

SUPREME COURT OF NIGERIA

24TH APRIL, 1998. SC 115/1996

**CORAM:- M. L. UWAIS CJN, A. B. WALI, M. E. OGUNDARE,
E. O. OGWUEGBU, U. MOHAMMED, JJSC.**

DAN AWAZA BASHAYA & 7 ORS. APPELLANTS
V.
THE STATE RESPONDENT

***ALIBI** - Plea of Alibi - The courts below were right in accepting the positive evidence that the appellants were fixed at the scene of crime - Thus destroying their defence of alibi.*

***APPEALS** - Findings on facts - Where the appeal revolves on issues of facts - And there is nothing to show that the findings on such facts are erroneous - The appellate Court will dismiss the appeal.*

***APPEALS** - Concurrent findings of fact - Will not be disturbed unless they have been shown to be perverse - And the appellants have failed to show this in the present case.*

***CRIMINAL LAW** - Conspiracy - Collective participation in committing a crime - Each of such persons is liable for that act.*

***CRIMINAL PROCEDURE** - Identification parade - Is desirable where mass arrest of suspects was made - But its absence is not fatal where some of the suspects are known to the witnesses.*

FACTS

As a result of the murder of Ayuba Chaimang the chief of Ganawuri Atar Aten on or about the 29th of November 1991 at Tahoss Village of Plateau State, 18 (eighteen) persons were arrested and charged to the Jos High Court on various counts : Conspiracy under s. 79 of the Penal Code; Culpable homicide under s. 221 Penal Code; and wrongful

damage and mischief to property under s. 341 Penal Code. All the accused persons pleaded not guilty to the charges. On 29 November, 1991 the deceased left his village in his official car together with PW2, PW3 and his driver. When the car got to Tahoss a village along the route, persons were seen lining on either side of the road. At a point on the road, stones had been placed across the road to block the path of the deceased's vehicle. The vehicle was thus forced to a halt. Some people then emerged from an adjoining road. They carried offensive weapons which were sticks, cutlasses an axe and a gun. One of them carried a stone. The stone was thrown at the front wind screen of the car. The wind screen was thus broken. The three persons with the deceased came out or were forced out of the car and were beaten up. The deceased was dragged out of the car. He was attacked with weapons. The following day i.e. 30/11/91 he died in Jos Hospital of the injuries received during the attack on him.

At the conclusion of trial, the learned judge found that the 4th, 8th and 16th accused persons did not take part in the commission of the crime and he accordingly discharged them; of the remaining accused persons each and every one of them was found guilty as charged and convicted accordingly. Aggrieved by the judgment, the convicted persons appealed to the Court of Appeal, Jos Division which court unanimously allowed the appeal of 5th, 6th, 10th, 11th and 12th appellants while that of the 1st, 2nd, 3rd, 4th, 7th, 8th, 9th and 13th appellants was dismisses and their conviction and sentence affirmed. They have now further appealed to the Supreme Court raising three issues.

ISSUES FOR DETERMINATION

"1. Having regard to the fact that the case against each of the Appellants depended on the correctness of their identification (which the defence contended was mistaken) - was the court of Appeal right in affirming the conviction of the Appellants in this case?

2. Having held that the defence of alibi timeously raised by each of the Appellants was not investigated by the Police, was the Court of Appeal right in its view that the defence of alibi did not avail Appellants in this case?

3. *On the basis of the finding of facts by the trial court and the Court of Appeal, was the guilt of the Appellants proved beyond reasonable doubt?"*

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

Identification parade

1. While an identification parade is desirable where mass arrest of suspects was made by the police, its absence is not fatal to the prosecution's case where some of the suspects are known to the witnesses.¹ Also, it is not in all cases connected with identification that a witness must before the identification give the name and some physical features of the suspect. Each case will be treated on its own facts circumstance and merit. In the present case there is over-whelming admissible evidence as regards the identification of the appellants. As regards the present appellants, the learned justice reconsidered and re-evaluated the evidence by the prosecution on their identity and participation in the commission of the criminal act resulting in the death of the deceased. He found that the identity and participation of the appellants in the commission of the offence was proved beyond reasonable doubt. (p. 1011 E/1013 A)

Plea of alibi

2. Both P.W.1, P.W.2 and P.W.3 knew the appellants long before the incident and their evidence fixed them at the scene of the crime and participating in the criminal acts. It is not correct as argued by the learned Senior Advocate that the appellants were identified in the dock by the witnesses. The incident happened in broad day light with no obstruction of the view between the witnesses and their assailants, the appellants inclusive. The question of mistaken identity or non-recognition of the appellants in their participation in the criminal act is completely ruled out. See R. v. Turnbull (1976) 3 All ER 549 particularly at p.55. I agree with

¹ See other SC cases on identification parade - *Ugwunba v. State* (1993) 7 KLR 190; *Alabi v. State* (1993) 10 KLR 147.

the conclusions by the Court of Appeal on the alibi raised by the appellants some of whom did not adduce evidence in support. Both the trial court and the Court of Appeal were right in accepting the positive and cogent evidence of P.W.1, P.W.2, and P.W.3 that the appellants were fixed at the scene of the crime, thus destroying the defence of alibi raised. The identification parade harped upon was not necessary and infact undesirable in the circumstance and its rejection by the learned trial judge did not affect the prosecution's case against the appellants.

(p. 1014 E/ 1022 A)

Criminal law - Conspiracy

3. The evidence of P.W.1, P.W.2 and P.W.3 taken together established beyond reasonable doubt the participation collectively of the appellants in the commission of the crime. There was evidence which was accepted by both the learned trial judge and the Court of Appeal that dangerous instruments were used by the appellants in achieving their common purpose. Some of these weapons were tendered and formally admitted in evidence as Exhibits. Section 79 of the Penal Code provides as follow:-

"When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." (p. 1017 B)

Appeals - Findings on facts

4. I have myself carefully examined the evidence and the findings on it made by the two lower courts, but unable to find any fault in them. The case of each one of the appellants was painstakingly examined viz-a-viz the evidence against him and the conclusions that they are guilty of the offence for which they were charged is well supported by such evidence and therefore unimpeachable. Where the appeal revolves on issues of fact, as primarily in the present case, and there is nothing to show that the findings on such facts are erroneous, the Court of Appeal will dismiss the appeal. See Lucy Onowan & Anor. v. Iserhien (1976) 9-10 SC 95. (p. 1026 D)

