

SUPREME COURT OF NIGERIA
12TH JANUARY, 2001. SC. 88/2000
CORAM:- A. B. WALI, U. MOHAMMED, O. ACHIKE,
U. A. KALGO, A. O. EJIWUNMI, JJSC.

DR. SEGUN ODUNEYE APPELLANT
V.
THE STATE RESPONDENT

APPEALS - *Concurrent findings - Will not be disturbed - Except the adversary party - Shows that the circumstances of his case falls into the exceptions to the law.*

CONVICTION - *Propriety of - Conviction of appellant for a different offence - Was rightly confirmed by the court of Appeal - In the present case.*

CRIMINAL PROCEDURE - *Burden of proof - Lies without exception on the prosecution - To prove the offence beyond reasonable doubt.*

CRIMINAL PROCEDURE - *Contradiction - Complained of - Is an inconsequential discrepancy rightly overlooked by the court of Appeal.*

CRIMINAL PROCEDURE - *Contradictions - Only contradictions that go to the substance & materiality of facts or facts in issue - Are fatal to the prosecution's case.*

CRIMINAL PROCEDURE - *Witnesses - As conviction can be based on evidence of a sole witness - The prosecution is not required to call every eye witness to the offence - Even when they are described as material witnesses.*

EVIDENCE - *Appeals - Revaluation - In the absence of a challenge by the adverse party - As to the credibility of the evidence - The court of*

Appeal and the supreme court cannot castigate its credibility.

EVIDENCE - Evaluation - The duty of evaluating evidence - As to value and credibility - Is within the special preserve of the trial judge - As was rightly held by the lower court in this case.

EVIDENCE - Findings of fact - If read together in this case - Suggests the irresistible inference of an agreement - Enough to sustain a charge of conspiracy to murder.

EVIDENCE - Witnesses - Material or indispensable witness - A person does not become such a witness - If there is no nexus and if his evidence would not be helpful - In getting at the truth.

EVIDENCE - Witnesses - Prosecution must call any material or indispensable witness even if not favourable to its case - Or if not raise a doubt which must be resolved in favour of the defence.

FACTS

The appellant was arraigned before an Oyo State High Court on a two court charge of conspiracy to commit murder and the actual murder of one chief Amuda Olorunkosebi - The Ashipa of Oyo. At the trial the prosecution led evidence to prove that the appellant in the company of one Abiodun Faseyitan came to the deceased and requested for a parcel of land suitable for fish pond and cattle rearing. Consequently the appellant and Faseyitan visited and inspected the site allocated by the deceased in the presence of agents of the deceased including prosecution witness 1 (pw 1) amongst others. However on the insistence of Faseyitan that the deceased should follow them to the site to confirm his ownership of the site, a day was fixed for the visit. On the fateful day the deceased accompanied by pw 1 and some others rode to the site with the appellant and Faseyitan in appellants Datsun Bluebird car. At the site a masked man, emerged and threatened them with a gun. Faseyitan then drew out a picture of the Alafin of oyo and showed it to the deceased and said he

was the person to be asked about the matter. Pwl then ran away after there was a gun shot leaving Faseyitan and the appellant with the masked man and the deceased as well as one other person who was also matcheted. The appellant was subsequently arrested two years later and arraigned and in his defence totally denied meeting the deceased.

The trial judge after addresses by counsel, on the basis of a catalogue of incontrovertible facts discharged and acquitted the appellant on the second count charge of murder but convicted him on the first count charge of conspiracy to commit murder and sentenced him to seven years imprisonment, without option of fine. His appeal to the Court of Appeal was dismissed and his sentence and conviction confirmed. He has further appealed to the Supreme.

ISSUES FOR DETERMINATION

"1 Whether the learned Justices of the Court of Appeal were not wrong in confirming the appellant's conviction for conspiracy inspite of the finding of the learned trial judge that "The prosecution has not fixed the action or inaction of the accused with the death of the deceased".

2. Whether the learned Justices of the Court of Appeal were not wrong when they held that the failure by the prosecution to call Abiodun Faseyitan and Alaafin of Oyo was not fatal to the prosecution's case.

3. Whether the contradictions in the case of the prosecution are sufficiently material to justify the discharge and acquittal of the appellant by the Justices of the Court below."

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

Duty of evaluating evidence

1. With due respect to learned counsel, it appears there is some misapprehension somewhere. The shortcut to this problem is simply this: the learned trial judge, having evaluated the evidence of the prosecution reached the conclusion that it was of good quality and in fact acted on it, it is too late in the day to cast aspersion on such evidence unless the evidence is tainted with perversity. The appellant, from the record, did not even feebly raise such perversity nor can it be said to have been

surreptitiously or subtly raised suo motu by the lower court, because the learned justice of the lower court had conceded, rightly in my view, that the appraisal of evidence and ascription of value and credibility to it are within the special preserve of the trial judge, more so as he had the advantage of seeing and hearing the witnesses. (p. 371 G)

Revaluation of evidence

2. It was therefore manifest, and beyond any peradventure that the credibility of the evidence led by the prosecution was above reproach. If so determined by the trial judge then in my judgment, in the absence of any challenge by the adversary party, neither the lower court nor even this Court can castigate the credibility of such evidence. (p. 372 C)

Findings of fact - Sufficient for conviction

3. In the final analysis, it is my view that a communal reading of the 15 itemized factual situations identified by the learned trial judge coupled with the finding that Exhibits "P17" and "P18" were fake leaves one with cogent irresistible inference of the agreement between the appellant, Faseyitan and others to conspire the murder of the deceased. The Court of Appeal unanimously upheld the decision of the learned trial judge that the evidence led by the prosecution was not merely that founded on suspicion and speculation but rather one positive and strong enough to inferentially sustain a charge for conspiracy to murder. (p. 373 H)

Conviction - propriety of

4. Learned appellant's counsel under his first Issue for determination wondered whether the lower court was not wrong in confirming the appellant's conviction for conspiracy inspite of the finding of the learned trial judge that "the prosecution has not fixed the action or inaction of the accused with the death of the deceased". This observation was made by the learned trial judge at the conclusion of consideration of the offence of murder in contradistinction to consideration of the charge of conspiracy. This conclusion is legitimate because at the end of the day, the learned trial judge, unimpressed that the charge of murder had been made out,

discharged the appellant. Again, it is unfortunate the learned appellant's counsel did not appreciate the circumstances leading to this assertion. (p. 374 B)

Burden of proof

5. It is now trite that in all criminal cases, without exception, the prosecution have the heavy responsibility to prove the offence preferred against the accused beyond reasonable doubt, see Okpolor v State (1990) 7 NWLR (Pt. 164) 581 at 593 (p.375 B)

