

SUPREME COURT OF NIGERIA
26TH JANUARY, 2001. SC. 44/2000
CORAM:- S. M. A. BELGORE, S. U. ONU, A. I. IGUH,
A. I. KATSINA-ALU, A. O. EJIWUNMI, JJSC

NMA DOGO & 4 ORS. APPELLANTS
V.
THE STATE RESPONDENT

***APPEALS** - Concurrent findings of fact - Will be disturbed - If perverse or leading to miscarriage of justice.*

***CRIMINAL LAW** - Culpable Homicide - Eye witness evidence - The prosecution must prove -That the witness - Had opportunity of seeing the accused.*

***CRIMINAL LAW** - Culpable Homicide - Eye witness evidence - Unresolved contradictions and inconsistencies - Would entitle accused to benefit of doubt.*

***CRIMINAL LAW** - Culpable Homicide - Eye witness evidence - Must be clear and unequivocal - As to opportunity of seeing the accused*

***CRIMINAL PROCEDURE** - Alibi - Places an onus on prosecution - To prove beyond reasonable doubt - The presence of the accused at the scene of the offence*

FACTS

The appellants were charged along with several others for the offence of conspiracy and culpable homicide in the Minna High Court for the murder of one Alhaji Ibrahim Tsadu and were convicted by the trial judge and sentenced to hanging. The prosecution had contended that the accused persons had been identified at the scene of the murder on the fateful day by a prosecution witness who was acquainted with them. They were cutting down the tree trunks that were used to block the way

the vehicle of the deceased was supposed to pass. This was done in the company of many others. According to the witness they had equally participated in the murder of the deceased when the car had been forced to stop and the driver had taken to his heels for his life. The trial judge believed the prosecution witness and convicted them on his evidence.

Aggrieved the appellants appealed to the Court of Appeal which dismissed the appeal and affirmed the judgment of the lower court. The Appellants have further appealed to the Supreme Court raising the following issues for determination

ISSUES FOR DETERMINATION

(1) Whether from the nature and circumstances of this case, the prosecution had actually proved its case against the Appellants beyond reasonable doubt.

(2) Whether the affirmation of the conviction and sentences imposed on the Appellants by the trial Court in the way and manner done by the Court of Appeal was not unreasonable and against the weight of evidence adduced at the trial.

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

Culpable homicide - Eye witness evidence

1. As I have said above in this judgment, what is of crucial importance in this case is whether the 4th PW could have seen the appellants at the time he claimed he saw them at the scene of crime. The evidence led by the prosecution must show that he had the opportunity of seeing them and the prosecution had the burden of establishing that fact. (p. 341 H)

Eye witness evidence - Unresolved contradictions and inconsistencies

2. In this regard, the evidence as to what time the 4th PW got to the scene and the nature of the vegetation prevalent at the time are material contradictions and inconsistencies in the evidence of the prosecution. Where such contradictions and inconsistencies are established, then the appellants are entitled to be given the benefit of the doubt so created. See Onubogu v The State (1974) 9 SC 63. (p. 342 A)

Eye witness evidence - Must be clear and unequivocal

3. In my respectful view, the evidence of a witness who said that he was able to identify accused persons in the circumstances disclosed in this case, must be clear and unequivocal as to the opportunity he had of seeing the accused. Moreso, where in this case the witness did not report the incident soon after it happened. And also bearing in mind the fact that this incident happened in the early evening to late evening. There must be in my humble view, evidence that the witness had a clear view of the appellants in all the circumstances by proving positively that at that time of the day, the witness was able to see clearly the appellants he identified as some of the persons who blocked the road and who later took part in the killing of he deceased. (p. 342 H)

Alibi - Onus on prosecution

4. In this regard it must be borne in mind that where an accused sets up an alibi, the onus still lies on the prosecution to prove beyond reasonable doubt that the accused was at the scene of the offence as alleged. See *Adediji v The State* (1971) 1 ALL N.L.R. 75 (p. 343 H)

Concurrent findings of fact

5. During my consideration of this appeal, I have not been unmindful of the settled law that the concurrent findings of facts of two Lower Courts should not be disturbed unless there is a substantial error apparent on the record or that the findings are shown to be perverse or that they would lead to some miscarriage of justice. Having regard to all I have said above, I am of the firm view that in the instant case the concurrent findings of the two Lower Courts ought to be disturbed. This flows from my considered view that the evidence linking each of them to the commission of the offence has not been proved beyond reasonable doubt. (p. 344 B)

NOTABLE POINTS OF INTEREST**IGUH JSC*****1. Credibility of a witness***

In this regard, it has been said that the character of a witness for habitual

veracity is an essential ingredient in his credibility; for a man who is capable of uttering a deliberate falsehood is in most cases capable of doing so under the solemn sanction of an oath. If, therefore, it appears he has formerly said or written the contrary of that which he has now sworn (unless the reason for his having done so is satisfactory accounted for), his evidence should not have much weight with a jury and if he has formerly sworn the contrary, the fact is almost conclusive against his credibility. (p. 349 A)

C
2. *Inconsistencies in eye witness's evidence ought to be explained*
Where, therefore, there are material or substantial inconsistencies and conflicts in the evidence of a witness, as is the case in the present proceeding with regard to the evidence of PW4, the purported only eye witness to the incident and no cogent reasons for the inconsistencies and conflicts are given, it is not sufficient for a trial Judge to state that he has no reasonable doubt whatever as to the guilt of the accused; he should state clearly and in detail the conclusions reached. (p. 349 E)

E
3. *An alibi must be verified or disproved by the police*
In the second place, where an accused has disclosed an alibi before the trial, as in the present case, and the Police has taken no available steps to verify or disprove it, the court may hold that the prosecution has failed to prove its case. (p. 350 E)