Concurrent findings of fact

5. There are concurrent findings of fact by the trial court and the Court of Appeal and this court does not, in practice, disturb such concurrent findings unless they have been shown to be perverse. See Sobakin v. The State (1981)5 SC 75; Adio & Anor. v. The State (1986) 2 NWLR B (pt.24) 581 at 589 and Nwobodo v. Chief Federal Elect Officer (1984)1 SC 1. The appellants have failed to show that the findings against them are wrong or perverse. I find no reason to interfere with the concurrent findings. (p. 1026 F)

C

NOTABLE POINT OF INTEREST**OGWUEGBU JSC**

1. Raising of the plea of alibi without proof will not lead to automatic discharge of the accused

D

The mere raising of the plea of alibi without proof of it by the appellants would not entitle them to automatic discharge. They did not discharge the evidential or secondary burden showing that they were at another place other than the scene of crime. see Gachi v. The State (1965) E N.M.L.R. 333 and Stanley v. Liddle (1928)21 Cr. App R.3 at13. The plea of alibi was destroyed when the trial judge believed the evidence of P.W.1, P.W.2 and P.W.3 which fixed them at the scene of crime and the results of the identification parade did not form the basis of the decision F of the trial court or the court below. It cannot be true that the accused persons were identified in the dock when they were infact arrested and eventually charged on the information supplied by P.W.1, P.W.2, and P.W.3. The evidence of P.W.6 (Patrick Makama) an Assistant Superintendent of Police showed clearly that the arrests were made on informa- G tion received by the police from the prosecution witnesses. On the whole, there was overwhelming evidence which was accepted by the trial court of the eye witnesses (P.W.1, P.W.2, and P.W.3) of the presence of the accused persons at the scene and their plea of alibi was rightly rejected, H see Yanor & Or. v. The State (1965) N.M.L.R. 337. The learned trial judge did not disregard the defence of alibi but it was rejected because of the strong and overwhelming evidence produced by the prosecution

against the watery evidence of alibi adduced by the appellants. I have no hesitation in coming to the conclusion that the guilt of the appellants was proved beyond reasonable doubt. (p. 1028 F)

B REPRESENTATION

T. J. O. Okpoko Esq. S.A.N with M. A. Ekone, S Abedugbo and A. O. Awotishe for the Appellants.

Saleh M. Shuaibu, Director, Civil Litigation, Plateau State with Mr James Gwra PSC for the Respondent .

C

CASES REFERRED TO

Arenia v. The State (1982) 4SC 78

Jizirumba v. The State (1976) 3 SC 89

D Stephen V. The State (1986) 5 NWLR (pt. 46) 787

Oladejjo v. The State 1987) NWLR (pt. 61) 419

Chukwu v. The State (1992) 7 NWLR (pt . 253) 325.

Onowan v. Iserhien (1976) 9-10 SC 95

E Sobakin v. The State (1981)5 SC 75

Adio v. The State (1986) 2 NWLR (pt.24) 581 at 589

Nwobodo v. Chief Federal Elect Officer (1984)1 SC 1

F STATUTE REFERRED TO

Penal Code ss. 79, 97, 201, and 341

LEAD JUDGMENT BY WALI JSC

G As a result of the murder of Ayuba Chaimang the Chief of Ganawuri Atar Aten, on or about the 29th of November, 1991 at Tahoss Village of Plateau State, the following 18 (eighteen) persons were arrested and charged to court on various counts:-

- H**
1. NANI DANGIDA
 2. DAN AWAZA BASHAYI
 3. KAMPA DACHUNG
 4. DANJUMA ATSA
 5. GYANG MANKON

6. BANDUNG MAREN
7. NYANGAI DAGONG
8. DANLADI DARA
9. DANDUK LOCHUNG
10. ISITFANUS KYATA
11. DACHUNG ZANGO
12. DALYOP DACHU
13. MUSA DALYOP
14. BULUS DAVOU
15. BOYI DALYOP
16. GYANG PTAM
17. GYANG BASHAYA
18. BADUNG DALYOP

B

C

After their arraignment before Oyetunde J. of Jos High Court, D
Plateau State the pleas to the charges of the accused persons that were
present were recorded as follows:-

Conspiracy under s. 97 of the Penal Code

1st, 2nd., 3rd, 5th, 6th, 7th, 8th, 9th, 10th, 11th, , 13th, 14th, E
15th, 16th, 17th, 18th, 19th, 20th- pleaded not guilty.

Culpable Homicide under s. 221 Penal Code

1st, 2nd, 3rd, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 13th, 14th,
15th, 16th, 17th, 18th, 19th, and 20th- pleaded not guilty.

F

Wrongful Damage and Mischief to property under s. 341
Penal Code

1st, 2nd, 3rd, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 13th, 14th,
15th, 16th, 17th, 18th, 19th, and 20th - pleaded not guilty.

G

It is to be noted that 4th and 12th accused persons were absent
during the arraignment, so their pleas to charges were not taken and the
remaining accused persons were renumbered 1-18.

The case proceeded to trial of the accused persons present and
whose pleas were taken.

H

To prove their case against the accused persons the prosecution
called 16 (sixteen) witnesses and tendered in evidence some exhibits,
The defence also called 2 (two) witnesses while the 1st, 2nd, 3rd, and

16th accused persons elected to give evidence and testified.

At the conclusion of presentation of their respective cases, learned counsel for the defence and the prosecution addressed the court after which judgment was reserved.

B After considering the evidence, Oyetunde J. found that the 4th, 8th and 16th Accused persons were shown not to have taken part in the commission of the Crime and he accordingly discharged them; of the remaining 13 (thirteen) accused persons each and every one of them was found guilty as charged of conspiracy, murder and mischief to property
C and convicted accordingly.

Aggrieved by the trial court's judgment, the convicted persons appealed to the Court of Appeal, Jos Division. In a considered judgment delivered by Oguntade JCA who presided and with which both Orah and
D Coomassie JJCA agreed, the appeal of 5th, 6th, 10th, 11th, and 12th, appellants who were the 9th, 10th, 14th, 15th, and 17th accused persons respectively was allowed while that of the 1st, 2nd, 3rd, 4th, 7th, 8th, 9th, and 13th appellants who were the
E 2nd, 3rd, 5th, 7th, 11th, 12th, 13th, and 18th accused persons respectively was dismissed and their conviction and sentence affirmed.

It is against the affirmation of their conviction by the court of Appeal that the 1st, 2nd, 3rd, 4th, 7th, 8th, 9th, and 13th appellants have now
F further appealed to this court.