Prosecution need not to call all eye witnesses

6. Unless where the law prescribes otherwise, there can be a conviction based on the evidence of a sole witness. Whether, therefore the prosecution will call one, two or more witnesses in proof of their case, or even the choice to make between witnesses, is a matter of strategy and the decision in respect thereof is entirely at the discretion of the prosecutor. No doubt, some witnesses are more material than others. Yet the law, in my view, does not require the prosecution to call every eye-witness to the offence to testify nor will the situation be different even where some of the witnesses may be described or identified as material witnesses. Indeed, it is not good practice to field numerous witnesses where the prosecution could, with a handful of witnesses, have discharged the burden of proof required to establish the guilt of the accused. So it follows that the prosecution in order to secure conviction must obviously call material witnesses in proof of their case and it is immaterial that the testimony of such witnesses is favourable to or against the prosecution. It will be invidious however to insist that the prosecution must field every witness connected with the case, as argued in Ram Ranjan Roy v R (1914) I L R 42 Cal 422; 14 Digest 490273, 22816(ii). Such general approach, in my judgment, is to heap on the prosecution the performance of the functions both of prosecution and defence. (p. 375 C)

Need for prosecution to call any indispensable witness

7. What this boils down to in the light of recent authorities is that the prosecution has no duty to call and field all known material witnesses so long as they call and field all material witnesses that they may consider necessary for proof of their case beyond reasonable doubt. Additionally, it must be emphasized that material or indispensable witnesses crucial for eliciting and setting the basis of the prosecution's case, must inevitably be called and fielded by the prosecution, notwithstanding that the consequence of such witnesses's testimony is favourable to or against the case of the prosecution; to act otherwise, of course, would leave an indelible question mark in the prosecutions's case that must be resolved in favour of the defence. (p. 376 D)

D Witnesses - Material or indispensable witness

8. In my judgment, the mere mention of Alafin of Oyo or producing his picture in the circumstances of this case does not create any real nexus between him, the appellant and the other conspirators in this case as to hold him out as a material or indispensable witness to the charge of conspiracy laid against the appellant. Further more, the appellant's downright denial of knowing or ever meeting PW1 or PW2 would tend to negative the entire testimonies of PW1 and PW2 in relation to the events even on the previous occasions at the site before those of the fateful day, and in such circumstances the evidence of Faseyitan would be un-helpful to lend credence to those testimonies. After all, the best that Faseyitan can attest to in relation to the event at the site on that fateful day is the death of the deceased but by no stretch of the imagination would one expect Faseyitan to shed any light on the grand plot of the deceased's elimination. Thus in my judgment, Faseyitan was neither a desirable nor an indispensable witness to unfold, by his testimony, the narratives on which cogent inference of conspiracy to murder the deceased would be made. (p. 377 C)

Fatal contradictions

9. Appellant's learned counsel delights himself in making a mountain out of a molehill, as it were, on this frivolous and inconsequential issue,

giving the impression that every 'contradiction' is fatal to the prosecution's case. This is unfortunate. On the contrary, it has long been laid down by a long chain of authorities that not every contradiction is fatal to the prosecution's case save where such contradiction goes to the substance and materiality of a fact or facts in issue in the charge as to raise a doubt in the mind of the court. Unequivocally, such doubt must be resolved in favour of the accused. See Ibrahim v State (1978) 4 NWLR (Pt.186) 399, 415 (p. 378 D)

Contradiction rightly overlooked

10. I am at one with the lower court that the so-called contradiction in this case is really a matter of discrepancy of inconsequential nature that did not relate to the role allegedly played by the appellant in this case. It ought safely to have been over looked. I would myself unhesitatingly reject the wobbling and woolly submissions of appellant's counsel in this regard. Accordingly, the third issue is resolved against the appellant (p. 378 G)

Appeals - Concurrent findings

11. I find the submission on concurrent finding, as argued, unanswerable. The law is quite clear in this regard. The general policy of the law is that it will be unreasonable to overflog such determined findings of fact by unwittingly permitting the adversary party to re-open arguments on them, at his whims and caprices and without first demonstrating with the utmost pellucidity that the circumstances of his case bring him within the purview of the exception for disturbing the findings. See Nasamu v State (1979) 6-9 SC 153 (p. 379 G)

NOTABLE POINTS OF INTEREST

ACHIKE JSC

1. Conspiracy - How established

What is being chorused by these authorities, simply put, is that for the offence of conspiracy to be established there must exist a common criminal design or agreement by two or more persons to do or omit to do an act criminally. Since the gist of the offence of conspiracy is embedded in the

agreement or plot between the parties it is rarely capable of direct proof; it is invariably an offence that is inferentially deduced from the acts of the parties thereto which are focused towards the realization of their common or mutual criminal purpose. (p. 369 G)

B

2. Prosecution has a duty to make material witnesses available to the defence

Undoubtedly, the prosecution are obliged to make all material witnesses available to the defence even though they would not field them in proof of the case for the state. (p. 375 H)

C

3. How to deal with arguments on issues of concurrent finding

The point of concurrent finding of fact by both of the two lower courts was respectively made by respondent's counsel after the conclusion of the 1st issue on the one hand and again after the arguments on conclusion of the 2nd and 3rd issues argued together, on the other, and it gave the impression that respondent's counsel was repetitious in this regard, an approach that must be condemned. A neater approach, in my view, would have been to take the issue of concurrent findings of fact in respect of all the various issues together at the end of counsels' submissions on the identified issues for determination; this would have placed the submissions on concurrent findings on a clearer and separate pedestal without being tortuously repetitious. (p. 379 D)

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REPRESENTATION

N. O. O. Oke, Esq., with him, L. A. Adeniyi, for the appellant

G

O. Oyesina, (Mrs.) Chief Legal Officer, M.O.J., Oyo State, for the respondent.

CASES REFERRED TO

H *Mulcahy v R* (1868) LR 3 IIL 306 at 317

Ikemson v The State (1989) 1 CLRN,

Dabo v The State (1977) 5 SC 222

Patrick Njoven & Ors v The State (1973) 5 SC 17,

Alake v The State (1992) 9 NWLR (Pt. 265) 260

Daboh & anor v The State (1977) 5 SC 197

Sobakin v State (1981) 5 SC 75

Nasamu v State (1979) 6-9 SC 153

Nwiboko v State (1985) 5 SC Pt. 11at 183

B

Adio v State (1986) 2 NWLR (Pt 24) 581

Erim v State (1994) 5 N WLR (Pt 346) p.535

Woluchem v Gudi (1981) 5 SC 291

BOOKS REFERRED TO

C

Modern Nigerian Law of Evidence, F. Nwadialo p.3

Law of Evidence in Nigeria, 2nd Edition p.14 , Aguda.