KATSINA-ALUJSC

G
4. *Conviction on uncorroborated identification evidence*
As I indicated earlier, this is the sole evidence of identification connecting the appellants to the crime. This evidence was uncorroborated. In such a situation the trial judge should have warned himself of the danger of a mistaken identification and only in the most exceptional circumstances should a conviction based on uncorroborated identification evidence be upheld in the absence of such a warning. (p. 354 D)

REPRESENTATION

K. T. Turaki for the appellants

M. B. Abdul DPP (Niger State) with him M. G. Chiroma S.C. II for the respondents.

CASES REFERRED TO

Emine v The State (1991) 7 NWLR (Pt. 204) 481

Onubogu v The State (1974) 9 SC 63;

Nwabueze v The State (1988) 3 NWLR (pt.86) 16

Oteki v A.G. Bendel State (1986) NWLR (Pt.24) 648 at 651

Zekeri Abudu v The state (1985) 1 NWLR (pt.1) 55 at 62

Sobakin v State (1986) 5 S.C. 75;

Nasamu v State (1979) 6 - 9 S.C. 153

R.V. Ukpong (1961) 1 ALL N.L.R. 25

Hycienth Egbe v. The king (1950) 13 W.A.C.A 105

The State v. John Adegbami (1968) N.M.L.R. 347

LEAD JUDGMENT BY EJIWUNMI JSC

The above named appellants were convicted for the offences of conspiracy and culpable homicide contrary to sections 97 and 221(a) of the Penal Code respectively by Fati Abubakar J, sitting at the Minna High Court. The state filed its information against them and eight others.

That information, which contained three counts read thus:-

THE CHARGES

ONE: That you,

(1) Nma Dogo (m) (2) Aliyu Dwafu Agaie (3) Alhaji Alfa Tella (Tailor) (m) (4) Alhaji Baba Idirisu Mohammed (Badirisu) (m) (5) Garba Magaji (Alias Nnazuru) (m) (6) Baba Sallah Ibrahim (m) (7) Ibrahim Abubakar Kago (m) (8) Etsu Dzuko Ndako Agaie (m) (9) Alhaji Babadoko Kafinta (m) (10) Alhaji Ndako Agaie (m) (11) Mohammed Cece (m) (12) Alhaji Muhammadu Attahiru (Etsu of Agaie (m) and (13) Ndagi Mohammed Babadoko (m) on or about the 9th to the 13th day of February, 1994, at Agaie in Agaie Local Government Area of Niger State agreed to do an illegal act, to wit; to cause the death of one Alhaji Ibrahim Tsadu (m) (Former Chairman of

Agaie Local Government Council) and that the same act (causing his death) was done in pursuance of the said agreement and that you thereby committed an offence punishable under section 97 of the Penal Code and triable in the Honourable Court.

B TWO: That you,

(1) Nma Dogo (m) (2) Ibrahim Abubakar Kago (m) (3) Alhaji Aliyo Dwafu Agaie (m) (4) Etsu Dzuko Ndako Agaie (m); and (5) Garba Magaji (Alias Nnazuru)

C on or about the 9th to the 13th day of February, 1994, at Agaie in Agaie Local Government Area of Niger State, formed a common intention with:

(6) Alhaji Muhammadu Attahiru (m) (7) Mohammed Cece (m) (8) Alhaji Alfa Tella (Tailor) (m) (9) Alhaji Babadoko Kafinta (m) (10) Alhaji Ndako Agaie (m) (11) Alhaji Baba Idirisu Mohammed (Badirisu) (m)

D (12) Baba Sallah Ibrahim (m); and (13) Ndagi Mohammed Babadoko, to commit an offence, namely; to cause the death of one Alhaji Ibrahim Tsadu (m) (former Chairman of Agaie Local Government Council) and in furtherance of which you on the 13th day of February, 1994 along Agaie
E to Etsu Gaie Road, Agaie, did the following criminal acts; inflicting injuries on the said Alhaji Ibrahim Tsadu with sticks, knives, cutlasses and axes, which acts led to his death, an offence punishable under section 221 of the Penal Code read with section 79 of the said Penal Code and triable
F in this Honourable Court.

THREE: That you,

(1) Nma Dogo (m) (2) Ibrahim Abubakar Kago (m) (3) Alhaji Aliyu Dwafu Agaie (m) (4) Etsu Dzuko Ndako Agaie (5) Garba Magaji (Alias Nnazuru) (m) (6) Alhaji Babadoko Kafinta (m) (7) Alhaji Ndako Agaie
G (m) (8) Mohammed Cece (m) (9) Alhaji Alfa Tella (Tailor) (m) (10) Alhaji Baba Idirisu (Badirisu) (m) (11) Baba Sallah Ibrahim (m) (12) Alhaji Muhammadu Attahiru (m) (Emir of Agaie); and (13) Ndagi Mohammed Babadoko (m)

H on or about the 13th day of February, 1994 along Agaie to Etsu-Gaie Road, Agaie, did commit the offence of culpable homicide punishable with death in that you caused the death of one Alhaji Ibrahim Tsadu (m) (former Chairman of Agaie Local Government Council) by doing the

following acts; to wit: beating, stabbing and inflicting injuries on the said Ibrahim Tsadu with sticks, knives, cutlasses and axes with the intention of causing his death and that you thereby committed an offence punishable under section 221(a) of the Penal Code and triable in this Honourable Court.

Following their plea of not guilty to each of the counts upon which they were charged, the trial court then proceeded with their trial. In support of its case, the State called 38 witnesses in the course of which 58 items that included the voluntary statements of the accused persons were tendered and were admitted in evidence as exhibits. As a result of the no case submissions made on behalf of each of the accused persons at the end of the case for the prosecution, the learned trial judge struck out the second count of the information. The learned trial judge discharged and acquitted the 10th and 11th accused persons, namely, Alhaji Ndako Agaie and Alhaji Mohammed Cece respectively.