It is convenient at this stage to reproduce the brief facts of this case as adequately stated in the lead judgment of the Court of Appeal which are as follows:-

G *"On 29 November, 1991, the Head Chief of a Village called Ganawuri on the outskirts of Jos in Plateau State, Atar Aten, Mallam Ayuba Chaimang (hereinafter referred to as the deceased) left his village, Ganawuri, in his official car, a Peugeot 504, Registration No. PLIG 1R at about 1.30 p.m. He was going to a place called Barakin-Ladi. He has with him in his car three other persons who were P.W.1, his body guard, P.W. 2, his driver, and another person who testified as P.W.3. In the course of the journey from Ganawuri to Barakin-Ladi, the deceased's car had to pass through a village called Tahoss. When the car got to*

Tahoss, persons were seen lining on either side of the road. At a point on the road, stones had been placed across the road to block the path of the deceased's vehicle. The vehicle was thus forced to a halt. Some people then emerged from an adjoining road. They carried offensive weapons which were sticks, cutlasses, an axe and a gun. One of them carried a stone. The stone was thrown at the front windscreen of the car. The windscreen was thus broken. The three persons with the deceased came out or were forced out of the car. They were beaten up. The deceased was dragged out of the car. He was attacked with weapons. The following day, i.e.30/11/91, he died in a Jos Hospital of the injuries received during the attack on him."

Learned counsel for the appellants as well as for the respondent filed and exchanged briefs of argument and which they orally elaborated upon during the hearing of the appeal.

In the brief of argument filed by Onomigbo Okpoko, Learned Senior Advocate, the following 3 (three) issues as arising from the 6 groups of appeal filed (three original) and 3 additional) were formulated for determination;-

"1. Having regard to the fact that the case against each of the Appellants depended on the correctness of their identification (which the defence contended was mistaken)-was the court of Appeal right in affirming the conviction of the Appellants in this case?"

2. Having held that the defence of alibi timeously raised by each of the Appellants was not investigated by the Police, was the Court of Appeal right in its view that the defence of alibi did not avail Appellants in this case?"

3. On the basis of the finding of facts by the trial Court and the Court of Appeal, was the guilt of the Appellants proved beyond reasonable doubt?"

Learned counsel for the respondent also formulated in the respondent's brief the following 3 (three) issues for consideration and determination by this court:-

1. Was the identity of the Appellants established beyond reasonable doubt?

2. Is a conviction fatal for failure to investigate a plea of alibi in the light of eye witness account of prosecution witnessess, fixing the Appellants at the scene of crime?

3. Were the charges against the Appellants proved reasonable doubt?"

The Issues raised in the Respondent's brief are substantially the same as the issues formulated by Learned Senior Advocate for the appellants. In writing this judgment I shall adopt the issues in the Appellants' brief.

The gravamen of complaint in this issue is that the learned trial judge, having rejected the evidence of identification, was left with no other evidence on which to base his finding that the appellants were positively identified as having taken part in the commission of the offence. He submitted that the trial judge was in grave error when he said that appellants were identified by P.W1, P.W. 2 and P.W. 3. Learned Senior Advocate submitted that the identification made by P.W.1,P.W.2 and P.W.3 at the identification parade and which was rejected by the trial judge, were tantamount to statements made to the police by the witnesses concerned and therefore subsequent evidence in court by any of such witnesses that any of the appellants not previously identified at the parade was his assailant was inconsistent with his statement at the parade. He cited Christopher Onubogu v. The State (1974) 9 SC 9 in support. He also submitted that the Court of Appeal failed to adequately treat this matter and that had resulted in grave miscarriage of justice. He contended that the true test of description lies in the ability of the victim to identify his assailant by name at an identification parade, and cited in support the case of Idahosa v. The State (1965) NWLR 88. Learned Senior Advocate further submitted that the evidence of P.W.1,P.W.2. and P.W.3 relied upon by the lower court and the court below was full of contradictions and inconsistent with the identification parade and therefore unreliable and cited in support Obade v. The State (1991) 6 NWLR (pt.198)435;Uman v.The State (19880 1 NWLR (pt. 70) 270; Arenia v. The State (1982) 4SC 78; Jizirumba v. The State (1976) 3 SC 89; Stephen V. The State (1986) 5 NWLR (pt. 46) 787; Oladejo v. The

Bashaya v. The State (1998) 4 KLR Wali JSC 1011
State 1987)3 NWLR (pt. 61) 419 and Chukwu v. The State (1992) 7
NWLR (pt . 253) 325.

In reply, the learned Director of Civil Litigation submitted that P.W.1, P.W.2, and P.W.3, gave cogent and reliable evidence free from any contradictions or inconsistencies and that both the trial court and the Court of Appeal were perfectly right and in order in relying on their evidence as regards the identification of the appellants as among those that actively participated in committing the crime. He submitted that as the incident happened in broad day light and that there was a fairly long and reasonable contact sufficient between P.W. 1, P.W.2, and P.W.3 and the appellants, the issue of mistaken identity of any of the appellants could not arise. Learned counsel said though it was true that there was nothing to show that the 1st appellant was identified by any of the three eye witnesses at the identification parade, his identity was not in issue, as he was identified at the scene of the incident, not only by P.W.1 and P.W.2, but also by the deceased before he was beaten to death. He cited Okasi & Anor v. The State in support.

While an identification parade is desirable where mass arrest of suspects was made by the police, its absence is not fatal to the prosecution's case where some of the suspects are known to the witnesses. Also, it is not in all cases connected with identification that a witness must before the identification give the name and some physical features of the suspect. Each case will be treated on its own facts circumstance and merit.

In the present case there is over-whelming admissible evidence as regards the identification of the appellants.

P.W. 1 who was one of the body guards of the deceased at the time of the attack identified in his evidence 2nd, and 3rd accused who are now 1st and 2nd appellants. P.W. 2 also in his evidence identified 1st, 2nd, 3rd, 4th, 5th, 7th, and 8th appellants as among those that took part in the criminal incident while P.W. 3 identified 1st, 2nd, 3rd, 4th, 5th, 6th and 8th appellants as equally having taken part in the criminal act.

The learned trial judge after considering the whole evidence arrived at the following conclusions in respect of these appellants:-

"P.W.1, P. 2 and P.W.3, clearly positively and directly identified, the 2nd accused, the 3rd accused, the 5th accused the 7th accused, the 9th accused, the 10th accused, the 11th accused, the 12th accused, the 13th accused, the 14th accused was identified in court by P.W.1, the
 B 15th accused, the 17th accused and the 18th accused in court. They also gave information to p.w. 6 about these accused persons which led to the arrest of the said accused persons.