LEAD JUDGMENT BY ACHIKE JSC

D

The appellant was arraigned before an Oyo High Court presided over by M.A. Owoade, J. on a two count charge of conspiracy to commit murder and the murder of Chief Amuda Olorunkosbi, the late Ashipa of Oyo, on or about the 26th day of November, 1992, at Ijawaya village, E contrary to and punishable under sections 516 and 319 of the Criminal Code, Cap 30 Volume 11, Laws of Oyo State of Nigeria 1978.

The trial commenced on the 12th of February 1998 wherein the prosecution fielded a total of 14 witnesses. The appellant, on his part, F testified on oath and called his wife, DWI, as a witness. Both learned counsel for the appellant and the prosecution respectively addressed the court. The learned trial judge thereafter delivered his judgment on the 18th of June, 1998 whereupon he discharged and acquitted the appellant on the second count charge of murder but convicted him on the first G count charge of conspiracy to commit murder and sentenced him to seven years imprisonment, without option of fine.

Dissatisfied with the judgment of the trial court, the appellant appealed to the court below which confirmed his conviction and H sentence, hence the appellant's further appeal to this Court.

I shall first outline the evidence of the key witnesses in this case. The case for the prosecution is that the appellant in company of one

Abiodun Faseyitan came to the deceased and requested for a parcel of land suitable for fish pond and cattle poultry (sic). Consequent to this, the appellant and Abiodun Faseyitan (hereinafter referred to as Faseyitan) visited the deceased and inspected the site in company of agents or representative of the deceased on two occasions between the months of October and November 1992. PWI, Alhaji Ganiyu Ajiboye, testified that when the appellant and Faseyitan came back to the deceased he, the deceased, requested him to take them to the pond site at Ijawaya. PWI recognised the appellant as one of the persons whom he took to the site. The visit to the site was in a Datsun Bluebired with Registration No. KD 1586 DU, driven by the appellant while he sat in front with him and Faseyitan sat at the back. On the way to the site they collected Gbadamosi Oyelakin and Raimi Ishola. And after visiting the site Gbadamosi Oyelakin and Raimi Ishola were dropped at their homes and he, PWI, proceeded with the accused and Faseyitan to show them the deceased's personal pond as directed by the deceased and thereafter the three of them went to report their mission to the deceased.

On the insistence of Faseyitan and in the presence of the appellant and the deceased, Faseyitan demanded that the deceased should accompany them to the site to confirm that the site belonged to him. The visit to the site was fixed for 26/11/92. On that day, after a naming ceremony attended by the deceased, PWI accompanied the deceased, along with the appellant and Faseyitan and some others to the site. At this time, Faseyitan, the deceased, PWI Raimi Ishola and the appellant rode together to the site. On arrival at the site, PWI said that they saw a masked person who suddenly emerged, threatened them and pointed a gun at them. Faseyitan then brought out a picture of Alafin of Oyo and showed it to the deceased and said that this is the person he should ask about these matters. At this point the deceased bent down but PWI did not see whether the gun shot hit the deceased or not, because he fled as soon as he heard the gun shot, leaving Faseyitan and the appellant there. He also saw another masked person who was armed with a matchet. On his return to Ijawa, he discovered that Raimi Ishola had been matcheted. The witness later reported the incident at the police Station.

It was only in 1994, while in the company of one Ayankojo that witness saw the appellant, identifying him as the person who was always, in the company of Faseyitan. Subsequently, he made a report of this to the police in Lagos that they had seen the appellant. One police officer, named Tinubu was detailed to go with us to Ibadan where, with the assistance of two other police officers, the appellant was arrested. Later witness identified the appellant, having earlier in an identification parade, identified Faseyitan.

PW2, Alhaji Raimi Ishola, was another key witness for the prosecution and virtually confirmed the testimony of PW1 particularly on the issues surrounding the death of the deceased. PW4, Lasisi Ayankojo, confirmed how while in PW1's company efforts were made to locate the appellant at his house at Ibadan and his subsequent arrest. On 3rd May 1995 the matter was assigned to PW5, Mojeed Olajide Tinubu, an Assistant Superintendent of police. There was also PW7, James Oyelowo Jenfa, a Surveying Assistant who accompanied the appellant and others to the side sought to be sold by the deceased to the appellant and Faseyitan. He readily identified the appellant, as the person who drove them to the site on 19th November, 1992. Again, one Sunday Adeyinka, PW8, a motor mechanic, at Mokola, Ibadan testified as the person, who on the instruction of Faseyitan changed the system of the Datsun Bluebird car being used by the appellant and Faseyitan from right hand drive to left hand drive, sometime in December 1992. PW 10, Raimi Buraimoh, bought the Datsun Bluebird from Faseyitan after the change in the system from right hand drive to left hand drive.

The appellant testified in his own defence. A striking aspect of his testimony is that appellant denied ever meeting the deceased and further denied involvement in the charges of conspiracy or murder of the deceased. He however admitted that Exhibit "P2" - a photocopy of the passport of the Alafin of Oyo - was recovered in the house. He also admitted that Faseyitan served as a pointer to the police who come to arrest him in 1993 with regard to this case. Appellant's wife DWI also testified on behalf of the defence and asserted that the appellant was not in talking terms with Faseyitan at the material time to the case.

As already stated, after the confirmation of Appellant's conviction and sentence by the Court of Appeal, appellant undauntedly shifted the legal battle to this Court. His learned counsel filed three grounds of appeal on his behalf and therefrom formulated three issues for determination, namely,

"1. Whether the learned Justices of the Court of Appeal were not wrong in confirming the appellant's conviction for conspiracy in spite of the finding of the learned trial judge that "The prosecution has not fixed the action or inaction of the accused with the death of the deceased".

2. Whether the learned Justices of the Court of Appeal were not wrong when they held that the failure by the prosecution to call Abiodun Faseyitan and Alaafin of Oyo was not fatal to the prosecution's case.

3. Whether the contradictions in the case of the prosecution are sufficiently material to justify the discharge and acquittal of the appellant by the Justices of the Court below."

Learned counsel for the respondent also identified three issues for determination, namely,

"1. Whether the prosecution, proved the charge of conspiracy against the appellant beyond reasonable doubt.

2. Whether the failure of the prosecution to call certain witnesses is fatal to the case of the prosecution.

3. Whether the court below, was right in affirming and upholding the conviction of the appellant".

The two respective sets of issues for determinations identified by both parties are identical and there is hardly much to choose between them. Nevertheless, I prefer to tackle the resolution of the issue herein by relying more on the appellant's set of issues.

