

**SUPREME COURT OF NIGERIA**

1ST JUNE, 2001. SC. 59/2000

**CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI, O. ACHIKE,  
S. O. UWAIFO, E. O. AYOOLA, JJSC.**

1. ISONG AKPAN UDOEBRE

2. UFIA AKPAN JOE ..... APPELLANTS

3. MONDAY AKPAN ETOK UDO UDO

V

THE STATE ..... RESPONDENT

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**APPEALS** - Conviction - Expunged evidence - As the conviction is supported by overwhelming evidence - Despite the expunged evidence - The conviction is confirmed (H 16)

**APPEALS** - Reversal - Murder - Identification Evidence - Despite the discountenanced evidence - Other evidence exist to identify the appellant - As participating in the murder - Therefore the error of the lower court - Cannot lead to reversal of the conviction (H 2)

**COURTS** - Witnesses - Disbelieving of - A trial judge is at liberty - To disbelieve some portion of a witness's testimony - While believing his unaffected evidence (H 14)

**CRIMINAL PROCEDURE** - Alibi - Consideration of - Any plausible defence raised by the defence - Or arising casually or by the tenor of evidence - Must be considered by the court (H 4)

**CRIMINAL PROCEDURE** - Alibi - Defence - Failure to investigate or consider the defence - Will lead to quashing a conviction on appeal - If it has occasioned a miscarriage of justice (H 5)

**CRIMINAL PROCEDURE** - Alibi - Meaning of (H 3)

**CRIMINAL PROCEDURE** - Alibi - Proof - Once the plaintiff has furnished information of his whereabouts - The burden shifts to the prosecution to disprove the defence (H 9)

**CRIMINAL PROCEDURE** - Alibi - Success of - Is based on accused furnishing comprehensive particulars of his whereabouts on the crucial day - Which must be capable of investigation by the police (H 6)

**CRIMINAL PROCEDURE** - Alibi - Timing - It must be timely raised - To enable the police investigate it - And cannot be raised first at the trial in court (H 7)

**CRIMINAL PROCEDURE** - Alibi - Vagueness of - Where the alibi consist of vague accounts - Devoid of material facts capable of investigation - It cannot avail an accused person (H 8)

**CRIMINAL PROCEDURE** - Identification evidence - Was rightly discountenanced by the trial judge - As the witness failed to identify appellant - In her earlier statement to the police (H 1)

**CRIMINAL PROCEDURE** - Joint trial - Evidence - As the evidence of the 4th accused - Which led to his acquittal - Was different from that of the other accused persons - Their conviction was proper (H 10)

**CRIMINAL PROCEDURE** - Murder - Conviction - Can be based on circumstantial evidence - In the absence of eye witnesses (H 11)

**EVIDENCE** - Circumstantial evidence - In the absence of suitable explanation from the appellants - The only irresistible inference - From the surrounding circumstances - Is that they killed the deceased (H 13)

**EVIDENCE** - Circumstantial evidence - Whether the circumstantial evidence is consistent with the guilt of the accused - Is determined by surrounding circumstances (H 12)

***PRACTICE & PROCEDURE*** - Appeals - Submissions - Every complaint or submission of appellants - Should be backed up by specific facts - To enable the court fairly decide on them (H 15)

### **FACTS**

The three appellants were arraigned along with another person - the 4th accused person on a one count charge for murder at the High Court of Akwa Ibom State.

At the trial two children aged between 8 and 9 years respectively testified as PW1 and PW3 that sometimes on 3rd April 1990, at Ekoi Ikot Nyoho village while playing in their compound with other children, they saw the 1st appellant with seven other persons pushing a wheel barrow containing a fresh headless human being towards the forest. The headless body had his dress intact. PW1 and PW3 ran into the house and drew the attention of their mother, PW2 who ran out with them. On getting close she saw the headless body in the wheel barrow and recognized it as that of her brother. She fainted subsequently. She testified that she saw eight persons including the 4th accused person pushing the wheel barrow on that fateful day. All the accused persons flatly denied the charge in their evidence.

The trial judge in a considered judgment, convicted the appellants respectively for murder and sentenced them to death, while he discharged and acquitted the 4th accused. The appellants' appeals to the Court of Appeal, were unanimously dismissed and the sentences of death confirmed. They have finally appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*“(1) Whether the failure to mention the name of the 1<sup>st</sup> Appellant by the PW2 to the Police at the earliest opportunity was fatal to the case of the prosecution in the face of other proven evidence.*

*(2) Whether the identification evidence which acquitted the 4<sup>th</sup> accused was the same with the evidence against the appellants.*

*(3) Whether the defence of alibi was properly raised by the appellants.*

(4) *Whether the circumstantial evidence against the Appellants was strong and compelling to amount to proof beyond reasonable doubt.*

(5) *Whether Exhibit 'C' expunged by the Court of Appeal in any way weakened the case against the 3<sup>rd</sup> Appellant."*

B

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

***Identification evidence - Was rightly discountenanced***

C 1. I have given counsel's submissions very close consideration. There is no doubt that the lower court was palpably in serious error when it took the view that PW2 mentioned 1st appellant in her extra-judicial statement. The time she was making the statement, indeed, was the earliest opportunity for her to recollect those things she saw, because at that stage, all the facts of the incident, within her knowledge were still fresh in her mind. PW2 was unable to offer any explanation for that omission though she insisted that she mentioned the name of the 1<sup>st</sup> appellant in her thumb-impressed recorded statement to the Police but surprisingly, D this was not recorded by the Investigating Police Officer. The truth of the matter was neither here nor there. Undoubtedly, that piece of evidence was vital in order to implicate the 1<sup>st</sup> appellant with the commission of the offence charged. In the absence of any explanation forthcoming from the prosecution, the learned trial judge declined, and rightly F in my view, to speculate on this matter. Consequently, his Lordship discountenanced PW2's evidence of identification of the 1<sup>st</sup> appellant. By this approach, the principle laid down in the earlier cases cited to the court and relied upon by learned 1st appellant's counsel in this regard, G especially Abudu v The State (supra), a decision of this Court, was strictly placed in focus and adhered to. (p. 1958 H)