In addition, the learned trial judge discharged and acquitted the 3rd, 4th, 6th, 9th and 13th accused persons on the count alleging that they committed the offence of culpable homicide punishable with death contrary to section 221(a) of the Penal Code. Although they were made to defend the remaining count of conspiracy against them with the other accused persons, not yet discharged and acquitted in the counts standing against them in the information they were also discharged and acquitted when the learned trial judge delivered her judgment. Before that judgment, the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 13th accused persons had testified in their own defence and also called witnesses who testified in support of their defence and in which some of them raised the defence of alibi. The 12th accused person, Alhaji Muhammadu Attahiru, the Etsu of Agaie, did not give evidence nor did he call any witnesses. He apparently rested his case on that of the prosecution. Following addresses of learned counsel for the accused persons, the learned trial judge delivered a considered judgment. Before that judgment, the learned trial judge had discharged and acquitted the 9th and 13th accused persons. And in the judgment aforesaid, she discharged and acquitted the 3rd, 4th, 6th and 12th accused persons on counts alleging conspiracy to cause the

death of Alhaji Ibrahim Tsadu punishable under section 97 of the Penal Code. The learned trial judge however found the 1st Accused, Nma Dogo; 2nd Accused, Alhaji Aliyu Dzwafu; 5th Accused, Garba Magaji; 7th Accused, Ibrahim Kago; and the 8th Accused guilty of the twin offences of conspiracy to cause the death of Alhaji Ibrahim Tsadu, and also causing his death punishable under section 221(a) of the Penal Code. They were consequently sentenced to death by hanging.

Following their convictions and sentence as aforesaid, they appealed to the Court below where their convictions and the sentence passed on each of them were confirmed.

As they were all dissatisfied with the judgment and orders of the Court below, each of them has now appealed to this Court. Pursuant thereto each of them filed grounds of appeal to challenge the decision of the Court below. The grounds of appeal so filed would not be set down in this judgment as the issues raised thereon are sufficiently covered by the issues raised in the appellants' brief. They are as follows:

Issue 1 Whether from the nature and circumstances of this case, the prosecution had actually proved its case against the Appellants beyond reasonable doubt.

Issue 2 Whether the affirmation of the conviction and sentences imposed on the Appellants by the trial Court in the way and manner done by the Court of Appeal was not unreasonable and against the weight of evidence adduced at the trial.

The issues reproduced above were adopted in the respondent's brief. Before the issues so raised are considered in the light of the submissions made for the parties by their respective counsel, the brief background facts that led to the arrest and conviction of the appellants would be given.

The deceased, Alhaji Ibrahim Tsadu, who was then the Chairman of Agaie Local Government Council in Minna was the victim who was allegedly murdered on the 13th day of February 1994. On the night of that day, the deceased in the company of his wife and another person were all being driven in his car by his driver from Agaie towards Etsugaie when the car was forcibly stopped along the road. This occurred when

the windows of the car were smashed with stones and cudgels. The driver soon found that he could not continue further as the road upon which he was driving had been blocked with wooden objects that had been laid across it. As soon as the car stopped, several persons attacked the car and its occupants with dangerous weapons which included, sticks, B knives and axes. It is alleged that the deceased who came out of the car to challenge the attackers with his gun was eventually killed. Though his wife was also injured, she did not die. The others, i.e. the driver and the other person in the car escaped from the scene, though not injured. C

It is also part of the case for the prosecution that the above five appellants named above conspired with each other and the other persons named in the information filed against them to murder the deceased. It is alleged also, that the conspirators met to hatch the conspiracy in the palace of the 12th accused, Alhaji Mohammed Attahiru (Emir of Agaie), and who has D since been discharged and acquitted.

I think it is also appropriate to mention here that the gravamen of the case of the prosecution against the appellants is that they were seen at the scene of crime before the event, either helping in the cutting of the wood or E laying same to block the road leading to Agaie. For this evidence, and that concerning their participation in the commission of the offence, heavy reliance was placed on circumstantial evidence.

At the end of the trial, the learned trial judge convicted the appellants F upon the evidence led by the prosecution. Hence the appellants were convicted of the offence of culpable homicide for which they were charged. The learned Justices of the Court of Appeal also accepted the finding of the learned trial judge. Hence the appellants lost their appeal to that court.

In this Court the appellants filed an appellants brief, and upon the receipt of the respondent's brief, they filed a reply brief. G

I will now set down the main arguments made for the appellants in the two briefs filed for them.

The thrust of the argument of the learned counsel for the appellants is H that the Court below was wrong to have confirmed the findings of the trial Court that the prosecution had established beyond any shadow of doubt the guilt of the appellants. It is the submission of the learned counsel for

the appellants that though the case of the prosecution rested on the evidence of PW1; PW2; PW4; PW8 and PW16, a careful consideration of the evidence of these witnesses would have revealed to the learned Justices of the Court of Appeal that their evidence alone, or when taken together could not have led to the conclusion reached by the trial Court that the case against the appellants was proved beyond reasonable doubt.

It is further argued for the appellants that the only witness who claimed to have seen the appellants at the scene of crime preparing to commit the offence, and who indeed claimed to have seen them participating in the commission of the offence is the PW4, Umaru Mohammed. It is the further submission of learned counsel for the appellants that for the evidence of such a witness to be relied upon, his evidence must be free from material discrepancies and contradictions. In that regard, reference was made to the case of Emine v The State (1991) 7 NWLR (pt. 204) 481. He then submitted that the evidence of PW4 lacks credibility having regard to its inconsistency and inherent contradiction revealed in his testimony both under cross-examination and when compared with the evidence of other witnesses who gave evidence at the trial. Several of such inconsistencies and contradictions were listed in the appellants' brief. Some of them would be considered later in this judgment. It is therefore the submission of learned counsel for the appellants that had the learned Justices of the Court of Appeal considered "*dispassionately*" the evidence of PW4 and the other pieces of evidence given by other witnesses the court below would have come to a different conclusion. This Court is therefore urged to reconsider the evidence led at the trial and to hold that the prosecution had failed to discharge the burden of proof laid on the prosecution to establish the guilt of the appellants beyond reasonable doubt. Also cited in the appellants' brief to support the contention that throughout the trial the prosecution never took any steps to either explain these inconsistencies or reconcile these contradictions in the evidence of PW4 and the evidence of other witnesses called by the prosecution are the following cases: Onubogu v The State (1974) 9 SC 63; and Nwabueze v The State (1988) 3 NWLR (pt.86) 16.