Issue 1

Relying on the authorities of Muleahy v R (1868) LR. 3 HL 306 at 317, Ikemson v The State (1989) 1 CLRN 1, Dabo v The State (1977) H 5 SC 222 and Patrick Njoven & Ors v The State (1973) 5 SC 17, learned counsel for the appellant, N.O.O. Oke, Esq submitted that the prosecution failed to link any action or inaction of the appellant with the alleged conspiracy to murder the deceased. Counsel pointed out that although the

two eyewitnesses in the case, PW1 and PW2, stated that the appellant drove the vehicle that conveyed Faseyitan and the followers of the deceased to the site, they also testified that the appellant was present when Faseyitan allegedly showed the picture of Alafin to the deceased as the brain behind the action of the unknown masked assailants of the deceased, yet counsel submitted that this evidence, without more, was not enough to establish the charge of conspiracy implicating the appellant. It is his further submission that although Faseyitan allegedly made the statement regarding the Alafin's picture in the presence of the deceased, the appellant and all the other people present at the site, there was nothing that demonstrated that the appellant and Faseyitan were acting in concert. Finally, it was submitted on behalf of the appellant that notwithstanding the itemized pieces of evidence stated by the trial judge and confirmed by the lower court, these circumstances were not sufficient to sustain the conviction for conspiracy, more so as they were not shown to be positive, direct and unequivocal and pointing unmistakably and irresistibly to the commission of the offence of conspiracy by the appellant. In support of this submission, counsel cites Alake v The State (1992) 9 NWLR (Pt.265) 260 at 272-273.

Learned counsel for the respondent submitted that since it is not always easy to prove the actual agreement to commit the offence of conspiracy, the courts usually consider it sufficient, if it is established by evidence, circumstances from which the court would consider it safe and reasonable to infer or presume conspiracy, and relies on the authority of Daboh & anor v The State (1977) 5 S.C 197 at 222. Counsel referred to the itemized 15 factual situations tendered in evidence which combined effect, he submitted, assisted the trial judge to draw inference of a conspiracy between the appellant, Faseyitan and others to effect the unlawful purpose of the murder of the deceased.

As part of the overt act of the appellant in pursuance of the conspiracy between himself and Faseyitan to murder the deceased, Exhibit "p17" - a letter of Request of Grant of land for Agricultural and Fishery project in Oyo Area, dated 17th November, 1992, allegedly presented to the deceased by the appellant and Faseyitan, and purportedly said to have

emanated from Sanni Factory, at No. 15 Niger Road, kano was found to be fake from what could be gleaned from the evidence of PW14, an Inspector of Police formerly stationed at Ibadan. This witness stated that they could not discover any Sanni Farming Factory in the address shown in Exhibit "P17". This witness also attested to the fact that the Registration No. KD 1586 DU allocated to Exhibit "P18", the vehicle allegedly used by the appellant and Faseyitan in their visits to the deceased and at the site - a Datsun 1.8 Bluebird - did not exist in the Registration Books in Kaduna State Licensing Authority. Still on Exhibit "P18", additionally it was repainted, its Registration number changed from KD 1586 DU to YGT 252W while more profoundly, it was later converted from Right hand drive to left. Finally, on Exhibit "P18", counsel recalled that this was the vehicle purchased by the Alafin of Oyo while the Alafin, Faseyitan and the accused were together in London.

Learned counsel called our attention to the concurrent findings of both the trial court and the lower court that the prosecution proved the charge of conspiracy beyond reasonable doubt against the appellant. And on the authorities - Sobakin v State (1981) 5 SC. 75, Nasamu v State, (1979) 6-9 SC. 153, Nwiboko v State (1985) 5 SC Pt.11 at 183 and Adio v State (1986) 2 NWLR (Pt.24) 581 at 589 - he urged the court to be slow to disturb those concurrent findings unless they have been shown to be perverse or reached in violation of some law or procedure. In conclusion, counsel urged us to uphold the findings and conclusion reached by the two lower courts on the charge of conspiracy.

Under Issue 1 the gist of the question that calls for consideration is whether the conspiracy charge laid against the appellant was proved to the hilt by the prosecution at the trial court as to warrant the conviction and sentence in respect thereof being confirmed by the lower court. Let it be said straightaway that after a careful perusal of the record of appeal, it is common ground that except for PW1 and PW2, there were no other eyewitnesses who testified to the dastardly murder of the deceased. The murderer who unleashed the gunshot on the deceased being fully masked and unchallenged it become an uphill, if not impossible, task on the prosecution, in the circumstances of this case, to press for a conviction for

murder but felt that they were on good wicket to seek a conviction for conspiracy to commit murder. A conviction for conspiracy is not without its inherent difficulties. First the offence of conspiracy is not defined under the Criminal or Penal Code. But, perhaps, more importantly, a successful conviction for conspiracy is one of those offences predicated on circumstantial evidence which is "evidence not of the fact in issue but of other facts from which the fact in issue can be inferred: see F Nwadialo, Modern Nigerian Law of Evidence, (Ethiopia Publishing Corporation) 1981, P.3. Aguda, in his Law of Evidence in Nigeria, 2nd ed., p.14 has put it more tersely as "evidence offered to the existence of a fact in issue". Evidence in this connection must be of such quality that irresistible compels the court to make an inference as to the guilt of the accused.

How then does one identify the offence of conspiracy?. Willes, J, in the House of Lords' decision offered the generally accepted definition of the offence of conspiracy in Mulcahy v R (1868), 3 HL at p.317 where he stated as follows:

"A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act, or to do a lawful act, by unlawful means. So long as a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means." (The emphasis is mine)

See also Patrick Njovens & ors v The State (1973) 5 SC. 17 Dabo & anor v The State (1977) 5 SC. 222 and Erim v State (1994) 5 NWLR (pt.346) P.535. What is being chorused by these authorities, simply put, is that for the offence of conspiracy to be established there must exist a common criminal design or agreement by two or more persons to do or omit to do an act criminally. Since the gist of the offence of conspiracy is embedded in the agreement or plot between the parties it is rarely capable of direct proof; it is invariably an offence that is inferentially deduced from the acts of the parties thereto which are focused towards the realization of their common or mutual criminal purpose.

It may be recalled that the learned trial judge unequivocally accepted the evidence of the prosecution witness when he said:

"On the whole I am impressed with the quality of the evidence of the prosecution witnesses in this case, especially PW1 who I consider to be a very truthful and intelligent witness. He had ample opportunities to render damning faces (sic) as against the accused person - but he refused even to exaggerate the facts and circumstances which he perceived, led to the death of the deceased".

Against this background of the quality of evidence of the prosecution witnesses, the learned trial judge set out the following catalogue of facts adduced by the prosecution in support of the case:

"1 That the accused, Abiodun Faseyitan and the ALAAFIN OF OYO are friends and/or parties in business.