***Appeals - Reversal***

H 2. I am satisfied that in the absence of the discountenanced evidence of PW2 on the identification of 1<sup>st</sup> appellant as shown above, the testimonies of PW1 and PW3 provide sufficient evidence establishing the presence of the 1<sup>st</sup> appellant at the locus in quo and further establish 1<sup>st</sup>

appellant's participation in the commission of the offence charged. Accordingly, the authorities of Commissioner of Police v Alao (supra) cannot avail the 1<sup>st</sup> appellant. Furthermore, it has not been urged on us that this excusable slip or error by the lower court (but not the trial court) was of such gravity and magnitude that it has occasioned or was such as would occasion a miscarriage of justice that would lead to a reversal of the judgment of the lower court; vide Olubode v Salami (1985) 2 NWLR (Pt. 7) 282. In the circumstances, this issue must be resolved against the 1<sup>st</sup> appellant. (p. 1959 H)

C

### ***Alibi - Meaning***

3. The defence of alibi is popular and commonplace today in many criminal prosecutions. In essence, alibi, as a defence, simply put, seeks to establish that at all times material to the commission of the offence, the accused person was no where near the locus in quo and ordinarily, therefore, he could not be expected to be involved in the physical execution of the criminal offence alleged. (p. 1961 B)

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### ***Alibi - Consideration of***

4. Generally, the accused person raises the defence of alibi. However, where evidence placed before the court clearly demonstrates that the accused person seeks to rely on alibi, that defence cannot be denied to the accused person. Full consideration should be accorded to whatever plausible defence is relied upon by the defence as if it had been expressly pleaded or raised by the accused person. This is so because the court is obliged to give due consideration to a defence either raised by the accused person or arising casually or by the tenor of the evidence placed before the court once that evidence raises a reasonable doubt in the prosecution's case. (p. 1961 C)

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### ***Alibi - Defence***

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5. Where the prosecution fails to investigate the defence or the court fails to examine or consider such defence and it is demonstrable that the failure would lead to a miscarriage of justice, then any order of conviction

arising in the circumstance, would, on appeal, be quashed and substituted with an order of discharge and acquittal. (p. 1961 F)

***Alibi - Success of***

- B 6. We must hasten to state quite clearly that the defence of alibi is not readily conceded with levity to the accused person seeing that when properly established it has the far-reaching finality of exculpating the accused person from complete criminal responsibility. To take advantage of this defence, the accused person must give a detailed particularisation of his whereabouts on the crucial day of the offence which will include not just the specific place(s) where he was, but additionally, the people in whose company he was and what, if any, transpired at the said time and place(s). Obviously, such comprehensive information furnished by the accused person must, unquestionably, be capable of investigation by the Police should they wish to do so. A fair-minded tribunal would have no other option than to exercise its discretion of doubt in favour of the accused person. (p. 1961 G)

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***Alibi must be timely raised***

7. Furthermore, such defence must be timeously brought to the attention of the Police by the accused person, preferably in his extra-judicial statement to afford the Police an ample time to carry out its investigation. For the accused person to raise the defence while testifying at his trial is to deliberately deny the prosecution its right ad duty to investigate the defence. Such a ploy cannot avail the accused. See Gachi v The State (1965) NMLR 333. (p. 1962 B)

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***Alibi - Where it consists of vague accounts***

8. Conversely, where the defence of alibi consists of vague accounts which are simply placed before the court as mere make-beliefs of plea of that defence, and which are completely devoid of material facts worthy of investigation, the Police in the circumstance would least be expected to embark on a wild goose chase, all in the name of investigation. In such a situation, the court would have nothing before it to consider by

way of alibi. For example, where the accused person in his extra-judicial statement stated that either that “he was not in town on that day” or that “he travelled to a neighbouring town or village – Awka”, and nothing more, no reasonable person would think that a serious plea of alibi has been made out. In other words, a general defence of alibi without sufficient facts to warrant an investigation is clearly porous and vague and cannot avail an accused person. (p. 1962 D)

### ***Alibi - Burden of proof***

9. It is the law that there is no duty on the accused to prove or establish his alibi once he has furnished particulars of his whereabouts lucidly to the Police; see Okosi v the State (1989) 1 SC. LRN 29, 41 and Yanor v The State (1965) 1 All NLR 193. In fact, once the accused has reasonably and sufficiently furnished information of his whereabouts on the date of the offence alleged, the burden shifts on the prosecution to disprove the defence of alibi sought to be raised by the accused. (p. 1963 D)

### ***Criminal procedure - Joint trial***

10. From the above, it is quite clear that although 4<sup>th</sup> accused was tried together with the three appellants, nevertheless the evidence of alibi that led to the discharge and acquittal of 4<sup>th</sup> accused was distinctly peculiar to the 4<sup>th</sup> accused’s case and could not, by any stretch of imagination, be said to be closely interwoven and inseparable from those of the three appellants. For example, the content of 4<sup>th</sup> accused’s narration of his whereabouts on that fateful day has no correspondence whatsoever with those of any of the three appellants. Perhaps, what is fair to be stated categorically is that the four persons were tried together, but the evidence led in respect of the defence of each of the appellants was unquestionably different from that led with regard to the 4<sup>th</sup> accused. With such divergence between the case of the 4<sup>th</sup> accused and those of the three appellants it is erroneous and misconceived for the appellants to have relied on the Supreme Court decision in Abudu v State (supra) because the facts and circumstances of that case are incomparable with those of the instant case. Accordingly, this authority cannot avail the appellants.