P.W. 3, not only identified the 2nd, 3rd, 5th, 7th, 11th, 12th and 18th
 C accused, he gave the names of the weapons that each accused carried on that day at the scene, P.W.2 also identified, the 1st, 2nd, 3rd, 5th, 7th, 10th, 11th, 12th, 13th, 14th and 18th accused persons. P.W. 1 similarly identified the 2nd, 3rd, and 9th accused persons as being present at the scene. He said that the 3rd accused also hit the chief with his stick.

D I accept the evidence of P.W.1, P.W.2 and P.W.3. I hold that the 2nd, 3rd, 5th, 7th, 9th, 11th, 12th, 13th, 14th, 15th, 17th, and 18th accused persons were at the scene of crime and that they carried dangerous weapons. I accept the evidence of P.W.3 that the 5th accused carried a big
 E stone which he threw at P.W. 3 and thereby smashed the front windscreen of the car. The stone hit P.W.3 in the chest and landed on P.W.1's feet. I therefore reject plea of alibi of the 2nd, 3rd, 5th, 7th, 9th, 10th, 11th, 12th 13th, 14th, 15th, 17th and 18th accused persons. I hold that they
 F were at the scene of crime. Their plea of alibi is rejected.

I accept the evidence of P.W.3, that it was the 5th accused that carried the big stone and threw the same at the front windscreen of the car, smashing the said windscreen. P.W.1's evidence that it was the 6th accused is
 G rejected. It is most likely that because of the beating that, he suffered, he was not fully aware of the person carrying the big stone. P.W. 3 being the driver was in a better position to see the person who threw the stone at him."

On appeal to the Court of Appeal, Jos Division, Oguntade JCA in
 H his lead judgment [with which both Orah and Coomassie JJCA, agreed] after thorough and meticulous consideration of the evidence allowed the appeal of the 9th, 10th, 14th, 15th and 17th accused persons who were the 5th, 6th, 10th, 11th and 12th appellants respectively before that court

for lack of sufficient evidence to sustain the convictions and sentences passed on them. He discharged and acquitted them.

As regards the present appellants, the learned justice re-considered and re-evaluated the evidence by the prosecution on their identity and participation in the commission of the criminal act resulting in the death of the deceased. He found that the identity and participation of the appellants in the commission of the offence was proved beyond reasonable doubt. The learned Justice concluded:

"I now come to the 2nd accused [i.e the 1st appellant]. He was identified by all of P.W.1, P.W. 2 and P.W.3. The distinct roles he played in the events of 29/11/91 were given in evidence. All the eye witnesses had known the 1st appellant before 29/11/91 as he was a regular visitor to the deceased's palace. The substance of the conversation between the deceased and 1st appellant was given in evidence. There was certainly over-whelming evidence against 1st appellant. It is true that 1st appellant set up the defence of alibi which as I observed earlier was not investigated, by the police. But overall, I think that the strong, direct and positive evidence against 1st appellant effectively destroyed the defence of alibi which he set up. It is correct to say that whilst P.W.1 said he killed the deceased by stabbing him with a knife on his thigh P.W.2 said he hit the deceased with a stick. But the important thing is that all P.W.1, P.W.2 and P.W.3 who had known him before 29/11/91 said he was one of those who attacked the deceased. It is my conclusion that he was rightly convicted. With respect to 1st appellant I am unable to see a material contradiction between the evidence of P.W.1 on one part and P.W.2 and P.W.3 on the other as would entitle 1st appellant to an acquittal on the principles of Onubogu & Anor. v. State (1974) 9 SC 1 at 20. The accused (i.e., 2nd appellant) also raised an alibi. He called a witness in support of the defence of alibi he raised. But the 2nd appellant had been well known to each of P.W.1, P.W.2 and P.W.3 before 29/11/91. The evidence of the eye-witnesses suggests that he played a prominent role in the attack on the deceased. The strong and overwhelming evidence against him destroyed the defence of alibi he raised. It is my conclusion that he

was rightly convicted.

Each of the 5th, 7th, 11th, 12th, 13th, and 18th accused persons also raised the defence of alibi, of these accused persons, only the 5th testified in support of the defence of alibi he raised. The others did not call evidence. As I observed earlier in relation to the 2nd and 3rd accused persons, each of P.W.1, P.W.2, and P.W.3 had known each of the 7th, 11th, 12th, 13th, and 18th, accused persons before 29/11/91 and each of these witnesses categorically stated that they were members of the gang that attacked the deceased on 29/11/91. Only P.W.1 did not say anything concerning 5th accused. Earlier in this judgment I referred to judicial authorities to the effect that since in a defence of alibi the whereabouts at the material time of the accused relying on it are only known to himself, such accused should lead some evidence. The 7th, 11th, 12th, 13th, and 18th accused persons have chosen not to lead evidence.

I am of the view that the evidence against each of the 5th, 11th, 12th, 13th, and 18th accused persons is strong and cogent and that they were rightly convicted."

I entirely agree with him. Both P.W.1, P.W.2 and P.W.3 knew the appellants long before the incident and their evidence fixed them at the scene of the crime and participating in the criminal acts. It is not correct as argued by the learned Senior Advocate that the appellants were identified in the dock by the witnesses. The incident happened in broad day light with no obstruction of the view between the witnesses and their assailants, the appellants inclusive. The question of mistaken identity or non-recognition of the appellants in their participation in the criminal act is completely ruled out. See R. v. Turnbull (1976) 3 All ER 549 particularly at p.55, where Lord Widgery CJ said as follows on the issue-

" Firstly, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what

light? Was the observation impeded in any way, as for example by passing traffic or a press of people? How often? If only occasionally, had he any special reason for remembering the accused? How much time elapsed between the original observation and the subsequent identification to the police?"

Before the conclusion referred to above the learned trial justice had considered the issue of rejection of the identification parade by the learned trial judge who was incidentally sustaining the objection raised by learned defence counsel against its admissibility and came to the following inevitable and unimpeachable conclusion:-

The question I now ask myself is- How much credence can be placed on the evidence of P.W.1, P.W.2, and P.W.3? In other words; was there a chance they could be wrong when they asserted positively that each of the appellants was at the scene of crime? The key to the answer of this question lies in the ascertainment of whether or not each of the P.W.1, P.W.2 and P.W.3 had known the appellants before 29/11/91. P.W.1 in a relevant part of his evidence said:-

"Apart from the 2nd and 3rd accused, there were others present on that day who are also in court now. The 9th accused also attacked the Chief after the Chief had been killed. He hit him with his stick, I never saw them before. It was on that day that I first saw them. One of these three people viz: 2nd, 3rd and 9th accused usually comes to the Chief's palace everyday. He is the 2nd accused. He USED to come with one Gibiling. It was at the scene of this incident that I first saw the other accused person." (Underlining mine)

So, P.W.1 had known only the 2nd accused before 29/11/91. P.W.2 for his part said:-

" I (?) the people I have identified before the date of incident. We live very close to each other. There were still some other people that I cannot identify now. They are not in court."