2. That it was Abiodun Faseyitan that introduced the accused person to the ALAAFIN OF OYO, OBA LAMIDI ADEYEMI.

3. That on or about the month of July 1992, the trio, that is the accused Faseyitan and the ALAAFIN OF OYO travelled to London and came back together.

4. That while in London and in the presence of the accused and Faseyitan the ALAAFIN OF OYO, Oba Lamidi Adeyemi purchased Exhibit P18.

5. Since then there had been various transactions and exchange of money between the parties - in particular the accused and Faseyitan collected huge amounts of money from the ALAAFIN OF OYO for one business or the other

6. That on at least two previous occasions before the 26th November 1992, the accused and Faseyitan visited the deceased and on the instructions of the deceased PW1 and PW2 accompanied the accused and Faseyitan to site which eventually became the scene of crime.

7. That on two occasions, the accused and Faseyitan conveyed PW1 and PW2 to the site with Exhibit P18.

8. That in the presence of the accused after the second visit, Faseyitan still requested the deceased to follow them to the site.

9. The accused, Faseyitan, PW1 and PW2 now in company of

the deceased went back - for the third time to the site, the scene of crime.

10. *On this occasion, the company was equally conveyed by Exhibit P18, driven on that day by the accused himself.*

11. *On getting to the site/the scene of crime, the company was threatened with a gun by a masked man.*

12. *At the stage and in the presence of all the others, Faseyitan brought out a picture of the ALAAFIN OF OYO - Oba Lamidi Adeyemi and told the deceased "this is the person you should ask about these matters".*

13. *PW1 ran away from the scene after a gun shot from the masked man and left the deceased, Faseyitan and the accused at the scene.*

14. *PW1 and the police went back to the scene only to meet the corpse of the deceased with machet cuts on his forehead and acid on his body.*

15. *PW1 did not see the accused any longer until he identified him at Ibadan and later to the Police.*

It is from the combined effect of these itemized factual situations in the evidence of the prosecution that the learned trial judge drew the inference of a conspiracy between the appellant, Faseyitan and others to effect the unlawful purpose of the murder of the deceased. The lower court in its leading judgment, per Tabai, J.C.A. also confirming the judgment of the learned trial judge, had this to say:

"In my view the itemized pieces of evidence, if credible, sufficiently meet the definition and elements of the offence of conspiracy laid down in the various authorities referred to above".

Learned counsel for the appellant, in his brief in this appeal, submitted that the use of the words "if credible" in the leading judgment of Tabai, J.C.A. indicated that the lower court was not convincingly satisfied that the itemized factual situations are credible. **With due respect to learned counsel, it appears there is some misapprehension somewhere. The shortcut to this problem is simply this: the learned trial judge, having evaluated the evidence of the prosecution reached the conclusion that it was of good quality and in fact acted on it, it is too late**

in the day to cast aspersion on such evidence unless the evidence is tainted with perversity. The appellant, from the record, did not even feebly raise such perversity nor can it be said to have been surreptitiously or subtly raised suo motu by the lower court, because the learned justice of the lower court had conceded, rightly in my view, that the appraisal of evidence and ascription of value and credibility to it are within the special preserve of the trial judge, more so as he had the advantage of seeing and hearing the witnesses. Tabai, J.C.A., fortified his view with the well-known authority of Woluchem v Gudi (1981 5 SC. 291). It was therefore manifest, and beyond any peradventure that the credibility of the evidence led by the prosecution was above reproach. If so determined by the trial judge then in my judgment, in the absence of any challenge by the adversary party, neither the lower court nor even this Court can castigate the credibility of such evidence. The mix-up of appellant's counsel in this connection, in my view, stems from his erroneous approach of disjointedly reading a section of the judgment of the lower court in isolation whereas it ought to be read harmoniously.

Let us return to the 15 itemized factual situations identified by the trial judge and from which he drew the inference of a conspiracy between Faseyitan, the appellant and others to effect the unlawful purpose of the murder of the deceased. The lower court, in confirming the judgment of the trial judge, held that these factual situations were sufficient to meet the definition and elements of the offence of conspiracy laid down in the various authorities it had considered in this respect. Additionally, the lower court considered the investigation and evidence led in regard to Exhibit "P17" - a request of Grant of Land for Agricultural and Fishery project in Oyo Area dated 17th November 1992 presented to the deceased by the appellant and Faseyitan. The investigation, through Exhibit "P17" revealed that the letter and its contents were fake. The lower court also confirmed the finding of the trial court that there was no Sanni Farming Company at No. 15 Niger Street, Kano which was not even challenged. The lower court further observed that the finding by the trial court that Exhibit "P18" bore fake registration number KD 1586 DU was

equally not controverted. Reacting to Exhibit "P17" and "P18" in the light of the evidence on record, the lower court said that:

"there was, in my view, evidence not only of criminal intention but also of agreement between the duo and others to commit the alleged murder. In all I am of the firm view that the evidence of the prosecution was not merely that founded on suspicion and speculation but rather one positive and strong enough to sustain a charge for conspiracy to murder."

I have examined the 15 itemized factual situations as identified by the learned trial judge. Perhaps, if I were to examine them separately and in isolation of one another, these pieces of evidence would appear merely speculative and suspicious and definitely not cogent enough to sustain a charge of conspiracy to murder, having regard to the association between Faseyitan and the deceased. Such a conclusion is inescapable particularly when one examines items 1 to 11 separately. But the situation under item 12 i.e. when Faseyitan or some other person displayed the picture of the Alafin and the remarks that followed that display, added a startling new look or colour to the events wherein the apparently lawful acts of Faseyitan and the appellant turned dreary and degenerated into the unlawful conspiracy of the appellant, Faseyitan and others. At this juncture, the inference of effectuating by unlawful means the agreement or scheme between the appellant, Faseyitan and others becomes cogent and irresistible. Little wonder when the armed masked person threatened the scenario at the site that eventually became the locus in quo, neither the appellant nor Faseyitan was ruffled by the gun shot while PW1 and PW2 who were startled and rattled fled for their lives and PW1 reported the incident to the Police. In response to what transpired on that fateful day at the site, the appellant pleaded alibi, denied knowing the deceased and unabashedly stated that he met the PW1 for the first time at the Police Station after his arrest. Appellant's alibi was investigated and found to be false and arid.

In the final analysis, it is my view that a communal reading of the 15 itemized factual situations identified by the learned trial judge coupled with the finding that Exhibits "P17" and "P18" were fake leaves one with cogent irresistible inference of the agreement

between the appellant, Faseyitan and others to conspire the murder of the deceased. The Court of Appeal unanimously upheld the decision of the learned trial judge that the evidence led by the prosecution was not merely that founded on suspicion and speculation but rather one positive and strong enough to inferentially sustain a charge for conspiracy to murder.