***Murder - Conviction***

11. It is common ground in this serious trial for murder that there was  
B no direct eye-witness account of the heinous act but the learned trial  
judge reached his verdict relying on circumstantial evidence. It was a  
curious case where the prosecution pressed for conviction for murder of  
the three appellants of the headless deceased victim. No doubt, an ac-  
C cused person can be convicted for murder where every thing points to  
the accused as the murderer but so long as the evidence in support of the  
conviction is not only cogent, complete and unequivocal but compell-  
ingly lead to the conclusion that the accused and no one else is the mur-  
derer. Thus in *R v Onufrezyk* (1955) 1 QB 388; 39 Cr. App. R 1, it  
D was held that the fact of death is provable by circumstantial evidence  
even though neither the body or any trace of the body has been found.  
Circumstantial evidence is nothing more than evidence of surrounding  
circumstances which by their very nature is capable of establishing a  
E proposition, such as the criminality of an accused person with the high-  
est exactitude. (p. 1966 A)

***Evidence - Circumstantial Evidence***

F 12. It is clear from the above cases considered herein that it is the  
surrounding circumstances that decide whether the circumstantial evi-  
dence sought to be relied on is consistent or not with the guilt of the  
accused, ensuring always that there are no other co-existing circum-  
stances which would weaken or undermine such inference. The fact  
G that there was no positive testimony of eye-witness should not be raised  
to cast aspersion on the quality of circumstantial evidence once such  
evidence is cogent and unequivocal, and leads one to infer and establish  
either the accused's innocence or any missing ingredients of the offence  
H with which the accused is charged. (p. 1967 H)

***Circumstantial Evidence - Absence of suitable explanation***

13. In the case on hand, the three star witnesses, namely PW1, PW2 and

PW3 did not testify to eye-witness account of the beheading of the deceased. Nevertheless, they gave lucid accounts of the persons they saw which included all the accused persons and others not prosecuted. They further described the accused persons' involvement in pushing the wheel barrow containing the headless body of the deceased towards an unknown destination. Obviously, the incriminating testimonies of these witnesses called for some explanation from the appellants with regard to how they came in possession of the headless body of the deceased, far beyond their mere denials of killing the deceased and their miserable efforts to set up the defence of alibi, which were both rejected by the learned trial judge. Strangely enough, no such explanation was forthcoming. I am clearly of opinion, that the only other reasonable and irresistible inference from the surrounding circumstances presented by the evidence which was accepted by the trial court, is that the appellants killed the deceased. (p. 1968 C)

### ***Courts - Witnesses***

14. It has been urged on behalf of the appellants that it was not open to the trial court to chose and pick with regard to the testimony of PW2, rather that it ought to have rejected PW2's evidence in its entirety. I do not think that it was necessary for the trial judge to go to that length. After all, it was only on one aspect of PW2's testimony that the trial judge, on evaluation, found some doubt to accept PW2's testimony. It was therefore open to him to disbelieve that portion of the witness's testimony without that fact prejudicing the rest of PW2's evidence that was neither challenged nor called in doubt. In my view, it was open to the trial judge to believe and act on the rest of the unaffected evidence. (p. 1969 A)

### ***Appeals - Submissions***

15. The second point is the submission made on behalf of the 2<sup>nd</sup> appellant that the prosecution's case was badly weakened by 'loopholes and gaps'. I must confess that I am completely at sea with regard to this submission. I would have thought that the strength of such submission

would command some force if the ‘loopholes and gaps’ sought to be relied upon are spelt out. That obviously would afford the Court the opportunity to have a second hard look on that complaint. Clearly, to denigrate the quality of the prosecution’s case as being worthless in terms of being shrouded in ‘loopholes and gaps’, without more, is merely to beat about the bush. In my view, that line of submission remains merely attractive but inconsequential in so far as counsel fails to develop the complaint(s) in terms of specifics. In other words, there is no material placed before the Court to enable it decide fairly on counsel’s submission. With respect, I see this submission as mere ranting that has not advanced appellant’s case one bit. (p. 1969 F)

***Appeals - Conviction***

D 16. Reading the record as closely as I have done, it is certainly clear that the evidence of the chief prosecution witnesses, i.e. PW1, PW2 and PW3, did not spare the third appellant with regard to his criminality in the murder of the deceased. Exhibits 2 and 2A made his involvement overwhelming so that with or without the exclusion of Exhibit 6, the trial court was entitled to reach a decision convicting the third appellant as charged. The Court of Appeal, in turn, cannot be said to be wrong in confirming the appellant’s conviction in the face of such overwhelming evidence adduced by the prosecution. I, myself, I have not the least hesitation in holding that the evidence on which the third appellant was convicted and sentenced established his guilt to the hilt, with or without exhibit 6. (p. 1971 A)

**G NOTABLE POINT OF INTEREST**

**ACHIKE JSC**

***1. Consequence of failure to tender an extra judicial statement***

Be it noted that, for unknown reasons, this extra-judicial statement was not tendered in evidence. Of course, the legal consequence of failure to tender this statement in evidence is that the content of that document is no evidence and merits no further consideration in this judgment. (p. 1962 H)

**REPRESENTATION**

Chief Kola Babalola for 1st Appellant.

Alhaji F. A. Oso for 2nd Appellant.

Chief D. I. Udogu with him Mrs. U. F. Udogu for 3rd Appellant.

C. J. Udoh, Esq., Senior State Counsel, Ministry of justice, Akwa Ibom State) for Respondent.

**CASES REFERRED TO**

Commissioner of Police v. Alao & anor 1959 WNLR 55

Olubode v Salami (1985) 2 NWLR (Pt. 7) 282

Gachi v The State (1965) NMLR 333

Okosi v the State (1989) 1 SC. LRN 29, 41

Yanor v The State (1965) 1 All NLR 193

Ekanem v The King 13 WACA 108

R v Onufrejezyk (1955) 1 QB 388; 39 Cr. App. R 1

R v Tepper (1952) AC 480

Igho v The State (1976) NSCC 166

Valentine Adie v The State (1980) 1-2 SC 116, 122

Stephen Ukorah v The State (1977) 4 SC. 167

**LEAD JUDGMENT BY ACHIKE JSC**

The three appellants were arraigned on a one count charge for murder at the High Court of Justice, Akwa Ibom State presided over by Eka, J. At the close of evidence and addresses by counsel on both sides, the learned trial Judge, in a considered judgment, respectively convicted the appellants for murder and sentenced them to death, while he discharged and acquitted the 4<sup>th</sup> accused.