Under cross-examination P.W.2 said further:

" I know these people (people identified) for a very long time. We live close to each other and we attend markets together. We pass through their village everyday i.e. Ta-Hoss. I know some of them by

looking at their faces and I know some of them by their name. I know the 1st accused, the 2nd accused, the 3rd accused, and Gililing who is not here are the ones I know by name. Those that I know by their faces: 5th, 7th, 18th, 13th, 11th, 10th accused."

B P.W.3 on the recognition of the names of the appellants said:-

"I know some of them by their names and some of them by their faces. I know the 1st accused by name, the 3rd accused by name. These are the people I know by name. I know (P.W.3 gets on) of witness box to touch the accused (he knows by their face) the 15th accused by his face, 11th C accused by his face, the 18th accused by his face, the 12th accused by his face.

"It is clear from the evidence of P.W.4 and P.W.5 that both P.W. 1 and P.W.2 suffered injuries as a result of which they bled. It may well D be that they were in a state notwithstanding their injuries to narrate to P.W. 4 and P.W.5 how they suffered their injuries but that was a matter which the appellants' counsel (who also appeared for them) at the lower court should have pursued in his cross-examination of E P.W.1, P.W.2, P.W.4, and P.W.5. Counsel did not also ask P.W.4 and P.W.5 in cross-examination if P.W.1 and P.W.2 had mentioned the names of those who attacked them. It is therefore unfair at this stage to argue that P.W.1 and P.W.2 had not mentioned the names of those who attacked F them at the first opportunity.

In SAMUEL BOZIN v. THE STATE (1985) NWLR (pt.8) 465 which counsel relied on., the Supreme Court said:

" The importance of the eye witness acting promptly in identification has been emphasised in several cases. Where such witnesses have G not been prompt to volunteer evidence, any such evidence thereafter should be accepted with caution."

I am in agreement with the above statement but it is necessary to point out that a victim of an attack would only be expected to promptly volunteer the names of his assailants to the police or any other person with a duty to receive or act on such information. P.W.4 and P.W.5 were not policemen. There is no basis to assume that P.W.1 and P.W.2 did not tell H them the names of their assailants. There is also no evidence that P.W.1

and P.W.2 did not tell P.W.6 the names of their assailants at the first opportunity they had to do so. The indication is that they did because P.W.6 said that he acted on the information he received from P.W. 1 and P.W.2. How soon after the incident P.W.1 P.W.2 gave P.W.6 useful information would obviously depend on the time it took them to recover from their injuries."

See Christopher Okose v. The State (1989) All WLR 170 and Okasi & Anor.V. The State (1989) 2 SCN J 183.

The evidence of P.W.1 P.W.2 and P.W.3 taken together established beyond reasonable doubt the participation collectively of the appellants in the commission of the crime. There was evidence which was accepted by both the learned trial judge and the Court of Appeal that dangerous instruments were used by the appellants in achieving their common purpose. Some of these weapons were tendered and formally admitted in evidence as Exhibits. Section 79 of the penal code provides as follow:-

"When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

In ONOHA NWAH & 4 ORS. V. THE STATE (1971) 1 NMLR 78 in which a question similar to the one involved in this case was considered this court said thus-

" There was of course no evidence of the actual thing done or foreborne to be done by the 4th and 5th appellants but we were of the view that they were in the gang of men who had attacked the deceased in his farm on the 30th April, 1966 in dastardly as described by the prosecution witnesses and slaughtered him. They all went there with the same and common intention. They were all there and watched on e or the other of them perform the exercise for which they were all prepared. If that is so, then it would not matter which of them did what of the result of the action of those who acted was criminal. (See AKPAMERE APISHE & ORS. V. THE STATE) (reference supplied by me) In other words the act of one executed in pursuance of the common intention was the act of all."

See also MUONWEN & ORS. V. THE QUEEN (1963) All NLR 96.

Issue I is therefore answered in the affirmative against the appellants.

The second issue is on the defence of alibi raised by the appellants. It is the contention of learned Senior Advocate that on the facts of this case, it cannot be said that the pleas of alibi promptly raised and set up by the appellants were destroyed having regard to the quality of the evidence adduced by the prosecution. He submitted that P.W.1, P.W.2 and P.W.3 who claimed to be eye witnesses to the incident gave unsatisfactory evidence as to the part played by each of the appellants in the incident. Learned Senior Advocate referred to page 186 of the record where the Court of Appeal in discharging the 9th and 14th accused persons said-

" Apart from this, PW1 had demonstrated some unsteadiness in his evidence. He alone said it was the 6th accused, whom the lower court later discharged and acquitted was the one who carried the stone which was thrown at the car's windscreen and which shattered it. PW2 and PW3 said it was the 5th accused who carried the stone. That the lower court eventually acquitted the 6th accused suggest that the lower court itself did not totally accept the correctness of the evidence on the point by PW1.

I think that the evidence of PW1 against the 9th and 14th accused was not sufficient to sustain a conviction for the serious offence brought against them. I think that they ought to have been discharged and acquitted."

and submitted that the court of Appeal on its own showing was not satisfied with the dock identification and this he said, has clearly reduced the quality of the evidence of PW1, PW2 and PW3 respectively. He submitted that failure by the prosecution to investigate the defence of alibi promptly raised by the appellants may cast some doubt on the probability of the prosecution case. He cited and relied on Adedeji v. The State (1971)1 All NLR 75 and Fatoyinbo v. A.G. Western Nigeria (1966) WNLR 6.