Learned appellant's counsel under his first Issue for determination wondered whether the lower court was not wrong in confirming the appellant's conviction for conspiracy inspite of the finding of the learned trial judge that "the prosecution has not fixed the action or inaction of the accused with the death of the deceased". This observation was made by the learned trial judge at the conclusion of consideration of the offence of murder in contradistinction to consideration of the charge of conspiracy. This conclusion is legitimate because at the end of the day, the learned trial judge, unimpressed that the charge of murder had been made out, discharged the appellant. Again, it is unfortunate the learned appellant's counsel did not appreciate the circumstances leading to this assertion.

Issues No. 2 & 3

These issues were argued together by both counsel rather briefly. One Issue 2, learned appellant's counsel submitted that from the prosecution's evidence it was crystal clear that both the Alafin of Oyo and Faseyitan were material witnesses whose evidence would settle the crucial issues before the court yet, surprisingly, they were not fielded by the prosecution. To establish the offences of conspiracy and murder, particularly as Faseyitan had earlier been tried on similar charges and discharged, the evidence of these two men, it was finally submitted, would have resolved the various contradictions in the testimonies of the prosecution witnesses and such doubt that existed in the case.

Learned respondent's counsel, as earlier noted also argued issues 2 and 3 together. In rebuttal to Issue 2, counsel submitted that there was no material issue, which created doubt nor necessitated calling Alafin of Oyo and/or Faseyitan. On the duty of the prosecution to calling witnesses, counsel submitted that the prosecution is not obliged to call every

eyewitness to the offence, but to call enough witnesses to enable them discharge the onus of proof on them of proving their case beyond reasonable doubt. He cites several Supreme Court decisions, including Ogoala v The State (1991) 2 NWLR (Pt. 175) 516, Saidu v State (1982) 4 SC. 41.

It is now trite that in all criminal cases, without exception, the prosecution have the heavy responsibility to prove the offence preferred against the accused beyond reasonable double, see Okpulator v State (1990) 7 NWLR (Pt. 164) 581 at 593 and Seneviratne v R (1936) 3 All ER 36. Unless where the law prescribes otherwise, there can be a conviction based on the evidence of a sole witness. Whether, therefore the prosecution will call one, two or more witnesses in proof of their case, or even the choice to make between witnesses, is a matter of strategy and the decision in respect thereof is entirely at the discretion of the prosecutor. No doubt, some witnesses are more material than others. Yet the law, in my view, does not require the prosecution to call every eye-witness to the offence to testify nor will the situation be different even where some of the witnesses may be described or identified as material witnesses. Indeed, it is not good practice to field numerous witnesses where the prosecution could, with a handful of witnesses, have discharged the burden of proof required to establish the guilt of the accused. So it follows that the prosecution in order to secure conviction must obviously call material witnesses in proof of their case and it is immaterial that the testimony of such witnesses is favourable to or against the prosecution. It will be invidious however to insist that the prosecution must field every witness connected with the case, as argued in Ram Ranjan Roy v R (1914) I L R 42 Cal 422; 14 Digest 490273, 22816 (ii). Such general approach, in my judgment, is to heap on the prosecution the performance of the functions both of prosecution and defence. Undoubtedly, the prosecution are obliged to make all material witnesses available to the defence even though they would not field them in proof of the case for the state. The responsibility of the prosecution with regard to material witnesses appears to have been tolerably

stated about 60 years ago by the erstwhile West African Court of Appeal in the case of R V Kuree 7 WACA 175 at p.177:

"It is well established that it is the duty of the prosecution to place before the court all available relevant evidence. This does not mean, of course, that a whole host of witnesses must be called upon the same point, but it does mean that if there is a vital point in issue and there is one witness whose evidence would settle it one way or the other, that witness ought to be called."

This dictum in Kuree is a watershed on the old approach by the courts that was exemplified in the case of R v Essien 4 WACA 122 which took the view that the prosecution should call all witnesses, whether their names appeared or not on the back of the information. This new approach, along the dictum in Kuree case, includes Udofia v State (1981) 11- 12 SC 46 at 63, Saida v State (1982) 4 SC. 41 at 68, the Privy Council decision in Seneviratne v R (1936) 3 All ER 36 - a case from Ceylon, and Opayemi v The State (1985) 2 NSCC 921,927.

What this boils down to in the light of recent authorities is that the prosecution has no duty to call and field all known material witnesses so long as they call and field all material witnesses that they may consider necessary for proof of their case beyond reasonable doubt. Additionally, it must be emphasized that material or indispensable witnesses crucial for eliciting and setting the basis of the prosecution's case, must inevitably be called and fielded by the prosecution, notwithstanding that the consequence of such witnesses's testimony is favourable to or against the case of the prosecution; to act otherwise, of course, would leave an indelible question mark in the prosecutions's case that must be resolved in favour of the defence.

Now to the case in hand with regard to the charge of conspiracy. The question that confronts us is whether the viva voce evidence of H Faseyitan or Alafin of Oyo was indispensable to the success of the prosecution's case? I think not. The Alafin was remotely mentioned by the defence in relation to the purchase of Exhibit "P 18" abroad and by the prosecution in the testimonies of PW1 and PW3 in respect of the picture

of Alafin that was shown to the deceased at the site on that fateful day before the gun-man appeared at the scene. As for Faseyitan, he had earlier been tried and discharged. He would not be useful, in my judgment, to further corroborate the impressive narratives - as found by the learned trial judge of the account of the event of that fateful day as meticulously rendered by PW1 and corroborated by PW2. Bearing in mind that in a charge of conspiracy direct positive evidence of the plot or design or agreement between the co-conspirators is hardly capable of proof, the courts, as we had earlier shown, have always tackled the offence of conspiracy as a matter of inference to be deduced from certain criminal acts or inaction's of the parties concerned.

In my judgment, the mere mention of Alafin of Oyo or producing his picture in the circumstances of this case does not create any real nexus between him, the appellant and the other conspirators in this case as to hold him out as a material or indispensable witness to the charge of conspiracy laid against the appellant. Further more, the appellant's downright denial of knowing or ever meeting PW1 or PW2 would tend to negative the entire testimonies of PW1 and PW2 in relation to the events even on the previous occasions at the site before those of the fateful day, and in such circumstances the evidence of Faseyitan would be un-helpful to lend credence to those testimonies. After all, the best that Faseyitan can attest to in relation to the event at the site on that fateful day is the death of the deceased but by no stretch of the imagination would one expect Faseyitan to shed any light on the grand plot of the deceased's elimination. Thus in my judgment, Faseyitan was neither a desirable nor an indispensable witness to unfold, by his testimony, the narratives on which cogent inference of conspiracy to murder the deceased would be made.