The appellant's appeals to the Court of Appeal, Calabar Division were unanimously dismissed while the sentences of death passed on them were confirmed. Still dissatisfied, the appellants have appealed to this court.

The facts of this case lie within a narrow compass and would be recapitulated hereunder. Sometime on 3<sup>rd</sup> April, 1990, at the Ekoi Ikot

Nyoho village, two children aged between 8 and 9 years respectively, testified herein as PW1 and PW3 that while playing in their compound with other children, saw the 1<sup>st</sup> appellant in the company of seven other persons, pushing a wheel barrow containing a fresh headless human being towards the direction of the forest. The headless body had its dress on and intact. PW1 and PW3 ran inside their house and alerted their mother, PW2 who in turn ran out. On getting close to the said eight men, she saw the headless body in the wheel barrow and recognised it as that of her brother, Ndarake Matthew Ndueso, now deceased. She fainted but was able to run to the bush where she lay unconscious till the next morning. She testified that she saw eight persons, including the 4<sup>th</sup> accused person pushing the wheel barrow on that fateful day, 3/4/90.

All the appellants and the other accused persons in their evidence flatly denied the charge. It was common ground that there was no eyewitness to the murder who testified at the trial, consequently the convictions of the appellants were predicated solely on the evidence of PW1, PW2, PW3, including the testimonies of the two investigating Police Officers, who respectively testified as PW4 and PW5. The three appellants respectively filed their briefs of argument in which they identified Issues for Determination. The 1<sup>st</sup> appellant's (Isong Akpan Udo Ebre), two issues run thus:

*"(a) Whether the appellant was properly connected with the commission of the offence of murder as to be found guilty and sentenced to death.*

*(b) Whether the circumstantial evidence before the Trial Court was of the quality of cogency and reliability required by law to ground a conviction for an offence of murder."*

On behalf of the 2<sup>nd</sup> appellant, three issues identified by his learned counsel run as follows:

*(i) Whether it was safe to have confirmed the sentence passed on the appellants on the same identification and other evidence which discharged and acquitted the 4<sup>th</sup> accused at the trial.*

*(ii) Whether the defence of the appellant (alibi) was properly considered.*

(iii) *Whether the case against the appellants was proved beyond reasonable doubt on circumstantial evidence.*”

Finally, 3<sup>rd</sup> appellant’s learned counsel, formulated two issues, running as follows:

“(1) *Whether the evidence, circumstantial or otherwise relied upon by the lower court was devoid of doubts as to be allowed to stand.*

(2) *What was the effect of Exhibit 6 which was expunged by the lower court?*”

For the prosecution, the learned Senior State Counsel submits five issues for determination, which in his view, are comprehensive and sufficient to encompass the above three sets of issues for determination:

“(1) *Whether the failure to mention the name of the 1<sup>st</sup> Appellant by the PW2 to the Police at the earliest opportunity was fatal to the case of the prosecution in the face of other proven evidence.*

(2) *Whether the identification evidence which acquitted the 4<sup>th</sup> accused was the same with the evidence against the appellants.*

(3) *Whether the defence of alibi was properly raised by the appellants.*

(4) *Whether the circumstantial evidence against the Appellants was strong and compelling to amount to proof beyond reasonable doubt.*

(5) *Whether Exhibit ‘C’ expunged by the Court of Appeal in any way weakened the case against the 3<sup>rd</sup> Appellant.*”

On close examination of all the issues for determination postulated by the parties and as they relate to each appellant’s appeal, on the one hand, and that of the prosecution, I think that the prosecution’s issues for determination are undoubtedly more comprehensive and sufficiently encompass the respective three sets of issues submitted by the appellants. I therefore prefer them for the purposes of considering the appeal, to the extent of the specific issues raised by each of the appellants.

Issue No. 1

“*Whether the failure to mention the name of the 1<sup>st</sup> appellant by the PW2 to the Police at the earliest opportunity was fatal to the case of the prosecution in the face of other proven evidence*”.

This issue was one of the complaints of 1<sup>st</sup> appellant. It may be recalled that when PW2 made her extra-judicial statement to the Police, Exhibit 1, the name of 1st appellant was not included as some of the people she saw pushing the wheel barrow containing the headless human body whereas when she testified in court she mentioned the name of 1<sup>st</sup> appellant and also vehemently insisted that she mentioned 4<sup>th</sup> appellant's name in her statement, exhibit 1 but was surprised that it was omitted in the said exhibit. The trial court also observed this discrepancy and dealt with it dispassionately, in my respectful views during his evaluation of evidence. Strangely, while reviewing the evidence on appeal, Ekpe, JCA erroneously, in his leading judgment, stated that PW2 in her thumb-printed extra-judicial statement had mentioned all the names of the persons that she saw on the road at the time of the incident and this included Effiong Udo Ebre, the 1<sup>st</sup> accused, herein 1<sup>st</sup> appellant.

Chief Kola Babalola, learned counsel for the 1<sup>st</sup> appellant, submits that where an eye-witness, such as PW2, omits to mention at the earliest opportunity the names of persons she saw committing an offence, a trial court must be careful and wary in accepting her evidence given later which implicates the person charged, unless a satisfactory explanation is given; reliance is placed on Commissioner of Police v. Alao & anor 1959 WNLR 55. In counsel's final address on this issue, he urges that this issue be resolved in favour of the appellant because the appellant was not properly identified with the commission of the offence of murder. The learned Senior State Counsel, C. J. Udoh, Esq., submits that despite the omission complained about, its effect is not fatal because PW1 and PW3 also testified that they recognised 1<sup>st</sup> appellant pushing the wheel barrow containing the headless body of the deceased. The testimony of the PW3 also showed that the 1<sup>st</sup> appellant was at the scene where they saw the headless body in the wheel barrow. Concluding, counsel submits that the authorities relied upon by the 1<sup>st</sup> appellant do not apply in the instant case.