The main contention made for the respondent as could be gathered

from the brief filed for the State is that the case for the prosecution was established beyond reasonable doubt. And reference was made to *Woolmington v DPP* (1935) E.R. 462. It is also argued that the trial court and the court below were right to have accepted the evidence of PW4, whose evidence it is contented is cogent and uncontroverted both in court and at the locus in quo. And in support of that submission, reference was made to *OTEKI v A.G. Bendel State* (1986) NWLR (pt 24) 648 at 651, and also to *Zekeri Abudu v The State* (1985) 1 NWLR (pt. 1) 55 at 62, for the submission that the evidence of PW4, was properly considered credible because of his identification of the appellants as the persons who joined in the killing of the deceased. His recognition of the appellants was not a fleeting recognition, it is submitted. B C

Now it is manifest from the argument of counsel in this appeal that the evidence of PW4 was crucial to the conviction of the appellants. D

In the course of her judgment, the trial court had this to say about the evidence of this witness at pages 550 -551 of the Printed Record:-

“In the course of his testimony both in this court and at the locus, I carefully observed PW4. He struck me as a very alert intelligent young man, his illiteracy notwithstanding. His testimony was unhesitant, sure and very confidently given. He withstood the withering and vigorous cross-examination of learned counsel very well. In this wise his inquisitive propensity becomes understandable. It is that curiosity that led him to observe the acts on the Etsugaie road that thoroughly rattled him,” E F

Then after making some comparison of the evidence of PW2., Safiya Ibrahim Tsadu, wife of the deceased, concerning the alleged conversation of PW4 with PW2, soon after the murder of the deceased, near he scene of the offence, the learned trial judge, held thus at p. 551:- G

“One may wonder what PW4 was doing on that road at that time of the night towing a bicycle without light. It certainly cannot be for the purpose of a leisurely stroll. This thus gives evidence to PW4’s testimony that he left his village while it was still light to go to his mission in Agaie and reach town before it gets dark before it gets dark as his bicycle has no light, he however came face to face with commission of crime. Thus H

notwithstanding his delay in reporting the crime, I am in the circumstance satisfied and have no doubt that PW4's testimony in court is the truth. I believe his account of what he saw and who he saw at the scene of crime is true."

B This appraisal of the evidence of PW4 by the learned trial judge was subjected to attack before the court below, and also in this Court. It is contended for the appellants that if the court below had carefully considered his evidence in the light of the inherent contradictions and inconsistencies in it, the court below would have been loathe in accepting his evidence as portrayed by the learned trial judge.

C Now it seems to me that the focus of the case of the appellants is that PW4, was simply not in a position to have given the evidence which he gave identifying the appellants at the scene of the offence, and as the perpetrators of this heinous offence. To begin with it is argued for the appellants that PW4 upon his evidence should not have been believed that he was at the scene of the offence and was in a vantage position to see the events that he described and to identify the appellants at the scene.

D E In the course of his evidence in chief, PW4, testified that he left his village at about 6.45 p.m. on the day of the incident, i.e. 13/2/94. That was after he broke his fast with porridge and kosai. Thereafter he proceeded towards Agaie on his bicycle. It was when he left Ekpangi at a place called Fillicko near a culvert that he saw some people ahead of him standing near another culvert. His evidence continued thus:-

F *"I saw these people enter into one Alhaji Isah's farm and began cutting some wood with which they started blocking the road. I wondered why they were doing so? I came down from my bicycle with a view to finding out what they were going to do. I went and squatted down under a tree on the right side of the road and watching these people. I saw some five people that I knew amongst them. At the time I was sitting under the tree I kept my bicycle in one Alhaji Audu Badama's farm. In the area there are trees. There was no grass at that time. Some of the people were cutting woods while others were carrying them and placing them on the road, blocking the road to the culvert. The people wore black dresses. The distance between where I was squatting to where the*

people were cutting the trees was about 45 feet. Those cutting trees were nearer to me than those blocking the road. There were more than five people cutting the trees but the five I knew were nearer to me. I had known them before the incident ... I saw their faces at that time."

Now it is clear from the evidence of PW4 that he sought to give the impression that he was able to see the appellants because of his closeness to the scene of crime and that he had a clear view of them because there was light at the time. But from the evidence that emerged when the court moved to the locus in quo it is manifest that he could not have been as near to the appellants as he said. The records show that from the 1st culvert where the 4th PW first stood and from where he sighted some persons to the second culvert where they were standing was 910 feet.

Although at the locus in quo the 4th PW demonstrated to the court where he was in relation to the persons he identified, yet the fact remained that all that demonstration could not have been of requisite assistance for a court seeking to reconstruct the events that happened on the fateful night. This is because as the real event happened in the early evening to late evening, the visit to the locus in quo would have been more useful if it was carried out at about the same time as when the incident occurred. It must be borne in mind also that during the investigation of this case, PW36 an Assistant Inspector of Police, Nkereuwem Ukoh, attached to FIIB, Alagbon Close, Lagos, went to the scene.

This witness in the course of his evidence estimated that PW4 could not have been less than about 60 metres to where he claimed he stood to where he saw the appellants. He further added that the time when this incident occurred was between 7.00 p.m. and 8.00 p.m. In his view the time the PW4 gave was exaggerated as he had no watch on him.

It is also pertinent to observe that under cross-examination, 4th PW who had earlier said that there were cashew trees at the scene of crime, turned to say that there are no cashew trees at the scene of crime. Yet it is established fact that cashew trees were found to have been used to block the road to stop the movement of the deceased's car.