On the celebrated case of Patrick Njovens & 3 Ors. v. The State

(1973) NNLR 76, learned Senior Advocate argued that it is not applicable to this case as in that case (Njovens), there was overwhelming evidence by a witness that described in detail the part played by each accused person. He finally submitted that the facts in this case are on all fours with Akor v. The State (1992) 4 N.W.L.R. (pt. 234) 198. He urged the court to answer the question raised by issue 2 in the negative in favour of the appellants. B

In reply, learned counsel for the Respondent submitted that though the appellants raised the defence of alibi the duty rested on them to establish it because it was a matter within the peculiar knowledge of each and every one of them and cited John Peter v. The State (1997) 3 SCNJ 48 and Gachi v. The State (1965) NMLR 333 particularly at page 335. He submitted that in every case where a plea of alibi is raised, the proper approach to the consideration of such a defence is to consider the evidence in support of the plea against the evidence adduced by the prosecution and cited Yanor & Anor .v. The State (1965) 1 All NLR 193 in support. He argued that both the trial court and the Court of Appeal accepted the evidence of P.W.1, P.W.2, and P.W.3, on the identity of the appellants and their physical presence at the scene of the incident as well as taking part in the criminal act. The decisions in Njovens & 3 Ors .v. The State (supra) and Michael Hausa .v. The State (1994) were cited in support. D E

It is well established principle of law that where an accused person raised the defence of alibi promptly with the necessary particulars of his whereabouts, the prosecution has a duty to investigate it. See Adedeji .v. The State (1971) 1 All NLR 75. But the mere raising of such a defence, the facts of which are within the peculiar knowledge of the accused without adducing evidence in support would not entitle him to the defence. See Eze .v. The State (1976) 1 SC 125; John Peter .v. The State (1997) 3 SCNJ 48 and Gachi .v. The State (1965) NNLR 333. But where the prosecution adduced cogent evidence of the physical presence of the accused at the scene of the crime, the prosecution is relieved of calling any further evidence to destroy the alibi raised. See Njovens & Ors .v. The State (supra) and Yanor & Anor. v. The State (1965) F G H

NNLR 337 where this court expounded the law thus:

"On the defence of alibi, the law is that evidence of the alibi should not be disregarded by a trial court unless there is stronger evidence against it and that while the onus is on the prosecution to prove the charge against accused person, the latter has the duty of bringing the evidence on which he relies for his defence of alibi. Having regard to the overwhelming evidence which was accepted by the trial court, of the two eye witnesses P.W.3 and P.W.9 of the appellant's presence at the scene and of his commission of the offence the defence of alibi was, in our view rightly rejected as also the wild suggestion unsupported by any also the wild suggestion unsupported by any evidence whatever, that the murder was committed by another lover of P.W.3."

The learned trial judge after considering the evidence raised for and against the alibi concluded:-

"P.W.1, P.W.2 and P.W.3, clearly positively and directly identified, the 2nd accused, the 3rd accused, the 5th accused the 7th accused, the 9th accused, the 10th accused, the 11th accused, the 12th accused, the 13th accused, the 14th accused was identified in court by P.W.1, the 15th accused, the 17th accused and the 18th accused in court. They also gave information to P.W.6 about these accused persons which led to the arrest of the said accused persons.

P.W.3, not only identified the 2nd,3rd,5th,7th,11th,12th and 18th accused, he gave the name of the weapons that each accused carried on that day at the scene, P.W.2 also identified the 1st, 2nd 3rd, 5th, 7th, 10th, 11th, 12th, 13th, 14th, and 18th accused persons. P.W.1 similarly identified the 2nd, 3rd, and 9th, accused persons as being present at the scene. He said that the 3rd accused also hit the chief with his stick.

I accept the evidence of P.W.1, P.W.2 and P.W.3. I hold that the 2nd, 3rd, 5th, 7th, 9th, 19th, 11th, 12th, 13th, 14th, 15th, 17th, and 18th accused persons were at the scene of crime and that they carried dangerous weapons. I accept the evidence of P.W.3 that the 5th accused carried a big stone which he threw at P.W.3 and thereby smashed the front windscreen of the car. The stone hit P.W.3 in the chest and landed on P.W.1's feet. I therefore reject plea of alibi of the 2nd, 3rd, 5th, 7th, 9th,

10th, 11th, 12th, 13th, 14th, 15th, 17th, and 18th accused persons. I hold that they were at the scene of crime. Their plea of alibi is rejected.

I accept the evidence of P.W.3, that it was the 5th accused that carried the big stone and threw the same at the front windscreen of the car, smashing the said windscreen. P.W.1's evidence that it was the 6th accused is rejected. It is most likely that because of the beating that he suffered, he was not fully aware of the person carrying the big stone. P.W.3 being the driver was in a better position to see the person who threw the stone at him."

The Court of Appeal in its lead and unanimous judgment of Oguntade JCA, thoroughly considered the evidence adduced on the alibi by both the defence and the prosecution and concluded:-

"The accused (i.e.2nd appellant) also raised an alibi. He called a witness in support of the defence of alibi he raised. But the 2nd appellant had been well known to each of P.W.1, P.W.2and P.W.3 before 29/11/91. The evidence of the eye-witnesses suggests that he played a prominent role in the attack on the deceased. The strong and overwhelming evidence against him destroyed the defence of alibi he raised. It is my conclusion that he was rightly convicted.

Each of the 5th, 7th, 11th, 12th,13th,and 18th accused persons also raised the defence of alibi. Of these accused persons,only the 5th testified in support of the defence of alibi he raised. the others did not call evidence. As I observed earlier in relation to the 2nd and 3rd accused persons, each of P.W.1, P.W.2,and P.W.3 had known each of the 7th, 11th, 12th, 13th, and 18th accused persons before 29/11/91 and each of these eye witnesses categorically stated that they were members of the gang that attacked the deceased on 29/11/91. Only P.W.1 did not say anything concerning 5th accused. Earlier in this judgment I referred to judicial authorities to the effect that since in a defence of alibi the whereabouts at the material time of the accused relying on it are only known to himself, such accused should lead some evidence. The 7th, 11th, 12th, 13th, and 18th accused persons have chosen not to lead evidence.

I am of the view that the evidence against each of the 5th, 11th, 12th,

13th, and 18th accused persons is strong and cogent and that they were rightly convicted."

I agree with the conclusions by the court of Appeal on the alibi raised by the appellants some of whom did not adduce evidence in support. Both the trial court and the court of Appeal were right in accepting the positive and cogent evidence of P.W.1, P.W.2, and P.W.3 that the appellants were fixed at the scene of the crime, thus destroying the defence of alibi raised. The identification parade harped upon was not necessary and infact undesirable in the circumstance and its rejection by the learned trial judge did not affect the prosecution's case against the appellants.

Issue 2 is therefore answered in the affirmative against the appellants.

D Issue 3. Under this issue Learned Senior Advocate attacked the finding that prosecution's case against the appellants was proved beyond reasonable doubt as required by law. I have already touched on this while dealing with other issues in this judgments as all the three issues are inter-related.