What I have said above is enough to resolve Issue No. 2 against the appellant. Finally, I come to the third and last issue. This issue questions whether the contradictions in this case were not enough to discharge and acquit the appellant. It is common ground that there was some discrepancy in the narratives in respect of the Alafin's picture : while PW1

said it was Faseyitan that brought out the picture of Alafin and showed it to the deceased, PW3 said it was the two men who emerged from the bush that showed the picture to the deceased. It is noteworthy that it is not appellant's case that a prosecution's witness attested to two contradictory pieces of evidence, rather appellant's contention is that there was some discrepancy in the evidence of two witnesses for the prosecution as stated above. The sole point of difference in their testimonies is simply who brought out the picture of Alafin of Oyo. It was common ground that the picture of Alafin of Oyo was in fact brought out. The discrepancy would have, perhaps, for purposes of credibility, become relevant if one witness said that it was the picture of Alafin of Oyo that was brought out while the other categorically stated that it was the picture of an EMIR of one the Northern State that was brought out. Here the difference in the personalities in such circumstance becomes crucial and material and cannot ordinarily be glossed over, at least, as it may relate to the credibility of PW1 or PW2.

Appellant's learned counsel delights himself in making a mountain out of a molehill, as it were, on this frivolous and inconsequential issue, giving the impression that every 'contradiction' is fatal to the prosecution's case. This is unfortunate. On the contrary, it has long been laid down by a long chain of authorities that not every contradiction is fatal to the prosecution's case save where such contradiction goes to the substance and materiality of a fact or facts in issue in the charge as to raise a doubt in the mind of the court. Unequivocally, such doubt must be resolved in favour of the accused. See Ibrahim v State (1978) 4 NWLR (Pt.186) 399, 415, Udo v State (1992) 2 NWLR (Pt. 224) 471, 479 and Mallam Zakari Ahmed v The State (1999) 7 NWLR (Pt. 612) 641,672, to mention a few. I am at one with the lower court that the so-called contradiction in this case is really a matter of discrepancy of inconsequential nature that did not relate to the role allegedly played by the appellant in this case. It ought safely to have been over looked. I would myself unhesitatingly reject the wobbling and woolly submissions of appellant's counsel in this regard. Accordingly, the third issue is

resolved against the appellant .

Although what I have said so far is enough to dismiss this appeal, it is however pertinent to recall as, earlier submitted by respondent's learned counsel, that this case is one of concurrent findings, of both the trial court and the court below on the fact that failure of the prosecution to call the two witnesses i.e. Faseyitan and Alafin of Oyo was not fatal to the case of the prosecution so also the minor discrepancies. Counsel further submits that it is settled law that where there is sufficient evidence to support concurrent findings of fact by the two lower courts, such findings should not be disturbed unless there is a substantial error, apparent on the record, that is to say, that the findings have been shown to be perverse or some miscarriage of justice or some material violation of some principle of law has been shown .

The point of concurrent finding of fact by both of the two lower courts was respectively made by respondent's counsel after the conclusion of the 1st issue on the one hand and again after the arguments on conclusion of the 2nd and 3rd issues argued together, on the other, and it gave the impression that respondent's counsel was repetitious in this regard, an approach that must be condemned. A neater approach, in my view, would have been to take the issue of concurrent findings of fact in respect of all the various issues together at the end of counsels' submissions on the identified issues for determination; this would have placed the submissions on concurrent findings on a clearer and separate pedestal without being tortuously repetitious.

Be that as it may, appellant's learned counsel neither filed a Reply brief nor made any effort in his oral submission to respond to respondent's submission. **I find the submission on concurrent finding, as argued, unanswerable. The law is quite clear in this regard. The general policy of the law is that it will be unreasonable to overfllog such determined findings of fact by unwittingly permitting the adversary party to re-open arguments on them, at his whims and caprices and without first demonstrating with the utmost pellucidity that the circumstances of his case bring him within the purview of the exception for disturbing the findings. See Nasamu v State (1979) 6-9 SC**

380 Oduneye v. State (2001) 1 KLR Achike JSC
153, Nwoboko v State (1985) 5 SC. 11, Igwego v Ezeugo (1992) 6
NWLR (Pt. 249) 561 at 574.

For all I have said, I find no merit whatsoever in this appeal, the
same is dismissed. The judgment of the lower court dated 25th January
B 2000 is accordingly affirmed.

WALI JSC

I have read before now, the lead judgment of my learned brother
C Achike, JSC and I entirely agree with his reasoning and conclusion for
dismissing the appeal.

For the same reasons ably stated I also hereby dismiss the appeal
and affirm the judgment of the Court of Appeal.
D

MOHAMMED JSC

I have had the privilege of reading the judgment of my learned
E brother, Achike, J.S.C., in draft and I agree with him that this appeal lacks
merit and ought to be dismissed. I have nothing more useful to add. Ac-
cordingly the appeal is dismissed. I affirm the judgment of the Court of
Appeal.

F

KALGO JSC

I have read in advance the judgment of my learned brother Achike,
JSC in this appeal and I am in full agreement with him that the appeal fails
G and ought to be dismissed. I adopt all the reasons given in the leading
judgment and dismiss the appeal.

I have nothing to add.

H

EJIWUNMI JSC

I was privileged to have read before now, the judgment just de-
livered by my learned brother, Okay Achike, JSC. In that judgment, the

issues raised having regard to the facts on the record that have been duly analysed before the appeal was dismissed.

I, however wish to add a few words of my own. In doing so, I will not review the facts except as relevant to the point I wish to emphasize. The appellant was arraigned before an Oyo High Court on a two count charge of conspiracy to commit murder and the murder of Chief Amuda Olorunkosebi on the 26th day of November, 1992, contrary to and punishable under section 516 and 319 of the Criminal Code, Cap 30 of the Criminal Code.

At the end of the trial, the learned Trial Judge delivered a considered judgment wherein he discharged and acquitted the appellant on the second count charge of murder and sentenced him to seven years imprisonment without option of fine.

As he was not satisfied with that judgment, he appealed to the court below. His appeal was dismissed and the court below confirmed his conviction and sentence. He has now appealed further to this Court.