**I have given counsel's submissions very close consideration. There is no doubt that the lower court was palpably in serious error when it took the view that PW2 mentioned 1st appellant in her**

extra-judicial statement. The time she was making the statement, indeed, was the earliest opportunity for her to recollect those things she saw, because at that stage, all the facts of the incident, within her knowledge were still fresh in her mind. PW2 was unable to offer any explanation for that omission though she insisted that she mentioned the name of the 1<sup>st</sup> appellant in her thumb-impressed recorded statement to the Police but surprisingly, this was not recorded by the Investigating Police Officer. The truth of the matter was neither here nor there. Undoubtedly, that piece of evidence was vital in order to implicate the 1<sup>st</sup> appellant with the commission of the offence charged. In the absence of any explanation forthcoming from the prosecution, the learned trial judge declined, and rightly in my view, to speculate on this matter. Consequently, his Lordship discountenanced PW2's evidence of identification of the 1<sup>st</sup> appellant. By this approach, the principle laid down in the earlier cases cited to the court and relied upon by learned 1st appellant's counsel in this regard, especially Abudu v The State (supra), a decision of this Court, was strictly placed in focus and adhered to.

In any event, the identification of 1<sup>st</sup> appellant was also amply established by the evidence of PW1 and PW3. Thus, dealing with 1<sup>st</sup> appellant's identification, the learned trial judge observed as follows:

*'Notwithstanding this, it is still open to the court to determine from the record, if there is other evidence linking the 1<sup>st</sup> accused with the crime charged. Like PW1, PW3 a boy of about 8 years, gave sworn evidence and was emphatic as to what he saw and those he knew. Even in cross examination he was indefatigable in his stand despite the legal dart thrown by three seasoned defence counsel. He maintained that he saw 8 people pushing a headless body in a wheel barrow. He recognised 5 of them whose names he gave among whom were the 4 accused persons. He also identified each of these accused persons by pointing at them and calling names.'*

**I am** satisfied that in the absence of the discountenanced evidence of PW2 on the identification of 1<sup>st</sup> appellant as shown

above, the testimonies of PW1 and PW3 provide sufficient evidence establishing the presence of the 1<sup>st</sup> appellant at the locus in quo and further establish 1<sup>st</sup> appellant's participation in the commission of the offence charged. Accordingly, the authorities of Commissioner of Police v Alao (supra) cannot avail the 1<sup>st</sup> appellant. Furthermore, it has not been urged on us that this excusable slip or error by the lower court (but not the trial court) was of such gravity and magnitude that it has occasioned or was such as would occasion a miscarriage of justice that would lead to a reversal of the judgment of the lower court; vide Olubode v Salami (1985) 2 NWLR (Pt. 7) 282.

In the circumstances, this issue must be resolved against the 1<sup>st</sup> appellant.

D Issues Nos. 2 & 3

It is common ground that in each of the three appellants' briefs their learned counsel have strongly submitted that the same benefit of doubt accorded to the 4<sup>th</sup> accused should have been given to the three appellants since the evidence against the three appellants was the same as that against the 4<sup>th</sup> accused. Each also contends that the three appellants were jointly charged and tried, and that since the evidence against the 4<sup>th</sup> accused was closely interwoven with and inseparable from that against the 4<sup>th</sup> accused, then, since the court acquitted the 4<sup>th</sup> accused, the appellants ought also to be discharged and acquitted. The appellants relied on the Supreme Court decision of Abudu v State (supra).

The learned Senior State Counsel for the respondent has urged us to discountenance the appellant's submissions in this regard because the case of the 4<sup>th</sup> accused was manifestly different and distinct from the case of the three appellants. First, not only did the 4<sup>th</sup> accused timeously raise his defence of alibi, he went further to furnish adequate and detailed particulars surrounding the said alibi. Second, the two investigating Police Officers, PW4 and PW5, failed to investigate the information furnished by the 4<sup>th</sup> accused. Counsel further submits that in the circumstances it cannot be said that the evidence surrounding the case against the 4<sup>th</sup> accused was inextricably interwoven and inseparable with

those of appellants that the benefit of his discharge, should, of necessity, be extended to the appellants.

To avoid unnecessary repetition, I propose to consider Issues Nos. 2 and 3 together,. First let us examine the defence of alibi raised by the 1<sup>st</sup> and 2<sup>nd</sup> appellants. **The defence of alibi is popular and commonplace today in many criminal prosecutions. In essence, alibi, as a defence, simply put, seeks to establish that at all times material to the commission of the offence, the accused person was no where near the locus in quo and ordinarily, therefore, he could not be expected to be involved in the physical execution of the criminal offence alleged. Generally, the accused person raises the defence of alibi. However, where evidence placed before the court clearly demonstrates that the accused person seeks to rely on alibi, that defence cannot be denied to the accused person. Full consideration should be accorded to whatever plausible defence is relied upon by the defence as if it had been expressly pleaded or raised by the accused person. This is so because the court is obliged to give due consideration to a defence either raised by the accused person or arising casually or by the tenor of the evidence placed before the court once that evidence raises a reasonable doubt in the prosecution's case.**

**Where the prosecution fails to investigate the defence or the court fails to examine or consider such defence and it is demonstrable that the failure would lead to a miscarriage of justice, then any order of conviction arising in the circumstance, would, on appeal, be quashed and substituted with an order of discharge and acquittal.**

**We must hasten to state quite clearly that the defence of alibi is not readily conceded with levity to the accused person seeing that when properly established it has the far-reaching finality of exculpating the accused person from complete criminal responsibility. To take advantage of this defence, the accused person must give a detailed particularisation of his whereabouts on the crucial day of the offence which will include not just the specific place(s)**

where he was, but additionally, the people in whose company he was and what, if any, transpired at the said time and place(s). Obviously, such comprehensive information furnished by the accused person must, unquestionably, be capable of investigation by the Police should they wish to do so. A fair-minded tribunal would have no other option than to exercise its discretion of doubt in favour of the accused person. Furthermore, such defence must be timeously brought to the attention of the Police by the accused person, preferably in his extra-judicial statement to afford the Police an ample time to carry out its investigation. For the accused person to raise the defence while testifying at his trial is to deliberately deny the prosecution its right ad duty to investigate the defence. Such a ploy cannot avail the accused. See Gachi v The State (1965) NMLR D 333.

