofor, Okija where I live in the night of 27-2-85. My wife by name Prisca Onuchukwu, one Celestine 'm' fathers (sic) name unknown who lives with my landlord Ignatius Oramba (m) one lady teacher at St. Mary's

Primary School Okija by name Miss Tina Obiakaeze know that I slept in my room at Okija on 27-2-85. Ichie Tobias Nwadiolor have (sic) a serious enmity with my family."

Police Sergeant Richard Odunze took part in the investigation.

B He also recorded exhibits "E" smf "G" under caution. He testified as P.W.11. In his examination-in-chief, he stated as follows:

"I investigated the alibi contained in the statement of the first accused Exhibit G that is to say I visited his house at Okija and obtained statements from his wife one Prisca Onuchukwu and from one Celestine Ibeabuchi. I could not trace the land lord and a lady teacher he mentioned in her (sic) statement. The outcome of my investigation into his alibi is that I disbelieved him and charged him to court because Celestine Ibeabuchi who is supposed to be an independent witness said that he saw
D the 1st accused at about 9 p.m, that night and the offence was committed at about 2 a.m I have no other reason(s) for disbelieving the alibi of the 1st accused" (underlining is for emphasis).

P.W.11 made no effort to contact the lady teacher - Miss Tina
E Obiakaeze, a co-tenant of the 1st appellant. He did not locate the landlord of the premises. There should have been no difficulty in reaching him. The address of the school where the lady teacher was teaching was given by the 1st appellant. The story that he could not trace the landlord
F and the lady teacher is unbelievable. He failed to state what efforts he made to locate them which failed. From the way this witness usurped the function of the court in disbelieving a witness and keeping her away from court, it can safely be said that the purported investigation of the
G alibi by P.W. 11 is nothing but a sham. The courts below failed to censure P.W. 11 for the reckless manner he handled the issue of alibi and assumed the role of the trial court in believing or not believing the 1st appellant.

From the foregoing, any right thinking judge who was not carried away by emotion ought to have held that the plea succeeded. In the
H circumstance I think the appeal of the 1st appellant must succeed and the conviction must be quashed.

The 2nd appellant (Living Okorie) who was the 2nd accused in

the court of trial stated in his statement to the police (Exhibit "F") dated 28-2-85:

"Last night I sleep for my house. I sleep around eight o'clock in the night. About 1 o'clock in the morning I hear many people voices shouting saying HO HOO, HO, HOO. I slept with my wife by name Esther. It was my wife Esther that woke me up. Then I got up and see many people for Samuel house. Then I see one Martin Ogboeri the brother of Samuel day cut banana leave to quench the fire. Then me I day help them quench the fire. In the morning I day for my house. This evening I see policeman to correct (sic) me and I escaped and ran away. Some people chase me and asked me why I escape this evening. They say I have case for Indian Hemp before with police that is why I run away this evening because some time ago I escape from police cell at Ihiala. I do not know anything about this Samuel and his wife and children who were murdered." (the underlining is for emphasis).

In his evidence in court he testified in part:

"..... I ran to the place with the wrapper I tied on my waist. When I got there I observed that Samuel Ikejiobi's house was on fire. They were many people at the scene. I saw one Matthew Oheafubesi, Josephat Okafor, Ahuagbakosi Akuewulu, Agure Chebeze Nwabuwa and others I collected the matchet Martin Igboeri was holding and used it in cutting plantain leaves for fighting the fire." (the underlining is for emphasis).

P.W.8 (Mgbeka Ejeahalake) a house wife and a widow testified that she heard people shout and she came out to the frontage of her house. She could not go to the scene because she was mourning the death of her husband but she saw the 2nd accused/appellant moving from his house towards the direction of the shouts of the fire alarm.

The plea of alibi was not investigated and this fact coupled with the evidence of P.W 8 that she saw the 2nd appellant move towards the house of the deceased when the alarm was raised as others did, would have raised some doubt in the mind of the learned trial judge as to the participation of the 2nd appellant in the commission of the crime.

With regard to the 3rd appellant, he volunteered a statement to

the police exhibit "j". He said:

"I day for my house around 12 for night when I hear gun sound and people de shout na thief na thief O'. I was sleeping on the same bed in the same room with my wife by (sic) Caroline Ileka. She know say na the time when gun sound na I go out I take my knife go out. Aguluchibueze Nwabuwa, Josephat Okafor (m) and Matthew Ohaefubesi saw me when run come out. I follow stop fire the people, see me two (sic). When day break I come follow other people cry and park the zinc and other things I no get land case with valentine."

P.W.11 made no attempt to interview the persons mentioned by the 3rd appellant in his statement (Exhibit "J").

No burden is placed on an accused person to prove his alibi once he has given the particulars of his whereabouts early. Where an alibi is set up as in this case, the primary onus of establishing the guilt of the accused person is on the prosecution. Only the evidential or secondary burden is on the appellant to adduce some evidence of where he was at the material time. The three appellants at the earliest opportunity gave the police reasonable information as to where they were and the persons with whom they were at the time charged. See Okosi & Or. v. The State (1989) 1 N.W.L.R. (Pt. 100) 642, Stanley v. Liddle (1928) 21Cr. App. R. 3 at 13 and Gachi v. The State (1965) N.M.L.R. 333.

Granted that the 2nd appellant was a fugitive from justice in respect of the offence of Indian hemp or armed robbery, his claim of innocence of the offence of murder should have been fully investigated and his evidence evaluated. No reasonable court would have convicted the three appellants of the offence charged having regard to what I have said above. The police investigation of this offence left much to be desired.

The wiping out of an entire family was wicked, unlawful and unjustified and no effort should have been spared in the investigation and prosecution of the culprits. The appellants might have committed the offence for which they were charged but the investigation was most unsatisfactory. I will therefore allow the appeal of each appellant and set aside the sentence of death pronounced on each of them. They are

discharged and acquitted.

IGUHJSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Mohammed, J.S.C. I must confess that B it is not without considerable reluctance that I am able to agree that the appeal succeeds.

It will be nothing but academic to go into any details. It suffices to state that the facts of this case as found by the trial court and affirmed C by the court below are as dastardly as they are obnoxious, atrocious and barbarous.

The one serious blunder on the part of the prosecution, however, is the casual manner, almost amounting to their failure to investigate satisfactorily the defence of alibi put up by the appellants. It is on this D single issue that I find myself compelled to give the appellants, albeit, reluctantly, the benefit of the doubt.

Accordingly, I, too, allow this appeal and set aside the conviction and sentence passed on each of the appellants. They are hereby E acquitted and discharged.

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