As I have said above in this judgment, what is of crucial importance in this case is whether the 4th PW could have seen the appel-

lants at the time he claimed he saw them at the scene of crime. The evidence led by the prosecution must show that he had the opportunity of seeing them and the prosecution had the burden of establishing that fact. In this regard, the evidence as to what time the 4th PW got to the scene and the nature of the vegetation prevalent at the time are material contradictions and inconsistencies in the evidence of the prosecution. Where such contradictions and inconsistencies are established, then the appellants are entitled to be given the benefit of the doubt so created. See Onubogu v The State (1974) 9 SC 63; Nwabueze v State (1988) 2 NWLR (pt.86)16. However, in the view of the learned trial judge, the evidence of the 4th PW properly identified the appellants with the offence. The court below also endorsed this view of the evidence of the 4th PW. But, having regard to the observations made above on the evidence of 4th PW, raise the troubling question to whether the 4th PW had he opportunity of seeing the appellants as claimed. While the 4th PW might have known the appellants before the incident, the question remains as to whether he saw them as he claimed at the scene of this incident. Though the 4th PW tried to suggest that there was light at the time he got to the scene, the time he actually got there remained in doubt. Now though this 4th PW, claimed that he was so disturbed by what he saw that he urinated in his trousers, yet he did not think it fit to report the matter to the police immediately. And he admitted that he knew the Agaie Police Station. But, he went on the next day to Agaie to collect money from his father that was the reason that took him out of his village. It is significant that he did not also tell his father or anyone else about the incident immediately after it happened. It must be noted that he at first said his statement was made a few days after the incident. But it seems clear that the police did not know of him until about four months after the incident.

With due respect to the learned Justices of the Court below, I have grave doubts as to whether they would have endorsed the judgment of the learned trial judge if they had considered the evidence of 4th PW in the light of the observation made above. **In my respectful view, the evidence of a witness who said that he was able to identify accused per-**

sons in the circumstances disclosed in this case, must be clear and unequivocal as to the opportunity he had of seeing the accused. Moreso, where in this case the witness did not report the incident soon after it happened. And also bearing in mind the fact that this incident happened in the early evening to late evening. There must be in my humble view, evidence that the witness had a clear view of the appellants in all the circumstances by proving positively that at that time of the day, the witness was able to see clearly the appellants he identified as some of the persons who blocked the road and who later took part in the killing of he deceased.

Having formed this view of the evidence of 4th PW, I must perforce refer to the issue argued for the appellants that the lower court wrongly upheld the view of the trial court on the defence of alibi raised by the appellants. In its judgment, the Court of Appeal at page 123 lines 12 - 16 of the Record said thus:-

“I am inclined to agree with the findings of the learned trial judge that even though the appellants raised the plea of alibi individually such plea cannot be sustained in view of the fact that the prosecution was able through PW4 to adduce evidence sufficient enough to fix all the appellants at the scene of crime.”

It is therefore clear that the lower court depended on the view held of the evidence of PW4 by the trial court. I have already pointed out that if the lower court had considered the evidence of PW4 critically as I have outlined above, the decision reached by the lower court might have been different. It must always be remembered that the plea of alibi, must not only be investigated by the prosecution. It is evident that in the instant appeal, that the appellants set up their defence of alibi as soon as they were arrested. But it is on record that this defence was not investigated in respect of the 4th and 5th appellants. In respect of the other appellants whose alibi were investigated, it is evident that their alibi was in each case dismissed because the trial court believed the evidence of 4th PW.

In this regard it must be borne in mind that where an accused sets up an alibi, the onus still lies on the prosecution to prove beyond reasonable doubt that the accused was at the scene of the offence as

alleged. See Adedeji v The State (1971) 1 ALL N.L.R. 75; Peter v The State (1997) 3 N.W.L.R. (Pt. 496) 625 at 642.

With the view I have held of the evidence of PW4, there can be no doubt that the prosecution cannot be said to have proved its case against B each of the appellants beyond reasonable doubt.

During my consideration of this appeal, I have not been unmindful of the settled law that the concurrent findings of facts of two Lower Courts should not be disturbed unless there is a substantial error apparent on the record or that the findings are shown to be perverse or that they would lead to some miscarriage of justice. See Sobakin v State (1986) 5 SC 75; Nasamu v State (1979) 6 - 9 SC 153; Adio v State (1986) 2 N.W.L.R. (Pt. 24) 581 at 589. C

Having regard to all I have said above, I am of the firm view D that in the instant case the concurrent findings of the two Lower Courts ought to be disturbed. This flows from my considered view that the evidence linking each of them to the commission of the offence has not been proved beyond reasonable doubt.

E In the result, I allow each of the appeal of the appellants. The conviction and sentence recorded against each of them by the Lower Courts are hereby set aside. I hereby also discharge and acquit each of the appellants accordingly.

F

BELGORE JSC

I am in full agreement with the judgment of my learned brother, Ejiwunmi JSC that this appeal has merit. For the reason he has so thoroughly adumbrated, to which I have nothing to add, I also allow this G appeal

ONU JSC

I have had the privilege of a preview of the judgment of my learned H brother Ejiwunmi, JSC just delivered. I am in entire agreement with his reasoning and conclusion that the appeal must perforce succeed and I allow it.

Accordingly, I must set aside the conviction and sentences passed on

the appellants and enter in respect of each appellant a verdict of discharge and acquittal on all counts preferred against them.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ejiwunmi, JSC and I agree that there is merit in this appeal and that the same ought to be allowed. B

The facts of the case have been fully set out in the leading judgment and no useful purpose will be served by my recounting them all over again. C
It suffices to state that the appellants were arraigned before the High Court of Justice, Niger State, holden at Minna upon an information which inter alia charged them with the murder of one Alhaji Ibrahim Tsadu, Chairman, Agaie Local Government Council, Niger State punishable under section 221(a) of the Penal Code. The case as presented by the prosecution D
was that the deceased on or about the 13th day of February, 1994 along the Agaie - Etsugaie Road was ambushed and attacked with various lethal weapons as a result of which he died. The appeals of the appellants against their conviction and sentences were on the 28th July, 1999 dismissed by E
the Court of Appeal, Abuja Division. Dissatisfied with this decision of the Court of Appeal, the appellants have now further appealed to this court.