Conversely, where the defence of alibi consists of vague accounts which are simply placed before the court as mere make-beliefs of plea of that defence, and which are completely devoid of material facts worthy of investigation, the Police in the circumstance would least be expected to embark on a wild goose chase, all in the name of investigation. In such a situation, the court would have nothing before it to consider by way of alibi. For example, where the accused person in his extra-judicial statement stated that either that “he was not in town on that day” or that “he travelled to a neighbouring town or village – Awka”, and nothing more, no reasonable person would think that a serious plea of alibi has been made out. In other words, a general defence of alibi without sufficient facts to warrant an investigation is clearly porous and vague and cannot avail an accused person.

The 2<sup>nd</sup> appellant in his extra-judicial statement put across a defence of alibi and claimed that he went to Akampa on the day and further said that he could not remember the day of the killing, having accompanied his sister to Akampa for farming purpose. Furthermore, he said that he did not know about the death of the deceased. Be it noted that, for unknown reasons, this extra-judicial statement was not tendered

in evidence. Of course, the legal consequence of failure to tender this statement in evidence is that the content of that document is no evidence and merits no further consideration in this judgment. Testifying on his behalf at his trial, after a complete denial of participating in the commission of the offence, the 2<sup>nd</sup> appellant deposed tersely:

*“I was not in my village on 3/4/90 and I did not take part in the crime”*

The above excerpt of 2<sup>nd</sup> appellant’s evidence was undoubtedly erected as a defence of alibi. It is very porous and evasive. If in fact 2<sup>nd</sup> appellant was not in his village on the date of the incident it behoved him to state in clear terms where he was thereby establishing good basis for investigation by the Police, if they so wish. But on the contrary, the need for any meaningful investigation of the alibi was foreclosed by the 2<sup>nd</sup> appellant’s freak. **It is the law that there is no duty on the accused to prove or establish his alibi once he has furnished particulars of his whereabouts lucidly to the Police; see Okosi v the State (1989) 1 SC. LRN 29, 41 and Yanor v The State (1965) 1 All NLR 193. In fact, once the accused has reasonably and sufficiently furnished information of his whereabouts on the date of the offence alleged, the burden shifts on the prosecution to disprove the defence of alibi sought to be raised by the accused.**

As I had said earlier, the 2<sup>nd</sup> appellant’s defence of alibi was feebly canvassed. I am satisfied that having regard to what I have said about the short-comings of the circumstances of this case, the defence of alibi cannot avail the 2<sup>nd</sup> appellant.

The learned Senior State Counsel ex cautela abundantia had submitted in his brief that the defence of alibi could not and ought not avail the 3<sup>rd</sup> appellant who said that he was at Calabar on the fateful day of the offence charged. It is worth noting that the 3<sup>rd</sup> appellant never canvassed this issue in his brief. That defence though raised by him at the lower court was not however pursued herein. It was, therefore, in my view, unnecessary and in fact did not deserve any further comment from the respondent. Indeed, since the 3<sup>rd</sup> appellant did not raise that issue, respondent’s reaction in respect of his alibi was baseless and must be

discountenanced.

**From the above, it is quite clear that although 4<sup>th</sup> accused was tired together with the three appellants, nevertheless the evidence of alibi that led to the discharge and acquittal of 4<sup>th</sup> accused was distinctly peculiar to the 4<sup>th</sup> accused's case and could not, by any stretch of imagination, be said to be closely interwoven and inseparable from those of the three appellants. For example, the content of 4<sup>th</sup> accused's narration of his whereabouts on that fateful day has no correspondence whatsoever with those of any of the three appellants. Perhaps, what is fair to be stated categorically is that the four persons were tried together, but the evidence led in respect of the defence of each of the appellants was unquestionably different from that led with regard to the 4<sup>th</sup> accused. With such divergence between the case of the 4<sup>th</sup> accused and those of the three appellants it is erroneous and misconceived for the appellants to have relied on the Supreme Court decision in Abudu v State (supra) because the facts and circumstances of that case are incomparable with those of the instant case. Accordingly, this authority cannot avail the appellants.**

Therefore, without any equivocation, my firm conclusion with regard to issues Nos. 2 and 3 is that they are each separately resolved against 2<sup>nd</sup> and 3<sup>rd</sup> appellants.

#### Issue No. 4

The question raised under this issue is whether the circumstantial evidence relied on by the trial and the appellate courts respectively was sufficiently cogent to support the convictions of the appellants in the sense that the prosecution could be said to have proved their case beyond reasonable doubt.

For the 1<sup>st</sup> appellant, it was submitted by his learned counsel that there was no cogent and compelling circumstantial evidence to lead to the irresistible conclusion that 1<sup>st</sup> appellant was either the murderer or one of the murderers of the deceased. It is counsel's submission that the evidence of PW2 which was found unsatisfactory and led to the discharge and acquittal of 4<sup>th</sup> accused, and accordingly, the evidence of the

very same witness ought not to be relied upon for founding any circumstantial evidence to ground appellant's conviction.

For the 2<sup>nd</sup> appellant, it was simply submitted that the case against him had not been proved beyond reasonable doubt on circumstantial evidence, because there remained many loopholes and gaps in the prosecution's case.

Finally, on behalf of the third appellant, his learned counsel similarly submitted that since the evidence of PW1, PW2 and PW3 were at variance with regard to the number of the accused persons that they saw conveying the headless person in a wheel barrow on the day of the incident, their divergent evidence ought not to be relied on as satisfactory circumstantial evidence in holding that the prosecution have discharged their heavy burden of proof against the appellant. Counsel further submitted that PW1, PW2 and PW3 generally contradicted themselves in their evidence and were therefore not credible witnesses whose evidence could be relied on as basis for the conviction of the appellant, more so as it is predicated on circumstantial evidence.