It was the submission of learned Senior Advocate that the evidence of star witnesses in this case to wit P.W.1, P.W.2 and P.W.3 is contradictory and therefore unreliable. He argued that both P.W.1 and P.W.2 remained lying down on the road or in the gutter within the scene of the incident in some unconscious state from the moment of the brutal attack on them by their assailants inclusive of the appellants and hence were unable to observe what happened to the deceased or any individual among the mob. He referred to the knife picked at the scene of crime, tendered and admitted in evidence as Exhibit 1, which was said to have been used in attacking the deceased and submitted that the presence of Exhibit 1 as well as other Exhibits also collected from the scene of the Crime raised doubt as to whether these exhibits were not planted for the purpose of building up the prosecution's case, particularly when the evidence of P.W.11 showed that the deceased did not receive any wound from a sharp instrument like a knife. As regards the evidence of P.W.3 he submitted that the witness was so severely brutalised by his attackers

to the extent that he was unable to recognise his assailants. He submitted that the contradictions in their evidence are material to rest any conviction on it. He urged that the appeal should be allowed and cited the cases of Queen .v. Obodo (1961)NSCC 311 and The State .v. Emine (1992) 7 NWLR (pt.256) 658 in support.

In reply, learned counsel for the Respondent submitted that P.W.1, P.W.2 and P.W.3 identified their attackers among whom the appellants were. He argued that all the 3 prosecution witnesses identified the 1st appellant as one of their assailants and that P.W. 6 evidence that they made the arrests of the suspected assailants on information received from P.W. 1, P.W.2 and P.W.3 was neither discredited nor impeached; and that it was after the mass arrests that the 18 accused persons were charged to court for the various offences they committed. He referred to section 221 of the penal code read together with section 79 of the same code and submitted that it was not essential for the prosecution to establish which of the appellants dealt the fatal blow since each one of them was liable for the act that caused death as if such act was done by him alone and cited in support, the case of Omoha Nwali & 4 Ors. v.The State (1971)1 NMLR 78, particularly at page 80. Learned counsel concluded his argument on this issue by submitting that even if there are contradictions in the prosecution's evidence they are merely minor variations which are not fatal to the prosecution's case and cited in support, Ikemsons & Ors. .v. The State (1989) 6 SCNJ (pt.1) 54 at 72. He urged that the appeal be dismissed.

As I have said earlier, I have dealt, some where in this judgment, with most of, if not all, the points canvassed under the umbrella of this issue. Some of these are the identification of the appellants by the three prosecution eye witnesses, admissibility, credibility and cogency of their evidence.

The learned trial judge after considering and evaluating the evidence, said as follows-

"All the three eye witnesses gave similar evidence. I accept the evidence of P.W.1,P.W.2,and P.W.3 that the chief was dragged out by the 2nd and 3rd accused from the car. P.W.3 testified and I accept his evi-

dence that the 2nd accused hit the chief with a stick on the head.

This stick was tendered and admitted as Exhibit 4. The chief was also beaten with the sticks other accused persons held. Exhibits 4-6 are sticks. P.W.11 testified that any of these exhibits can cause trauma if applied to the skull with force. I accept P.W.11's evidence that Exhibit 4 can cause trauma if applied to the skull with force. This evidence is consistent with the cause of death. I reject the statement of the P.W.1 that 2nd accused stabbed the chief in the thigh with a knife. P.W.1 sat in front with the driver. It is possible that he did not see what was being done behind the car to the chief by the 2nd accused. P.W.3's evidence is very clear on this point."

xx

"I find no material contradiction in the evidence of P.W.1, P.W.2 and P.W.3 in the circumstances of this case"

xx

" I accept the evidence of P.W.11 that anyone of Exhibits 4-6 can cause the injuries found on the chief. Exhibit 4 and Exhibit 6 was held by the 18th accused. I accept the evidence of P.W.3 that the 2nd accused hit the chief with Exhibit 4 on the head. I hold that the hitting on the head by the 2nd accused with Exhibit 4 caused the death of the chief. Other accused persons hit the chief with their sticks but there is no evidence that any other accused persons hit the chief on the head, with sticks.

The accused persons are charged in court with the offence of conspiracy on 29/11/91 to beat and wound the chief, P.W.1, P.W.2, and P.W.3 and as a result the accused persons did cause the death of the chief. It was charged that the said act was done in furtherance of a conspiracy. This is an offence punishable under Section 97 of the penal code.

There is evidence which I accept that the road at Tahoss along which the chief and P.W.1, P.W.2 and P.W.3 were to pass on their way to Barakin Ladi was lined on both sides with people who carried dangerous weapons including the accused persons. The same road was blocked and thereby prevented the chief and P.W.1, P.W.2 and P.W.3 from having a safe pas-

sage through Tahoss. They were forced to stop. I hold that as soon as their car stopped the accused and possibly other people not before the court attacked P.W.1,P.W.2,and P.W.3 and the chief with stone, sticks and other dangerous weapons. As a result of the said attack P.W.1,P.W.2,and P.W.3, sustained injuries. The chief was beaten in the head and later died from the injuries that he received from the said attack."

The learned Justice of the court of Appeal in his lead judgment also reviewed, re-evaluated and re-assessed the prosecution's evidence and made the following findings:

I have no doubt that there are discrepancies in the evidence of P.W.2and P.W.3 as to who forced the Chief out of the car and as to whether or not the 2nd accused attacked the deceased with a knife. I must observe here however that these discrepancies do not amount to material contradictions."

"Having regard to the other established facts, all that the prosecution needed to show was that the appellants were members of the gang that attacked the deceased with these dangerous weapons that were from their nature likely to cause bodily injury as is likely to cause the death of the deceased. I agree that the lower court was in error to have concluded that it was the 2nd accused that dealt the fatal blow that caused the death of the deceased. It is not every error made by a trial judge that will result in the appeal being allowed. It is only when the error is substantial in that it has occasioned a miscarriage of justice that the appellate court is bound to interfere. See GWONTO v. STATE (1983) SCNLR 142 and IKE v.UGBOAJA (1993) NWLR (pt.301) 593.

It is sufficient in my view to have found that the 2nd accused i.e, (1st appellant) was one of those who attacked the deceased on 29/11/91 with the dangerous weapons some of which were tendered in evidence.

The laid down and followed principle of law is that the evaluation of evidence and ascription of probative value to it are the primary functions of the trial court that saw heard and duly assessed the witnesses. When such functions are duly and correctly discharged by the trial court, an appellate court has no business of substituting its own

views for that of the trial court.

See Akinloye & Anor. v. Eyiola & Ors. (1968) NNLR 95 and Woluchem v. Gudi (1981) 5 SC 291.