Both the appellants and the respondent in their respective briefs of argument formulated the same issues for the determination of this court. F
These are couched as follows:-

“1. Whether from the nature and circumstances of this case, the prosecution had actually proved its case against the Appellants beyond reasonable doubt.

*2. Whether the affirmation of the conviction and sentences imposed G
on the Appellants by the trial court in the way and manner done by the Court of Appeal was not unreasonable and against the weight of evidence adduced at the trial.”*

It is, perhaps, convenient in this judgment to dispose of the two issues H
together.

It must be observed that although the prosecution in proof of its case called thirty-eight witnesses and tendered several exhibits, it cannot be

disputed that its case against the appellants, especially with regard to the charge of culpable homicide, rested principally on the direct evidence of PW4 who claimed to be the only eye witness to the incident. This fact was rightly recognised by the learned trial Judge when she stated as follows:-

B *“There is no doubt that PW4 is the most vital witness for the prosecution in respect of the charge of culpable homicide against the five accused persons. It is thus imperative at this stage that his role is closely considered.”*

C The learned trial Judge then proceeded to consider the role of the said PW4 in the incident. In the course of this exercise, she had cause to observe:-

D *“A very serious issue that has been highlighted by the defence is the failure of PW4 to report to the Police what he claims to have seen at a very early opportunity. Learned counsel to the five accused persons contended that the PW4 did not communicate this information until four months later. The prosecution concedes that the PW4 did not immediately report to the Police. PW4, under cross-examination, admitted that it was a few days before he gave his statements to the Police. Pressed further at a later date he said it was two months.”*

She then declared:-

F *“Thus notwithstanding his delay in reporting the crime, I am in the circumstance satisfied and have no doubt that PW4’s testimony in court is the truth. I believe his account of what he saw and who he saw at the scene of crime is true.”*

She added:-

G *“The position of the law is that the court can convict for culpable homicide based on the testimony of one single witness, but such witness must be one that is credible and whose conduct does not give room for reasonable doubt. In the light of the evidence adduced, the delay by PW4 before reporting what he saw notwithstanding, I am satisfied that he is a credible witness.”*

The trial court then concluded:-

“In the event I am satisfied that the prosecution has proved its case of the offence of culpable homicide punishable under section 221(a) Pe-

nal Code as charged against all the accused persons, namely, Nma Dogo (1st), Alhaji Aliyu Dzwafu (2nd), Garba Magaji (5th accused), Ibrahim Kago (7th accused) and Etsu Ndako Agaie (8th accused) and I convict them accordingly.”

On appeal against the conviction and sentences of the appellants before the court below, the above findings of the learned trial Judge were affirmed. Said the Court of Appeal.

“The ingredients of the offence of culpable homicide punishable with death under section 221 (a) of the Penal Code have been proved against the Appellants beyond reasonable doubt through the direct evidence of PW4 and other prosecution witnesses. The evidence of the common intention leading to the conviction in respect of conspiracy punishable under section 97 of the Penal Code is overwhelming. The conviction by the trial court under section 97 of the Penal Code is endorsed by this court and affirmed.”

Indeed, the court below in arriving at its conclusion and affirming the decision of the trial court to the effect that the case against the appellants was proved beyond reasonable doubt observed thus:-

“The trial court assessed and evaluated the evidence and ascribed probative values to evidence adduced before it. That court, for the reasons placed before it, relied on and accepted, inter alia, the evidence of the PW4. The evidence of that witness was unshaken even after the rigorous cross-examination by the Appellants’ counsel. The learned trial judge ruled that the evidence of PW4, who saw it all, is capable of being believed. Is the trial court, who saw and heard the witnesses testifying, not entitled to believe such cogent and uncontroverted evidence of PW4? It is manifest that the evidence of this eye witness (PW4) is direct and any reasonable Tribunal could be justified in believing and convicting upon such evidence.”

It is clear to me that both courts below in coming to the conclusion that the case against the appellants had been proved beyond reasonable doubt relied heavily on the evidence of PW4. The findings of both courts below on the credibility of the evidence of PW4 are concurrent findings of fact and it is trite law that the Supreme Court will not interfere with

such concurrent findings of both the High Court and the Court of Appeal where they are fully supported by the evidence and there is no substantial error apparent on the record of proceedings such as a violation of some principle of law and procedure which renders them perverse or unsupportable. Where, however, such findings are shown to be perverse or patently erroneous or it is shown that a miscarriage of justice will result if they are allowed to remain, this court is duty bound to interfere with them. The next question must be whether both courts below were right in holding that the testimony of PW4 was credible and without room for reasonable doubt.

A close examination of the evidence of PW4 discloses a number of material contradictions and inconsistencies. These have been carefully set out at pages 7-9 of the appellants' brief of argument. To mention but a few, PW4 in his examination in chief in an unmistakable attempt to assert his reliability and credibility testified that he reported this matter and made his written statement to the Police a few days after the incident. Under cross-examination, however, he changed and stated that it was after two months and no longer after a few days that he first reported the incident to the Police. Secondly, in his examination in chief, PW4 claimed that he only understood and spoke the Nupe language. Under cross-examination, it transpired that he also understood the Hausa language and testified as to all the discussions between the appellants in Hausa language at all material times at the scene of crime. Thirdly, PW4 in his examination in chief, at page 21 of the record, lines 13 - 15 and 29 - 30 stated that the incident he was testifying to happened when it was dark. Under cross-examination, however, he made a round about turn and stated at Page 253 of the record, lines 5 - 7 that it was not dark at the time of the incident. He was therefore able to recognise all the five appellants at the scene of crime.