A crux to this Court is that the court below was wrong to have convicted him for the offence of conspiracy in spite of the finding of the learned trial judge that "the prosecution has not fixed the action or inaction of the accused with the death of the deceased". In other words he is apparently complaining that the settled principle that the guilt of an accused must be established beyond reasonable doubt has not been followed in the instant case. Before addressing that contention, it is necessary to refer to the principles that ought to guide a court when considering a charge of conspiracy laid against an accused. Willes J. in *Mulcahy v R* (1868) 3 H.L at p.317 stated the principles thus:-

"A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act, by unlawful means. So long as a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the actum, capable of being enforced "if lawful, punishable if for a criminal object or for the use of criminal means"

In *Njovens & Ors v The State* (1973) N.S.C 257 at p. 280, Coker, JSC stated the principles as:-

"The overt act or omission which evidence conspiracy is the *actus reus* and every conspirator must be referable and very often is the only proof of the criminal agreement which is called conspiracy. It is not necessary to prove that the conspirators, like those who murdered Julius B Ceaser, were seen together coming out of the same place at the same time and indeed conspirators need not know each other. See *R. V. Meyrick & Rebuff* (1929) 21 C.A.R. 94. They need not all have started the conspiracy at the same time for a conspiracy started by some persons may C be joined at a later stage or later states by others. The gist of the offence of conspiracy is the meeting of the mind of the conspirators. This is hardly capable of direct proof for the offence of conspiracy is complete by the agreement to do the act or make the omission complained about. Hence, conspiracy is a matter of inference from certain criminal act of D the parties concerned done in pursuance of an apparent criminal purpose in common between them and in proof of conspiracy the acts of omissions (and or commissions) of any of the conspirators in furtherance of the common design may be and very often are given in evidence E against any other or others of conspirators.

It is therefore the duty of the court in every case of conspiracy to ascertain as best as it could the evidence of the complexity of any of those charged with that offence."

F See also *Daboh & Anor v The State* (1977) 5 SC 222; and *Ercim v State* (1994) 5 NWLR (Pt. 346) 535.

In the instant case the learned trial judge, quite properly recognised the principles noted above, and after due consideration of the evidence led by the prosecution and the evidence of the appellant, G then held thus:-

"On the whole I am impressed with the quality of the evidence of the prosecution witnesses in this case, especially PW1 who I consider to be a very truthful and intelligent witness. He had ample opportunities to H render damning faces (SIC) as against the accused person but he refused even to exaggerate the facts and circumstances which he perceived, led to the death of the deceased."

It would be recalled that it was PW1, Alhaji Ganiyu Ajiboye,

who visited the deceased before the incident with one Faseyitan. On the pretext that they were interested in the purchase of land for the purpose of developing a fish pond.

For that reason they requested that they be taken to the site where the deceased had told them was available for such project at Ijawaya. PW1 recognised the appellant of one of the persons whom he took to the site. He stated that they visited in a Datsun Blue bird Saloon Car with registration No. KD 1586 DU driven by the appellant. The PW1 said he sat in front with appellant, and Faseyitan sat at the back. On the way to the site Gbadamosi Oyelakin and Raimi Isholi joined them also. After visiting the site and Gbadamosi Oyelakin and Raimi Isholi were dropped, thereafter took the appellant and Faseyitan to show them the deceased's personal pond as directed by the deceased. Thereafter they returned to the deceased.

During that meeting, PW1 said that Faseyitan in the presence of the appellant insisted that the deceased should accompany them to the site to confirm that the site belonged to him. The deceased agreed, and the visit was fixed for 26/11/92.

They met accordingly. The deceased, PW1, Appellant and Faseyitan rode together to the site. The evidence of PW1 continued thus, and I quote:-

"When we got to the site and as we were showing them the land and the stream, we just heard "Hands up".
The deceased said who is this but the masked person now came out and pointed a gun at us. Faseyitan then brought out the picture of Alafin of Oyo showed it to the deceased and told him this is the person you should ask about these matters. The accused and Faseyitan did not leave the scene but I saw that the deceased bent down. I would not know whether the gun shot hit the deceased or not but I had to flee. As i was running away I saw another man not masked who held a matchet so I had to run from his side and took another side of the bush to run away. When I went back to Ijawaya I discovered that Raimi Ishola too had been matcheted. I then took a taxi and reported the incidence at the police station I took the police to the site and we found that the deceased was dead. We noticed matchet cuts on his forehead and acid was also poured on his

body. I told the police that the accused and Faseyitan did not leave the scene of crime when we ran away."

I have already referred to the view held of PW1 by the learned trial judge that the witness represented himself as a very honest and credible witness. That view of this witness was also endorsed by the court below. I am also of the considered view that the court below and the trial court were right in the conclusion the two courts reached on the evidence of the PW1. I only would add that his conduct even on the record showed him to be alert and was able in the circumstances of the event that happened in his presence, took the positive step of reporting the matter immediately to the police.

Having accepted the evidence of PW1 and the other pieces of evidence led at the trial, the learned trial judge then came to the conclusion that the Appellant was part of the conspiracy that led to the brutal killing of the deceased. The Court below also, after due consideration of the argument presented by learned counsel for the appellant also affirmed this finding of the trial court. The argument presented before us in this appeal is not different from that which was advanced without success in the court below. Now, it is manifest from the evidence that the appellant visited the deceased on a number of occasions purportedly to purchase or take lease of a piece of land from the deceased to set up a fish pond. The deceased in his earnestness to provide that opportunity for the appellant and his confederate, Faseyitan took pains to show them the land, and also showed them his own fish pond. It is evident from the records that the deceased at the invitation of the appellant and Faseyitan went on the fateful day to the proposed site where the dastardly offence took place. And when the deceased who the appellant and his confederate had invited to the site was attacked, they did nothing to protect him. Rather, they apparently thought it fit to show him the photograph of the Alafin of Oyo and to inform the deceased that it is the Alafin of Oyo that he can go to for the explanation of what was happening to him.

Now, as I have noted above in stating the principles that ought to guide a court in deciding whether a charge of conspiracy was established, the Court has a duty to consider what evidence was led and draw

the necessary inference therefrom the acts of commission or omission attributable to the person accused. In the instant case, the necessary inference that must be drawn upon the facts disclosed in the record, is that the deceased was lured to the proposed site of the fish pond by the appellant and confederate, Faseyitan to be killed, I will further add that in arriving at this conclusion, It must be borne in mind that apart from PW1 and PW2, the only persons who knew about the arrangement to visit the site on that day with the deceased was the appellant and Faseyitan his confederate. There is nothing to suggest that PW1 and PW2 informed any other person about the visit. The only two people who could tell anyone else of the visit remained the appellant and Faseyitan. It is therefore to be inferred that having regard to what happened leading to the murder of the deceased, that it was either or both of them that prepared the ground for the people who turned up at the site, and who apparently killed the deceased. It is also important to note that the appellant and his confederate having lured the deceased to the site did nothing to save the deceased from those who attacked him. It is in my view clear that the action and or inaction of the appellant as shown above established beyond reasonable doubt that the appellant conspired with others to effect the murder of the deceased.

For all the above reasons and the fuller reasons given in the lead judgment of my learned brother Okay Achike JSC, that the appeal lacks merit and must be dismissed. I therefore also dismiss this appeal and abide with the consequential orders made in the lead judgment.

G

H