In his reply on behalf of the respondent, the learned Senior State Counsel submitted that the prosecution tendered a high quality circumstantial evidence to sustain the conviction of the appellants. Barring the evidence of PW2 which was under heavy fire that led to the discharge and acquittal of the 4<sup>th</sup> accused, nevertheless, part of the evidence of that witness was accepted by the learned trial judge particularly with regard to the scene where the wheel barrow was being pushed by the appellants. He submitted that the fact that the learned trial judge disbelieved part of that witness's evidence did not render the whole of his evidence unacceptable; reliance was placed on the authority of Ekanem v The King 13 WACA 108. Counsel further contended that even if the evidence of PW2 was rejected completely there remained the evidence of PW1 and PW3 which was enough to secure the convictions of the appellants. Finally, counsel submitted that on the whole the prosecution witnesses produced sufficient circumstantial evidence that was strong and irresistible to prove the guilt of the appellants beyond reasonable doubt. He urged that we should so hold.

**It is common ground in this serious trial for murder that there was no direct eye-witness account of the heinous act but the learned trial judge reached his verdict relying on circumstantial evidence. It was a curious case where the prosecution pressed for conviction for murder of the three appellants of the headless deceased victim. No doubt, an accused person can be convicted for murder where every thing points to the accused as the murderer but so long as the evidence in support of the conviction is not only cogent, complete and unequivocal but compellingly lead to the conclusion that the accused and no one else is the murderer. Thus in R v Onufrejezyk (1955) 1 QB 388; 39 Cr. App. R1, it was held that the fact of death is provable by circumstantial evidence even though neither the body or any trace of the body has been found. Circumstantial evidence is nothing more than evidence of surrounding circumstances which by their very nature is capable of establishing a proposition, such as the criminality of an accused person with the highest exactitude. One hastens to add, as cautioned by Lord Normand, delivering the Address of the Judicial Committee of the Privy Council (which also included Lords Oaksey and Tucker) in the appeal of R v Tepper (1952) AC 480 from the Supreme Court of British Guiana:**

*“Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another... It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”*

See also Igho v The State (1976) NSCC 166.

I find the above excerpt from R v Tepper most helpful for it warns the court of the danger inherent in acting on what one often regards as circumstantial evidence in securing a conviction. Such convictions are invariably set aside when properly tested on appeal. A classic example is Stephen Ukorah v The State (1977) 4 SC. 167. Appellant was convicted of murder predicated on what the trial court tagged circumstantial evidence. The evidence placed before the court of trial was that

the appellant beat up the deceased with his fists on the night preceding the deceased's death. That witness also testified that he ran away from the scene for his own safety while the appellant was beating the deceased and only returned the next morning to that same place to observe that the deceased's body had a deep cut. Neither was evidence tendered about the manner the deceased sustained that injury or was there any medical evidence establishing the cause of death. On appeal to the Supreme Court, the appellant's conviction was set aside, the Court having first stated as follows:

*"What has to be established is the link between the appellant (or his actions) with the death of the deceased, and in the absence of clear unequivocal evidence:*

*(1) that the deceased died directly from the assault by the appellant on him, or*

*(2) that the appellant was armed with any sharp instrument during the assault on the deceased it becomes necessary to have a medical evidence on the cause of death so as to eliminate the problem raised by the existence of a long deep cut on the body of the deceased,. And until that problem is eliminated we are of the firm view that it must be every unsafe to convict for murder as charged on the circumstantial evidence available."*

The Supreme Court, per Idigbe, JSC, in rejecting to act on the circumstantial evidence which had favour at the trial court, reasoned thus:

*'From the foregoing facts it is, we think, pretty clear that the circumstances surrounding the death of the deceased given in evidence when accepted (as, indeed they were by the trial court) do not make such a "complete and unbroken chain of evidence" as would justify a jury (or a trial Court) in coming to the irresistible conclusion that the prisoner at the bar (in this case) the appellant and no one else was the murderer.'*

A similar approach was applied by this Court to set aside the conviction of the appellant in Valentine Adie v The State (1980) 1-2 SC 116, 122.

**It is clear from the above cases considered herein that it is the surrounding circumstances that decide whether the circumstan-**

tial evidence sought to be relied on is consistent or not with the guilt of the accused, ensuring always that there are no other co-existing circumstances which would weaken or undermine such inference. The fact that there was no positive testimony of eye-witness should not be raised to cast aspersion on the quality of circumstantial evidence once such evidence is cogent and unequivocal, and leads one to infer and establish either the accused's innocence or any missing ingredients of the offence with which the accused is charged.

In the case on hand, the three star witnesses, namely PW1, PW2 and PW3 did not testify to eye-witness account of the beheading of the deceased. Nevertheless, they gave lucid accounts of the persons they saw which included all the accused persons and others not prosecuted. They further described the accused persons' involvement in pushing the wheel barrow containing the headless body of the deceased towards an unknown destination. Obviously, the incriminating testimonies of these witnesses called for some explanation from the appellants with regard to how they came in possession of the headless body of the deceased, far beyond their mere denials of killing the deceased and their miserable efforts to set up the defence of alibi, which were both rejected by the learned trial judge. Strangely enough, no such explanation was forthcoming. I am clearly of opinion, that the only other reasonable and irresistible inference from the surrounding circumstances presented by the evidence which was accepted by the trial court, is that the appellants killed the deceased.

It remains to deal briefly with two points raised in counsel's submissions: first the attack made by the appellants generally on the evidence of PW2. The serious dent on her testimony was her failure to name the 4<sup>th</sup> accused expressly as one of the persons she saw on the day of the incident pushing the wheel barrow and yet, at the trial, when the events were no longer as green in her mind, she was able to name him. We should only refresh our minds and recall that the learned trial judge partially rejected her evidence of identification of the 4<sup>th</sup> accused person.