It cannot be doubted that the above contradictions and inconsistencies in the evidence of PW4 are clearly material and therefore relevant to the question of his credibility. This is particularly true when it is noted that throughout the trial the prosecution neither attempted nor took any steps to explain or give cogent reasons for the said inconsistencies or reconcile them as a result of which the credibility of the evidence of the said

PW4 came into serious question. See Christopher Onubogu v. The State (1974) 9 S.C. 1

In this regard, it has been said that the character of a witness for habitual veracity is an essential ingredient in his credibility; for a man who is capable of uttering a deliberate falsehood is in most cases capable of doing so under the solemn sanction of an oath. If, therefore, it appears he has formerly said or written the contrary of that which he has now sworn (unless the reason for his having done so is satisfactory accounted for), his evidence should not have much weight with a jury and if he has formerly sworn the contrary, the fact is almost conclusive against his credibility. See R.V. Leonard Harris 20 C.A.R. 144 at 147 per Hewart, L.C.J. See too R.V. Ukpong (1961) 1 All N.L.R. 25 and Christopher Onubogu v. The State (supra). So, too, if a witness is proved to have made a statement, though unsworn, in distinct conflict with his evidence on oath and he gives no cogent reasons for the inconsistencies or conflixtions, the proper direction to the jury is that his testimony on the point is negligible and unreliable and that their verdict should be founded on the rest of his evidence. See also R.V. Harris (supra). Where, therefore, there are material or substantial inconsistencies and conflixtions in the evidence of a witness, as is the case in the present proceeding with regard to the evidence of PW4, the purported only eye witness to the incident and no cogent reasons for the inconsistencies and conflixtions are given, it is not sufficient for a trial Judge to state that he has no reasonable doubt whatever as to the guilt of the accused; he should state clearly and in detail the conclusions reached. See Hyacinth Egbe v. The King (1950) 13 W.A.C.A. 105. This, the learned trial Judge failed to do in the present case. Nor may a court of law under the cloak of “*I believe*” or “*I do not believe*” purport to arrive at a finding or conclusion, whether in a civil or criminal proceedings, which cannot be justified by the evidence and is therefore totally unjustifiable and indefensible in law. I think the trial court, with respect, was in grave error by failing to consider the contradictions in the evidence of PW4 which rendered his testimony unreliable. It is also my view that the court below was, again with respect, equally in error by its affirmation of the decision of the trial court which overlooked the said

material contradictions in the evidence of the prosecution's star witness, PW4 and thereby arrived at a decision which is manifestly unsupportable. This is so as it is clear that once the evidence of the said PW4 is discountenanced, there is no other evidence on record to link the appellants B with the offences for which they were tried and convicted.

There is finally the question of the defence of alibi raised by all the five appellants both in their statements to the Police and in their evidence before the court. The said alibi raised by the appellants was at no time investigated by the Police. The learned trial Judge rejected this defence of C the appellants on the ground that all of them were known to PW4 who in his testimony had claimed that he saw them at the scene of crime.

It cannot be over-emphasized that where an accused person sets up the defence of alibi, he does not thereby assume the responsibility of proving the answer. The onus still lies on the prosecution to prove beyond D reasonable doubt that the accused was not only present at the scene of crime but that he committed the offence. See The State v. John Adegbami (1968) N.N.L.R. 347, Oyewunmi Adedeji v. The State (1971) 1 All N.L.R. E 75 at 79 and Peter v. The State (1997) 3 NWLR (Part 496) 625 at 642. In the second place, where an accused has disclosed an alibi before the trial, as in the present case, and the Police has taken no available steps to verify or disprove it, the court may hold that the prosecution has failed to prove its case. See The State v Edward Obinga and others (1965) N.M.L.R 170 F at 172, R.V. Akpan Modem (1947) 12 W.A.C.A. 224.

In the present case, the purported recognition and identification of the appellants by PW4 is as unreliable in law as it is weightless, having regard to the conflixtions and inconsistencies in the evidence of that witness. In addition, it is clear to me that the non-investigation of the appellants' plea of alibi by the Police even though they were raised at the earliest possible time and the rejection of the appellants' testimonies and that of their witnesses on the issue are erroneous on point of law. Con- G sequently the affirmation by the Court of Appeal of the conviction and sentences imposed by the trial court on the appellants is, with respect, unreasonable and against the evidence adduced at the trial and cannot H therefore be allowed to stand.

The conclusion I therefore reach is that the evidence adduced on behalf of the prosecution in the present case is such that there is not the certainty required by law to justify the conviction of the appellants nor is guilt on their part the only possible inference. In such circumstances, the conviction and sentences of the appellants must be and are hereby quashed. B See Adebiyi Majekodunmi v. The Queen (1952) 14 W.A.C.A. 64.

It is for the above and the more detailed reasons contained in the judgment of my learned brother, Ejiwunmi, JSC that I, too, allow this appeal, set aside the conviction and sentences of the appellants and order that they be and are hereby acquitted and discharged on all the counts preferred against them. C

KATSINA-ALU JSC

On 22nd February 1996 the appellants Nma Dogo, Aliyu Dwafu D Agaie, Garba Magaji, Ibrahim Abubakar Kago and Etsu Dzuko Ndako Agaie were found guilty of culpable homicide punishable with death and conspiracy contrary to sections 221(a) and 97 of the Penal Code and sentenced to death. Their appeals were dismissed by the Court of Appeal. E

The prosecution case against the appellants was that on or about 9th to 13th day of February 1994 they agreed to do an illegal act, to wit: to cause the death of one Alhaji Ibrahim Tsadu, and that on 13th February 1994 they beat and stabbed the said Alhaji Ibrahim Tsadu. He died from F his injuries. Safiya Ibrahim was in the company of the deceased her husband. She gave evidence at the trial as PW2. Muhammadu Ndaliman a relative the deceased was also in the company of the deceased when they were ambushed and attacked. He also gave evidence at the trial as PW1. G Adamu Abubakar Ndagi also a relative the deceased drove the car on that fateful night.