The duty of the appellate court is to ascertain whether or not there is evidence upon which the trial court acted, and once there is such evidence the appellate court must not interfere with the trial court's decision. See Akpagbue v. Ogu (1976) 6 SC 63; Joshua Ogunleye v. Babatayo Oni (1990) All NLR 341 and Tambani Majamma v. The State (1964) All NLR 205. However, an appellate court may interfere with the findings of fact of a trial court where the latter failed properly to evaluate the evidence or make a proper use of the opportunity of seeing or hearing the witnesses at the trial or where it has drawn wrong conclusions from the accepted evidence or where its findings are shown to be perverse. See Ojo v. Governor, Oyo State (1989) 1 NWLR (pt. 95) 1; Eholor v. Osayande (1992) 6 NWLR (pt. 249) 524.

I have myself carefully examined the evidence and the findings on it made by the two lower courts, but unable to find any fault in them. The case of each one of the appellants was painstakingly examined viz- a - viz the evidence against him and the conclusions that they are guilty of the offence for which they were charged is well supported by such evidence and therefore unimpeachable. Where the appeal revolves on issues of fact, as primarily in the present case, and there is nothing to show that the findings on such facts are erroneous, the court of Appeal will dismiss the appeal. See Lucy Onowan & Anor. v. Iserhien (1976) 9-10 SC 95.

There are concurrent findings of fact by the trial court and the Court of Appeal and this court does not, in practice, disturb such concurrent findings unless they have been shown to be perverse. See Sobakin v. The State (1981) 5 SC 75; Adio & Anor. v. The State (1986) 2 NWLR (pt. 24) 581 at 589 and Nwobodo v. Chief Federal Elect Officer (1984) 1 SC 1. The appellants have failed to show that the findings against them are wrong or perverse. I find no reason to interfere with the concurrent findings.

Issue 3 is also answered in the affirmative against the appellants.

On the whole, the appeal fails. The conviction and sentence passed on each of the charges they were tried for and convicted are hereby affirmed.

B

UWAIS CJN

I have had the privilege of reading in draft the judgment read by my learned brother Wali, J.S.C. I entirely agree with the judgment. I do not wish to add anything.

C

Accordingly the appeal fails and it is hereby dismissed. The decision of the Court of Appeal which affirmed that of the trial court in part is hereby confirmed. I adopt the order in the judgment of my learned brother Wali, J.S.C.

D

OGUNDARE JSC

I agree entirely with the judgment of my learned brother Wali, JSC just read. He has meticulously and correctly dealt with the three major issues of identification, alibi and contradictions canvassed in this appeal. I have nothing more to add.

E

I too, like him, dismiss the appeal of each appellant and affirm the judgment of the Court below.

F

OGWUEGBU JSC

I have had the advantage of a preview in draft of the judgment just delivered by my learned brother Wali J.S.C. I agree entirely with him that this appeal should be dismissed. I also agree with the reasoning leading to the conclusion dismissing the appeal.

G

The prosecution's case is mainly based on the evidence of P.W1, P.W.2 and P.W.3 who were eye witnesses. They were together in the same car with the deceased when the car was forced to stop and its occupants were then attacked. The witnesses suffered injuries from the attack and survived but the deceased died from his own injuries. The

incident took place in broad day light and the prosecution witnesses had reasons to remember the appellants. They were physically identified by P.W.1, P.W.2 and P.W.3. For example P.W.2 in his evidence-in-chief testified as follows:

B ".....*The chief remained in the car. But the 2nd accused then dragged the chief out of the car. The chief then told the 2nd accused: "You, Dan Awaza, even you if the people had planned to kill me you are also among them." The chief knew the 2nd accused. The accused then told the chief: "Atten, we used to say, may you live long. But today, your own life is finished." They then beat him. The people who beat the chief are 3rd accused, 5th accused, 7th accused, 11th accused, 13th accused and 18th accused. There is one, who is not here. He is called Gibiling. They beat the chief with sticks and knives.*"

D P.W.1 and P.W.2 testified as to the fact of this conversation. There was also the evidence of P.W.1 that the 1st appellant was a regular visitor to the palace of the victim. These facts were not denied. P.W.2 also testified that they attended the same markets with the appellants, he lives very close to those he identified and he had known them for a very long time. Within the shortest possible time the information relating to the identity of the appellants were passed on to the police.

F The learned trial judge who heard and saw the witnesses for the prosecution believed them. He found their evidence credible. It is not the function of an appellate court to interfere with such findings as the trial judge is in a peculiar vantage position to believe or disbelieve the witness. See Adelumola v. The State (1988) 1 N.W.L.R. (pt.73) 683.

G The mere raising of the plea of alibi without proof of it by the appellants would not entitle them to authomatic discharge. They did not discharge the evidential or secondary burden showing that they were at another place other than the scene of crime. see Gachi v. The State (1965) N.M.L.R. 333 and Stanley v. Liddle (1928)21 Cr. App R.3 at13. H The plea of alibi was destroyed when the trial judge believed the evidence of P.W.1, P.W.2 and P.W.3 which fixed them at the scene of crime and the results of the identification parade did not form the basis of the decision of the trial court or the court below. It cannot be true that the

accused persons were identified in the dock when they were infact arrested and eventually charged on the information supplied by P.W.1, P.W.2, and P.W.3, The evidence of P.W.6 (Patrick Makama) an Assistant Superintendent of Police showed clearly that the arrests were made on information received by the police from the prosecution witnesses. B

On the whole, there was overwhelming evidence which was accepted by the trial court of the eye witnesses (P.W.1, P.W.2, and P.W.3) of the presence of the accused persons at the scene and their plea of alibi was rightly rejected, see Yanor & Or. v. The State (1965)N.M.L.R. 337. The learned trial judge did not disregard the defence of alibi but it was rejected because of the strong and overwhelming evidence produced by the prosecution against the watery evidence of alibi adduced by the appellants. I have no hesitation in coming to the conclusion that the guilt of the appellants was proved beyond reasonable doubt. C D

It is for these reasons and for the more exhaustive reasons given by my learned brother Wali, J.S.C. that I dismiss this appeal and I further affirm the convictions and sentences. E

MOHAMMED JSC

I agree that there is no merit in this appeal and for the reasons given in the judgment just delivered by my learned brother, Wali JSC, the appeal is dismissed. There is over whelming evidence that the appellants were properly identified to have taken part in this dastardly act. They are therefore quite properly convicted and sentenced for their role in the murder. I affirm their conviction and sentence as has been done by the Court below. F G

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