This, I think, was correct. This led to the 4<sup>th</sup> accused's discharge and acquittal. **It has been urged on behalf of the appellants that it was not open to the trial court to chose and pick with regard to the testimony of PW2, rather that it ought to have rejected PW2's evidence in its entirety. I do not think that it was necessary for the trial judge to go to that length. After all, it was only on one aspect of PW2's testimony that the trial judge, on evaluation, found some doubt to accept PW2's testimony. It was therefore open to him to disbelieve that portion of the witness's testimony without that fact prejudicing the rest of PW2's evidence that was neither challenged nor called in doubt. In my view, it was open to the trial judge to believe and act on the rest of the unaffected evidence.** In any event, even if the entire evidence of PW2 was discountenanced, there remained sufficient evidence from PW1 and PW3, whose testimonies were not discredited and nothing has been urged on us to show that there has been a miscarriage of justice to warrant this Court to allow the appeal. See Ekanem v The King 13 WACA 108.

I am satisfied that the Court of Appeal, on the evidence before it, was perfectly entitled to reach the same conclusion as the trial court that the circumstantial evidence was sufficiently cogent and irresistible for confirming the convictions and sentences of death imposed on the appellants. I, on my part, have not the slightest hesitation in reaching the same conclusion that the circumstantial evidence as presented in the instant case is cogent, unequivocal and compellingly irresistible in proving the appellants' guilt beyond reasonable doubt.

**The second point is the submission made on behalf of the 2<sup>nd</sup> appellant that the prosecution's case was badly weakened by 'loopholes and gaps'. I must confess that I am completely at sea with regard to this submission . I would have thought that the strength of such submission would command some force if the 'loopholes and gaps' sought to be relied upon are spelt out. That obviously would afford the Court the opportunity to have a second hard look on that complaint. Clearly, to denigrate the quality of the prosecution's case as being worthless in terms of being shrouded in**

**‘loopholes and gaps’, without more, is merely to beat about the bush. In my view, that line of submission remains merely attractive but inconsequential in so far as counsel fails to develop the complaint(s) in terms of specifics. In other words, there is no material placed before the Court to enable it decide fairly on counsel’s submission. With respect, I see this submission as mere ranting that has not advanced appellant’s case one bit.**

All in all, I resolve the fourth issue against the appellants.

Issue No. 5

The fifth and last issue concerns only the third appellant. It is his contention that his conviction by the trial court was based on Exhibit 6 – an apparent confession – which the Court of Appeal expunged after observing as follows:-

*“It is correct therefore to assume that he, meaning the trial judge had made up his mind to admit Exhibit 6 nilly willy irrespective of objection by counsel for the 3<sup>rd</sup> appellant.”*

In the view of appellant’s counsel, all considerations leading to the conviction of appellant were based on Exhibit 6 (i.e. the confessional statement) while the 3<sup>rd</sup> appellant’s first extra-judicial statement, Exhibit 2, was mentioned only casually. An excerpt of the judgment of the trial judge, according to counsel, bears this out:

*“It is my view therefore that the 1<sup>st</sup> accused like the 3<sup>rd</sup> accused was neck-deep in the planned killing of the deceased and I accept that they were among those not seen pushing his decapitated body in a wheel barrow for burial in the forest away from Ikot Idim Esa shrine where, according to 3<sup>rd</sup> accused in his Exhibit 6 the head had been buried.”*

Counsel submits that with Exhibit 6 expunged, there was no longer any credible evidence to fall back on which would sustain the conviction of the appellant by the trial court, and consequently the Court of Appeal was not in any position to affirm the conviction of the appellant.

Responding, the learned Senior State Counsel submitted that even with the exclusion of Exhibit 6 there remained Exhibits 2 and 2A which equally confirmed 3<sup>rd</sup> appellant’s participation in the killing of the deceased. Concluding, the learned Senior State Counsel submitted that

when the evidence of PW1, PW2 and PW3 is also brought in support of Exhibit 2 and 2A, the evidence in support of appellant's conviction would be overwhelming and conclusive.

**Reading the record as closely as I have done, it is certainly clear that the evidence of the chief prosecution witnesses, i.e. PW1, PW2 and PW3, did not spare the third appellant with regard to his criminality in the murder of the deceased. Exhibits 2 and 2A made his involvement overwhelming so that with or without the exclusion of Exhibit 6, the trial court was entitled to reach a decision convicting the third appellant as charged. The Court of Appeal, in turn, cannot be said to be wrong in confirming the appellant's conviction in the face of such overwhelming evidence adduced by the prosecution. I, myself, I have not the least hesitation in holding that the evidence on which the third appellant was convicted and sentenced established his guilt to the hilt, with or without exhibit 6.**

Having resolved all the issues predicated on the grounds of appeal against the appellants severally, it follows that the appeals fail. Accordingly, the appeals are hereby dismissed for lacking in merit.

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#### KARIBI-WHYTE JSC

I have had the privilege of reading the leading judgment of my learned brother Achike, JSC of this Court in these appeals. I agree entirely with the reasoning, and the conclusion that these appeals lacks merit and ought to fail. I agree also with the decision dismissing the appeals in their entirety. I also will, and hereby dismiss the appeals; and affirm the judgment of the court below.

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#### KUTIGI JSC

I read before now the judgment just delivered by my learned brother Achike, J.S.C. I agree with his reasoning and conclusions. I find no merit in the appeals. The Court of Appeal was right in confirming the convictions and sentences of the appellants. I also confirm the con-

victions and sentences. The appeals are accordingly dismissed.

**UWAIFO JSC**

I agree with the judgment of my learned brother Achike JSC for  
B the reasons he has given. I too dismiss each of the appeals and affirm the  
conviction and sentence of death passed on each of the appellants.

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**AYOOLA JSC**

C I too would dismiss the appeal for the reasons given in the judg-  
ment delivered by my learned brother, Achike, JSC, which I have been  
privileged to read in draft.

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