In the course of their investigation, the Police arrested 13 persons, the appellants inclusive, who were subsequently arraigned before the Niger State High Court. At the end of the trial the appellants were convicted of H conspiracy and culpable homicide punishable with death. The other accused persons were acquitted and discharged.

PW1, 2 and 16 were in company of the deceased. None of them

could give an eye witness account of the persons who attacked and killed the deceased. This was so because at the time of the attack it was dark. All these witnesses said the attack took place after 8p.m.

This leaves us with the evidence of PW4 Umaru Mohammed which was said to be direct. He claimed he saw and identified the appellants as the persons who attacked and killed the deceased on the fateful night. Part of his testimony in-chief reads thus:

"I remember the 13/2/94, at about 6p.m., at Goba village, I was doing nothing but later when it was time to break the fast I did so. I broke my fast with porridge and kosai, it was about 6.45 p.m. After that I took my bicycle and headed towards Agaie. I cannot remember the exact time I set out to Agaie. I was going to Agaie to collect money from my father to buy food. From Goba I went to Ekpengi; then I took the road leading to Agaie. When I left Ekpengi at a place called Filicko near another culvert, I saw these people enter into one Alhaji Isah's farm and began cutting some wood with which they started blocking the road, I wondered why they were doing so? I came down from my bicycle with a view to finding out what they were going to do. I went and squatted down under a tree on the right hand side of the road and watching these people. I saw some five people that I knew amongst them. At the time I was sitting under the tree I kept my bicycle in one Alhaji Audu Badama's farm. In the area there are trees. There was no grass at that time. Some of the people were cutting woods while others were carrying them and placing them on the road, blocking the road to the culvert. The people wore black dresses. The distance between where I was squatting to where the people were cutting trees was about 45 feet. Those cutting trees were nearer to me than those blocking the road. There were more than five people cutting the trees but the five I knew were nearer to me. I had known them even before the incident. I heard them saying in Nupe Language 'Let us hurry'. There was a little light as it was not completely dark at that time. The names of the persons I identified are Etsuzuko, Nma Dogo, Garba Nnazuru, Ibrahim Kago, Alhaji Dzwafun. (He is asked to show these people if he can. He does so) I see Etsuzuko, Ibrahim Kago, Garba Nnazuru, Alhaji Dzwafun, Nma Dogo, (Witness Identified

8th, 7th, 5th, 2nd and 1st accused persons respectively). I saw these people's faces at that time. I knew 1st accused since my childhood. I knew 7th accused when he was a school supervisor; I knew 2nd accused by reputation having been pointed out to me irrespective of fertilizer problem we had, this was about 4 years ago. Since then I have been seeing him in Agaie town before that date of incident. I know 8th accused at Agaie Local Government Secretariat where he works. I also see him in Agaie town. I know 5th accused where they sell animals. I knew 1st accused as a driver, we used to enter his vehicle in Ekpangi. After they have finished blocking the road the people went to the 2nd culvert, the second one leading to Agaie. They were doing nothing there. After a long time I heard the sound of Engine approaching and light which turned out to be a vehicle. When the vehicle got to the culvert it stopped. At this stage it was dark. From the spot the vehicle stopped was far from where I was, then I heard as lot of noises. The thing I distinctly heard was a cry saying "Leave me alone because of God and because of the prophet,. This was been spoken in Hausa."

The trial court found as a fact that on the evidence led, the prosecution had proved beyond reasonable doubt the offences of conspiracy and culpable homicide punishable with death with which the appellants were charged. The Court of Appeal affirmed this finding. It held as follows:

"The ingredients of the offence of culpable homicide punishable with death under section 221(a) of the Penal Code have been proved against the Appellants beyond reasonable doubt through the direct evidence of PW4 and other prosecution witnesses. The evidence of the common intention leading to the conviction in respect of conspiracy punishable under section 97 of the Penal code is overwhelming. The conviction by the trial court under section 97 of the Penal Code is endorsed by this Court and affirmed."

The only evidence of identification was given by PW4 who testified that he had seen the appellants' faces. The appellants were people he knew before the day of the incident. The question to be resolved is what was the quality of the evidence of identification? Under what circumstances was the PW4 able to recognise the appellants?

This witness (PW4) said he broke his fast around 6.45 p.m. Thereafter he left and headed for Agaie. He could however not remember the exact time he left his house. He stated that at the time he arrived the scene of crime *“There was a little light as it was not completely dark at that time.”*

Under cross-examination this witness said:

“I was at the scene of crime when I heard the call for the Ishai prayers.”

Still under cross-examination he testified thus:

“The Ishai prayers occurs when it is dark and one is not able to be recognised in it”

So, we now have an idea of the time when PW4 arrived the scene of crime. By his own evidence it was dark and that it was not possible to recognise anybody. It is crystal clear therefore that the quality of the evidence of identification was poor and it would have been unsafe to convict on it - see R.V. Turnbull (1976) 3 All ER 549.

As I indicated earlier, this is the sole evidence of identification connecting the appellants to the crime. This evidence was uncorroborated. In such a situation the trial judge should have warned himself of the danger of a mistaken identification and only in the most exceptional circumstances should a conviction based on uncorroborated identification evidence be upheld in the absence of such a warning.

It must be observed that the appellants gave evidence and their defence was that they were elsewhere at the time of the commission of the offence at Agaie Road. They raised alibis which were never investigated. What is more at the time of their arrest they were not singled out by PW4 but arrested with a number of other persons.

On the whole, it was unsafe to convict the appellants on the evidence of PW4. Their convictions cannot be allowed to stand.

For this and the fuller reasons given by my learned brother Ejunmi, JSC I would also allow the appeal and quash the convictions of the appellants. Accordingly they are hereby discharged.